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IMPORTANT ANNOUNCEMENT

We have introduced a new section "Notes on recent Supreme Court cases" in A. I. R. from June part. Every effort will be made to cover the latest decisions of the Supreme Court in this section.

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- Union Territories (Separation of Judicial and Executive Functions) Act, 1969 (19 of 1969) S. 1 (3)** — Appointment of date under — Said Act shall come into force on 2-10-1969 in all the areas of Delhi Union Territory — Gaz. of Ind. 17-9-1969, II-S. 3 (ii), Ext. p. 1273

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1. Does a declaratory decree obtained by a competent reversioner under the Punjab Custom (Power to Contest) Act, 1920, that the alienation of the ancestral land shall be ineffective against his reversionary interest; enure in favour of the female heirs of the deceased alienor? (Yes)

AIR 1969 SC 1144

INCOME TAX

2. Has the Income-Tax Appellate Tribunal the jurisdiction to reopen the concluded assessment relating to the preceding assessment year in the appeal against the assessment for a particular year? (No)

AIR 1969 SC 1122

RAILWAYS

- 3 Where the goods booked on the Central Railway for destination of the South Eastern Railway were damaged by fire in transit at a station on the Central Railway, whether notice under Section 77, Railways Act sent to destination railway is enough or whether notice to Central Railway is not necessary? (Notice to Central Rail-

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—S 9 — Agreement between Ruler and Government of India — Whether succession to personal or private was made subject-matter of guarantee or assurance — Ascertainment — Court can look into terms of agreement — See Constitution of India, Art 363

Andh-Pra 423 A (C N 107)

—S 9 — Certificate by Government of India recognising person as sole successor to all private properties held by late Nawab — Jurisdiction of Courts not barred under Art 363 of the Constitution to agitate that matter subject to Section 87-B, Civil P. C — See Constitution of India, Art 362

Andh-Pra 423 B (C N 107)

—S 9 — Suit for injunction — Value of property exceeding Rs 25,000 — Suit is beyond jurisdiction of Bombay City Civil Court — See Court-fees and Suits Valuations — Bombay Court-Fees Act (36 of 1959), Section 6 (ix)

Bom 423 C (C N 70)

—S 9 — Decree in previous suit — When can be set aside on ground of collusion and fraud — See Civil P. C. (1908), Section 11

Mad 462 A (C N 108)

—S 9 — Remedy of Civil suit under Section 11 (4), Manipur Land Revenue and Land Reforms Act (33 of 1960) — No bar to filing of writ petition — See Constitution of India, Art 226

Manipur 84 I (C N 25)

—Ss. 11 and 9 — Decree — When can be set aside on ground of collusion and fraud

Mad 462 A (C N 108)

—S 15 — Suit for injunction — Value of property exceeding Rs 25,000 — Suit is beyond jurisdiction of Bombay City Civil Court — See Court-fees and Suits Valuations — Bombay Court-Fees Act (36 of 1959), Section 6(ix)

Bom 423 C (C N 70)

—Ss. 21, 73 — Letters Patent (Mad) Clause 12 — Decree-holder creditors applying for rateable distribution of assets held by executing court in respect of another decree passed by High Court cannot challenge the decree under which the assets were held as invalid on the ground

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that High Court had no territorial jurisdiction under, Clause 12 of Letters Patent to pass decree for sale of properties outside its local limits of its ordinary original jurisdiction

SC 1147 D (C N 210)

—S. 33, O. 20, Rr. 4 and 5; O. 49, R. 3(5) Contested suit — Trial Court decreeing claim without delivering judgment — High Court also in appeal confirming trial Court's decision without recording reasons — Held there was no re-trial of defendant's case

SC 1167 (C N 215)

—Ss. 47, 73 (1), Proviso (c), Order 7, Rule 7 and Order 6, Rule 17 — Decree declaring that the security bond in respect of immovable property would enure for the benefit of plaintiffs decree-holders for the decretal amount — This relief granted on oral prayer of plaintiffs — Decree should not be construed as containing merely a recital of the fact that a security bond had been exempted, because of omission to amend plaint by adding prayer for enforcement of charge — On its true construction the decree held declared that the security bond created a charge over the properties in favour of plaintiffs for payment of decretal amount and gave them liberty to apply for sale of properties for the discharge of the incumbrance — Properties sold and assets held by court — Under Section 73 (1) proviso (c) proceeds of sale, after defraying expenses of the sale, must be applied in the first instance in discharging the amount due to the decree-holders and the balance left over distributed amongst other decree-holders applying for rateable distribution

SC 1147 C (C N 210)

—S. 47 — Rent decree — Order under Section 168 of U. P. Tenancy Act directing delivery of possession to decree-holder — Order relates to execution, discharge or satisfaction of decree and is appealable — ILR (1965) 2 All 383 Reversed — See Tenancy Laws — U. P. Tenancy Act (17 of 1939), S. 168

SC 1270 (C N 231)

—S. 73 — Decree-holder creditors applying for rateable distribution of assets held by executing court in respect of another decree passed by High Court cannot challenge the decree under which the assets were held, as invalid, on the ground that High Court had no territorial jurisdiction under Clause 12 of Letters Patent to pass decree for sale of properties outside its local limits of its ordinary original jurisdiction — See Civil P. C. (1908), Section 21

SC 1147 D (C N 210)

—S. 73 (1), Proviso (c)—Properties sold and assets held by court under Section 73(1) Proviso (c) proceeds of sale after defraying expenses of the sale must be applied in the first instance in discharg-

CIVIL P. C. (Contd.)

ing the amount due to the decree-holder and the balance left over distributed amongst other decree-holders applying for rateable distribution — See Civil P. C. (1908), Section 47

SC 1147 C (C N 210)

—S. 79 — Suit against railways — Purpose of notice — See Railways Act (1890), Section 74-E

Bom 401 E (C N 69)

—S. 80 — Object of notice under — Compliance with section — Matters to be taken into consideration — Notice given by karta of joint family — Partition subsequent to notice — Notice held sufficient to sustain suit by divided coparceners — F. A. No. 217 of 1959, D/- 16-4-1963 (MP) Reversed

SC 1256 A (C N 228)

—S. 80 — Suit against railways — Purpose of notice — See Railways Act (1890), Section 74E

Bom 401 E (C N 69)

—S. 87-B — Certificate by Government of India recognising person as sole successor to all private properties held by late Nawab — Jurisdiction of Courts not barred under Art. 363 of the Constitution to agitate that matter, subject to Section 87-B, Civil P. C. — See Constitution of India, Art. 362

Andh-Pra 423 B (C N 107)

—S. 92, O. 8, R. 2 — Principles of Clauses (1) and (2) of Section 92 apply to defence also — Suit not under Section 92 — Special defence — Plea requiring Court to enter into questions covered by provisions of Section 92 — Cannot be entertained

All 571 E (C N 109)

—S. 96 — Appeal against consent decree — Agreement to refer disputes in pending suits to arbitration of sole judge extra cursum curiae — Under terms of agreement judge to act in dual capacity as arbitrator and a judge — Order passed in pursuance of agreement in partition suit — On facts order held to be judgment and preliminary decree and not award — See Arbitration Act (1940), Section 2(a) and (b)

SC 1133 C (C N 208)

—Ss. 96, 107 — Duty of appellate court to consider evidence independently

Ker 316 (C N 77)

—Ss. 100, 101 — Finding of fact — Finding by lower Courts that increase in rent did not import new demise — Finding cannot be interfered in second appeal

SC 1291 D (C N 236)

—S. 100 — Plea taken in written statement — No separate issue framed — But question discussed and decided under another issue — Finding not disturbed on technical objection in second appeal — See Civil P. C. (1908), O. 20, R. 5

Assam 134 A (C N 30)

—Ss. 100, 101 — Question of fact — Agreement between landlord and tenant to pay enhanced rent — Finding of lower

CIVIL P. C. (Contd.)

Court as to truth or otherwise of such agreement is essentially question of fact — High Court sitting in second appeal has to accept it

Mad 473 A (C N 110)

—S 100(1) (a) — Powers under, are not co-extensive with those under Section 75(1), first proviso, Prov Ins Act — See Provincial Insolvency Act (1920), Section 75(1), first Proviso

SC 1344 A (C N 246)

—S 107 — Powers of appellate court — Held on facts that the High Court was not legally justified in giving further relief to plaintiff by remanding case with direction that defendant should be asked to render account then that granted by trial Court—S A. S Nos 4940 and 3660 of 1961, D/- 27-4-1964 (All) Reversed — See Civil P C (1908), O 41, R 33

SC 1316 B (C N 242)

—S. 107 — Covenant of forefeiture of tenancy for non-payment of rent— Passing of decree for ejectment of tenant by trial Court — No bar to jurisdiction of appellate Court to grant relief against forfeiture — See Transfer of Property Act (1882), Section 114

SC 1349 A (C N 247)

—S 107 — Duty of appellate court to consider evidence independently — See Civil P C (1908), Section 95

Ker 316 (C N 77)

—S 112 — See Constitution of India, Art 136

—S 114 — Writ petition of civil side — Review — Provisions of Civil P C would apply — See Constitution of India, Art. 226

Andh-Pra 441 A (C N 109)

—S 115 and O 39, Rr 1 & 2 — Appellate court reversing Trial Court's order under O 39, Rr 1 & 2 — Revision against appellate order — Power of High Court — Discretion in granting interim injunction not improperly exercised — No jurisdictional infirmity — No interference in revision — Delhi 349 A (C N 61)

—S 115, O 14, R 2 — Issues as to maintainability of suit on ground of limitation and O 2, R. 2 Civil P C — Nothing wrong in not deciding the issues as preliminary issues — Suit must be tried as a whole and not piecemeal unless it involves question of jurisdiction — It cannot be said that lower court exercised its jurisdiction either illegally or with material irregularity

Orissa 295 (C N 108)

—S 115 — Stamp Act (1899) Section 35 — Question as to whether document is admissible or not admissible in evidence is matter of procedure and error in deciding question can be corrected in revision — Raj 313 A (C N 58)

—S 115 — Other remedy open — Order making document inadmissible in evidence under Section 35 Stamp Act —

CIVIL P. C. (Contd.)

Order is revisable — See Stamp Act (1899), Section 35

Raj 313 B (C N 58)

—S 151 and O 1, R 8 — Insurance claim — Insured negligent in defending suit — Right reserved in policy for insurer to defend actions in insured's name — Insurer should be allowed to do so under S 151 — Raj 315 (C N 59)

—S 153 — Case where Civil P C. does not permit suit to be brought in firm name — Description of plaintiff by firm name — Such a misdescription can be corrected by amendment of plaint — AIR 1965 All 586, Reversed — See Civil P. C. (1908), O 6 R 17 SC 1267 A (C N 230)

—O 1, R 8 — Insurance claim — Insured negligent in defending suit — Right reserved in policy for insurer to defend actions in insured's name — Insurer should be allowed to do so under Section 151 — See Civil P C (1908), Section 151

Raj 315 (C N 59)

—O 1, R 10 — Partition between A and B — Dwelling house not partitioned by metes and bounds — Death of A and sale of undivided share by his widow — Suit for partition by purchaser — Wife, sons and daughter of B are not necessary parties to proceeding under Section 4 — See Partition Act (1893), Section 4 — Orissa 294 A (C N 107)

—O 6, R 2 — Suit for ejectment by landlord against tenant — Denial by tenant that he has sub-let premises — No pleading or issue that permission to sub-let taken — Court has no jurisdiction to decide whether permission was granted — See Civil P C. (1908), O 14, R 2

SC 1291 E (C N 236)

—O 6, R 2 and O 14, R 1 — Omission to frame issue on particular aspect of matter in dispute — Matter covered by general issue — Parties fully knowing and understanding what the real issue was and adducing evidence in support of their contentions — Held, there was even in absence of specific issue no mis-trial such as might vitiate decision — None of the parties could be regarded as having been taken by surprise or prejudiced in any manner

Madh Pra 241 A (C N 61)

—O 6 R 17 — Decree declaring that the security bond in respect of immovable property would enure for the benefit of plaintiffs decree-holders for the decretal amount — Thus relief granted on oral prayer of plaintiffs — Decree should not be construed as containing merely a recital of the fact that a security bond had been exempted, because of omission to amend plaint by adding prayer for enforcement of charge — On its true construction the decree held declared that the security bond created a charge over the properties in favour of plaintiffs for pay-

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ment of decretal amount and gave them liberty to apply for sale of properties for the discharge of the incumbrance — See Civil P. C. (1908), Section 47

SC 1147 C (C N 210)

—O. 6, R. 17 and S. 153 and O. 30, R. 1 — Amendment of plaint — Discretion of Court — Not to be refused on technical grounds — AIR 1965 All 586, Reversed

SC 1267 A (C N 230)

—O. 6 R. 17 — Election petition — Amendment of — When can be allowed — Principles stated — See Representation of the People Act (1951), Section 86(5) Madh-Pra 243 B (C N 62)

—O. 7, R. 7 — Decree declaring that the security bond in respect of immovable property would enure for the benefit of plaintiffs decree-holders for the decretal amount — This relief granted on oral prayer of plaintiffs — Decree should not be construed as containing merely a recital of the fact that a security bond had been exempted, because of omission to amend plaint by adding prayer for enforcement of charge — On its true construction the decree held declared that the security bond created a charge over the properties in favour of plaintiffs for payment of decretal amount and gave them liberty to apply for sale of properties for the discharge of the incumbrance — See Civil P. C. (1908), Section 47

SC 1147 C (C N 210)

—O. 7, R. 10 — Suit for injunction — Prayer for asking defendants to discontinue attachment — Prayer is equivalent to one for setting aside attachment — See Court-fees and Suits Valuations — Bombay Court Fees Act (36 of 1959), Section 6(ix) Bom 423 C (C N 70)

—O. 8, R. 2 — Special defence — Suit on basis of contract — Defendant may admit contract and contractual liability and to avoid effect of admission raise plea of frustration or performance

All 571 D (C N 109)

—O. 8, R. 2 — Special defence — Suit not under Section 92 — Plea requiring court to enter into questions covered by Section 92 — Cannot be entertained — See Civil Procedure Code (5 of 1908), Section 92 All 591 E (C N 109)

—O. 14, R. 1 — Plea taken in written statement — No separate issue framed — But question discussed and decided under another issue — Finding not disturbed on technical objection in second appeal — See Civil P. C. (1908), O. 20, R. 5

Assam 134 A (C N 30)

—O. 14, R. 1 — Omission to frame issue on particular aspect of matter — Matter covered by general issue — Parties knowing and understanding real issue and adducing evidence — No mistrial such as might vitiate decision — See Civil P. C. (1908), O. 6, R. 2

Madh-Pra 241 A (C N 61)

CIVIL P. C. (Contd.)

—Order 14, Rule 2; Order 6, Rule 2 — Suit for ejectment by landlord against tenant — Denial by tenant that he has sub-let premises — No pleading or issue that permission to sub-let taken — Court has no jurisdiction to decide whether permission was granted

SC 1291 E (C N 236)

—O. 14, R. 2 — Issues as to maintainability of suit on ground of limitation and O. 2, R. 2 — May not be decided as preliminary issues — Suit must be tried as whole and not piece meal unless question of jurisdiction is involved — See Civil P. C. (1908), Section 115

Orissa 295 (C N 108)

—O. 20, R. 4 — Contested suit — Trial Court decreeing claim without delivering judgment — High Court also in appeal confirming trial Court's decision without recording reasons — Held there was no real trial of defendant's case — See Civil P. C. (1908), Section 33

SC 1167 (C N 215)

—O. 20, R. 5 — Contested suit — Trial Court decreeing claim without delivering judgment — High Court also in appeal confirming trial Court's decision without recording reasons — Held, there was no real trial of defendant's case — See Civil P. C. (1908), Section 33

SC 1167 (C N 215)

—O. 20, R. 5, O. 14, R. 1, S. 100 — Plea taken in written statement — No separate issue framed — But question discussed and decided under another issue — Finding not disturbed on technical objection in second appeal

Assam 134 A (C N 30)

—O. 20, R. 9 — Purchase of certain property by defendant 1 in execution of decree against defendant 2 — Finding by Court in suit by plaintiff for possession of property claiming the same to be his, that plaintiff is entitled to that property and also to recover possession — Direction by Court that plaintiff to deposit purchase money before recovering possession is invalid (obiter) Mad 462 D (C N 108)

—O. 20, R. 14 (1) (b) — Land-owner holding maximum permissible area under Punjab Security of Land Tenures Act — Suit for pre-emption not barred under Section 19-A of that Act — Bar comes into operation at the time of execution only — 1967-69 Pun LR 319, Overruled — See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), Section 19-A Punj 422 (C N 72) (FB)

—O. 21, Rr. 97 and 103 — Procedure prescribed by O. 21, Rr. 97 to 102 is summary and is not intended for decisions after hearing oral evidence — Conclusion arrived at is subject to result of suit under O. 21, R. 103 — Findings made by single Judge of High Court on chamber summons in application for possession

CIVIL P. C. (Contd)

under O 21, Rr 97 to 102 — Appeal under Clause 15 Letters Patent (Bom) — Division Bench would not interfere with those findings — Proper remedy is to file regular suit under O 21, R 103 — Whether order of single Judge amounts to judgment (Quaere)

Bom 447 (C N 74)

—O 21, R 103 — Procedure prescribed by O 21, Rr 97 to 102 is summary — Conclusion arrived at is subject to result of suit under O 21, R 103 — See Civil P. C (1908), O 21, R 97

Bom 447 (C N 74)

—O 23, Rr 1 and 3 — C, a trespasser, dispossessing A in possession of land in lieu of maintenance — Suit for declaration of right and possession by A joining B as co-plaintiff — B compromising with C applying for withdrawal of suit — Court cannot dismiss the suit of A on the basis of the application Misc Appeal No 22 of 1962, D/- 17-9-1962 (MP), Reversed.

SC 1118 (C N 204)

—O 23, R 3 — C, a trespasser, dispossessing A in possession of land in lieu of maintenance — Suit for declaration of right and possession by A joining B as to plaintiff — B compromising with C applying for withdrawal of suit — Court cannot dismiss the suit of A on the basis of the application Misc App No 22 of 1962, D/- 17-9-1962 (MP), Reversed — See Civil P. C (1908), O 23, R 1

SC 1118 (C N 204)

—Order 23, R 3 — Partition Act (1893) S. 4 — Partition between two brothers A and B — Dwelling house not partitioned — Partition suit by transferee of undivided share of A — B claiming to repurchase — Fixation of value by Commissioner — Plaintiff demanding high price — Compromise to repurchase at some high price — B failing to deposit money and repurchase the property within stipulated period — Held, it could not be said that B acted against interest of family in agreeing to pay high price when there was contest between plaintiff and defendant regarding valuation

Orissa 294 B (C N 107)

—O 30, R 1 — Case where Civil P. C. does not permit suit to be brought in firm name — Description of plaintiff by firm name — Such a misdescription can be corrected by amendment of plaint — AIR 1965 All 585 Reversed — See Civil P. C. (1908), O 6 R 17

SC 1267 A (C N 230)

—O 39 R 1 — Discretion in granting interim injunction not improperly exercised — No interference in revision — See Civil P. C. (1908), Section 115

Delhi 349 A (C N 61)

CIVIL P. C. (Contd)

—O 39, R 2 — Discretion in granting interim injunction not improperly exercised — No interference in revision — See Civil P. C (1908), Section 115

Delhi 349 A (C N 61)

—O 41, R 1 — Pleadings — Suit against Railway by plaintiff 1, the consignee and plaintiff 2 as subrogee of rights of plaintiff 1 — Railway in their pleading denying subrogation — In appeal against decree in favour of plaintiff 1, Railway cannot utilise plaintiff's allegation of subrogation as ground for non-suiting plaintiffs — See Evidence Act (1872), Section 115

Bom 401 C (C N 69)

—O 41, R 2 — Pleadings — Suit against Railway by plaintiff 1, the consignee and plaintiff 2 as subrogee of rights of plaintiff 1 — Railway in their pleading denying subrogation — In appeal against decree in favour of plaintiff 1, Railway cannot utilise plaintiff's allegation of subrogation as ground for non-suiting plaintiffs — See Evidence Act (1872), Section 115

Bom 401 C (C N 69)

—O 41, R 27 — Whether applies to appeals against orders granting temporary injunction under O 39, Rr 1 & 2 — (Quaere)

Delhi 349 B (C N 61)

—O 41, R 33 — "Which ought to have been passed" — Meaning of — Decree allowing claims of female heirs who had not appealed passed — S A No 254 of 1962, D/- 18-11-1963 (Pun), Reversed

SC 1144 B (C N 209)

—O 41, R 33, O 42, R 1, S 107 — Powers of appellate Court — Held on facts that the High Court was not legally justified in giving further relief to the plaintiff by remanding the case with a direction that defendants should be asked to render account than that granted by the trial Court — S. As Nos 4940 and 3660 of 1961, D/-27-4-1964 (All), Reversed

SC 1316 B (C N 242)

—O 42 R 1 — Powers of appellate Court — Held on facts that the High Court was not legally justified in giving further relief to plaintiff by remanding case with direction that defendants should be asked to render account than that granted by trial Court — S As. Nos 4940 and 3660 of 1961, D/-27-4-1964 (All) Reversed — See Civil P. C (1908), O 41, R 33

SC 1316 B (C N 242)

—O 47, R 1 — Writ petition on Civil side — Review — Provisions of Civil P. C. would apply — See Constitution of India, Art. 226

Andh Pra 441 A (C N 109)

—O 47, R 1 — Order under Art 226, Constitution passed following Supreme Court decision — Decision relied on reversed by Supreme Court before passing order — Latter decision not fully reported by that date but was only short noted in I. T. R. — Later decision not brought to

CIVIL P. C. (Contd.)

notice of Court — Held sufficient ground for reviewing the order — See Constitution of India, Art. 226

Andh Pra 441 B (C N 109)

—O. 49, R. 3 (5) — Contested suit — Privilege under, cannot be claimed — See Civil P. C. (1908), Section 33

SC 1167 (C N 215)

CIVIL SERVICES**—FUNDAMENTAL RULES**

—R. 52 — Dismissed servant reinstated — Suit for recovery of arrears of salary — Salary only for period of three years and two months before suit can be claimed — Rule 52 does not apply. ILR (1966) 1 Punj 302 & R. F. A. No. 8-D of 1964, D/-6-9-1966 (Punj) and (1967) 1 Ser LR 594 (Punj), Overruled — See Limitation Act (1908), Art. 102

Punj 441 A (C N 75) (FB)

—INDIAN POLICE SERVICE (APPOINTMENT BY PROMOTION) REGULATION (1955)

—Regn. 5 — Pre-existing Draft Rules for preparation of select list, R. 2 — List of Police Service Officers 'fit for trial to promotion posts' purporting to be made under draft R. 2, held could not be deemed to be select list within meaning of either Draft R. 2 or Promotion Regulation 5. ILR (1967) Cut 735, Reversed — See Civil Services — Indian Police Service (Regulation of Seniority) Rules (1954), R. 3 (3) (b) SC 1249 A (C N 227)

—INDIAN POLICE SERVICE (REGULATION OF SENIORITY) RULES (1954)

—R. 3 (3) (b) second proviso — Indian Police Service (Appointment by Promotion) Regulation (1955), Regn. 5 — Pre-existing Draft Rules for preparation of select list, R. 2 — Lists of Police Service Officers 'fit for trial to promotion posts' purporting to be made under Draft R. 2 held could not be deemed to be 'select list' within meaning of either Draft R. 2 or Promotion Regulation 5. ILR (1967) Cut 735, Reversed SC 1249 A (C N 227)

—R. 3 (3) (b), Second proviso and Explanation 1 — Scope — Object of second proviso and Explanation 1 — Officer appointed by promotion — Fixation of seniority and year of allotment — Period of Officiation prior to inclusion of officer in select list — Period could only be counted, if approved by Central Government in consultation with Commission — Approval to be recorded on by after appointment to I. P. S. and not before. ILR (1967) Cut 735, Reversed

SC 1249 B (C N 227)

—R. 3 (3) (b), Provisos — Petitioner governed by second proviso — There can be no question of discrimination in consideration of seniority. ILR (1967) Cut 735, Reversed — See Constitution of India, Art. 14 SC 1249 C (C N 227)

CIVIL SERVICES (Contd.)**—KERALA CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1960)**

—R. 60 — Employee has vested right to continue in service till the age of 55 reckoned on basis of actual date of birth — See Constitution of India, Art. 309

Ker 317 (C N 78) (FB)

—PUNJAB POLICE RULES (1934)

—Chap. XVI, R. 28 — Summary inquiry against Assist Sub-Inspector of Police — Order of censure — Order set aside under R. 28 and departmental inquiry ordered — Procedure prescribed under R. 38 has to be followed — See Civil Services — Punjab Police Rules (1934), Chap. XVI, R. 38

SC 1108 (C N 201)

—Chap. XVI, Rr. 38 and 28 — Complaint against Assistant Sub-Inspector of Police for receiving illegal gratification — Superintendent of Police (City) making summary inquiry and passing an order of censure — Deputy Inspector-General, under R. 28, setting aside the order that ordering to deal the matter departmentally — Superintendent of Police (Central District), to whom inquiry was entrusted, asking for the sanction of District Magistrate to proceed departmentally — District Magistrate not informed of the previous order of Superintendent of Police (City) and its setting aside by Deputy Inspector General — District Magistrate sanctioning to proceed departmentally without recording any reasons — Departmental action taken against the Assistant Sub-Inspector is invalid as there has been no substantial compliance with the provisions of R. 38 SC 1108 (C N 201)

—RAILWAY ESTABLISHMENT CODE

—Rr. 1707, 1706, 1712 and 1716—Charge sheet, mentioning major penalty of removal issued — Punishing authority is not barred from initiating minor penalty of recovery of pay for pecuniary loss caused by negligence after complying with procedure for minor penalties — Rule, that after initiating action for special remedy, the alternative general remedy cannot be availed of, on failure to comply with the special procedure, does not apply, as both the major and minor penalties are provided for by the same Code — Where a minor penalty only has been imposed the authority cannot be asked to justify the order with reference to the requirements of the procedure laid down for major penalties Cal 604 A (C N 104)

—Rr. 1708 and 1716 — Not the intention or object of the Railway authorities at the commencement of the proceedings, but the nature of the penalty which is eventually imposed, determines procedure which must be followed in order to render the order valid Cal 604 B (C N 104)

CIVIL SERVICES — RAILWAY ESTABLISHMENT CODE (Contd.)

—R 1712 — Major penalty — Procedure under R 1712 applies — See Railway Establishment Code, R 1707

Cal 604 A (C N 104)

—R 1716 — Minor penalty — Procedure under R 1716 applies — See Railway Establishment Code, R 1707

Cal 604 A (C N 104)

—R 1716 — Nature of penalty which is eventually imposed determines procedure to be followed — See Railway Establishment Code, R 1708

Cal 604 B (C N 104)

—TRAVANCORE SERVICE REGULATIONS

—Regn. 352-F (c) — Proof of age of employee — See Constitution of India, Art 309

Ker 317 (C N 78) (FB)

—U. P. HIGHER JUDICIAL SERVICE RULES (1953)

—R 19 — Judicial Magistrate, a pleader for not less than 7 years before his appointment to Higher Judicial Service — He is not already in service of State and is eligible for appointment as District Judge — See Constitution of India, Article 233 (2)

All 594 B (C N 112) (FB)

COMPANIES ACT (7 of 1913)

—S 109 — Non-registration of mortgage under — Effect of — Mortgage will be void against liquidator and creditors even if mortgage is valid mortgage

Cal 578 F (C N 101)

COMPANIES ACT (1 of 1956)

—Ss 2 (18) and 617 — Industrial Disputes Act (1947), Section 2 (j) — Company — Shares held by Union Government, State Government and private individuals — Union Government being largest shareholder nominating Company's directors — Held, that the Company being registered under the Companies Act and governed by the provisions of that Act, it was a separate legal entity and could not be said to be either a Government Corporation or an industry run by or under the authority of the Union Government

SC 1306 B (C N 240)

—S 12 — Promoter of company — Status of — See Trusts Act (1882) Section 94

Mad 462 B (C N 108)

—S 46 — Promoter of Company — Status of — See Trusts Act (1882), S. 94

Mad 462 B (C N 108)

—S 46 — Purchase of immoveable property by promoter of company — Adoption of benefit of purchase by company — Absence of conveyance by promoter in favour of Company under registered document — No effect on transfer of title to company — See Transfer of Property Act (1882), S. 9

Mad 462 C (C N 108)

COMPANIES ACT (1956) (Contd.)

—S 617 — Company — Shares held by Union Government, State Government and private individuals — Union Government being largest share holder nominating Company's director — Held that the Company being registered under the Companies Act and governed by the provisions of that Act, it was a separate legal entity and could not be said to be either a Government corporation or an industry run by or under the authority of the Union Government — See Companies Act (1956), S. 2 (18)

SC 1306 B (C N 240)

CONSTITUTION OF AMERICA

—Art 1 S. 8, Cl (3) — See Constitution of India, Art 304

USSC 108 (C N 18)

CONSTITUTION OF AMERICA, FIRST AMENDMENT AND FOURTEENTH AMENDMENT

—Case from America — Constitution of United States of America, First and Fourteenth Amendment — State statute prohibiting private possession of obscene matter is unconstitutional under the 1st Amendment read with the 14th Amendment — Government interest in dealing with such matter, extent of — Right to receive information and ideas is fundamental to free society — See Constitution of India, Art 19 (1) (a) and (f)

USSC 100 (C N 17)

CONSTITUTION OF AMERICA FOURTEENTH AMENDMENT

—S 1 — See Constitution of India, Art. 304

USSC 108 (C N 18)

CONSTITUTION OF INDIA

—Art 5 — Acquisition of foreign citizenship by Indian citizen prior to Constitution — He cannot claim citizenship of India by virtue of Arts 5 and 6 or 8 — See Constitution of India, Art. 9

SC 1231 B (C N 223)

—Art 6 — Acquisition of foreign citizenship by Indian citizen prior to Constitution — He cannot claim citizenship of India by virtue of Arts 5 and 6 or 8 — See Constitution of India, Art. 9

SC 1234 B (C N 223)

—Art. 8 — Acquisition of foreign citizenship by Indian citizen prior to Constitution — He cannot claim citizenship of India by virtue of Arts 5 and 6 or 8 — See Constitution of India, Art. 9

SC 1234 B (C N 223)

—Arts 9, 5, 6 and 8 — Article 9 deals with cases where citizenship of foreign State had been acquired by Indian citizen prior to Constitution and means that he cannot claim citizenship of India by virtue of Arts 5 and 6 or 8

SC 1231 B (C N 223)

—Art. 11 — Citizenship Act (1955) has been enacted under powers of Parliament preserved by Art. 11 — See Citizenship Act (1955), S. 9

SC 1231 A (C N 223)

CONSTITUTION OF INDIA (Contd.)

—Art. 13 — Case from America — Constitution of United States of America, (first and fourteenth Amendment) State statute prohibiting private possession of obscene matter is unconstitutional under the 1st Amendment read with the 14th Amendment — Government interest in dealing with such matter, extent of — Right to receive information and ideas is fundamental to free society — See Constitution of India, Art. 19 (1) (a) and (f)

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—Art. 29 (2) — Admission to university classes — Reservation made for children of ex-servicemen and service-men — See Constitution of India, Art 14

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—S. 215 — Sale of pawned goods by pawnee — Quality of goods disputed by purchaser — Section is attracted — See Contract Act (1872), S. 176

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CO-OPERATIVE SOCIETIES**—ASSAM CO-OPERATIVE SOCIETIES ACT (1 of 1950)**

—S. 85 — Writ petition by a society said to be represented by the named Chairman is maintainable

Manipur 84 G (C N 25)

—MAHARASHTRA CO-OPERATIVE SOCIETIES ACT (24 of 1961)

—S. 91 — Provisions do not affect provisions of S. 28 of Bombay Act of 57 of 1947

SC 1320 D (C N 243)

—S. 91(1) — Scope — Dispute touching the business of the Society — Word business is used in narrower sense — It

CO-OPERATIVE SOCIETIES — MAHARASHTRA CO-OP. SOCIETIES ACT (contd.)

means actual trading or commercial or similar business or activity of the Society

SC 1320 A (C N 243)

—S. 91(1) — Dispute touching the business of society — Ascertainment — Co-operative Bank acquiring a building — Dispute between the tenant of a member of the Bank in the building is not one touching the business of the Bank — No reference can be made

SC 1320 B (C N 243)

—S. 91(1) — Dispute between a Society and a member or a person claiming through a member — Claim should arise through a transaction entered into by a member with the Society as a member. AIR 1946 Nag 16 and AIR 1961 Madh Pra 40 Overruled

SC 1320 C (C N 243)

COURT-FEES AND SUITS VALUATIONS**—BOMBAY COURT FEES ACT (36 of 1959)**

—S. 6(iv)(d) — Suit, not for a declaration but for injunction only — S. 6(iv)(d) has no application — Specific Relief Act (1963), S. 37

Bom 423 B (C N 70)

—S. 6(ix), Sch. II, Art. 23(f) — Suit for injunction — Prayer for asking defendants to discontinue attachment — Prayer is equivalent to prayer for setting aside attachment — Suit falls under Section 6(ix)—Civil P. C. (1908), Sections 15, 9, Order 7, Rule 10 — Value of property exceeding Rs. 25,000 — Suit is beyond jurisdiction of Bombay City Civil Court even assuming that suit falls under Article 23(f) of Sch. II — Suit held to be within jurisdiction of Bombay High Court on its original side under Cl. 12 of Letters Patent

Bom 423 C (C N 70)

—Sch. II, Art. 23 (f) — Suit for injunction.— Value of property exceeding Rs. 25,000 — Suit is beyond jurisdiction of Bombay City Civil Court, even assuming suit falls under Art. 23 (f) of Sch. II — See Court-fees and Suits Valuations — Bombay Court Fees Act (36 of 1959), Section 6(ix)

Bom 423 C (C N 70)

—SUITS VALUATION ACT (7 of 1887)

—S. 3 — Suit for injunction — Value of property exceeding Rs. 25,000 — Suit is beyond jurisdiction of Bombay City Civil Court — See Court-fees and Suits Valuations — Bombay Court Fees Act (36 of 1959), S. 6(ix)

Bom 423 C (C N 70)

—S. 4 — Suit for injunction — Value of property exceeding Rs. 25,000 — Suit is beyond jurisdiction of Bombay City Civil Court — See Court-fees and Suits

COURT FEES AND SUITS VALUATIONS**—SUITS VALUATION ACT (contd)**

Valuations — Bombay Court Fees Act (36 of 1959), S 6(ix)

Bom 423 C (C N 70)

CRIMINAL PROCEDURE CODE (5 of 1898)

—S 1 — Existence of Civil remedy does not exclude trial by criminal court of offence — Fact that complainant is entitled to both civil and criminal remedies does not disentitle him to take recourse to criminal remedy

J & K 131 B (C N 29)

—S 4(1)(p) — Officer of Railway Protection Force is not police officer properly so called — See Railway Property (Unlawful Possession) Act (29 of 1966), S 3

Cal 594 A (C N 102)

—S 82 — Extradition Act (1962), Section 3 — Fugitive Offenders Act (1881), (44 and 45 vict C 69) — Presidency Magistrate issuing warrant and sending it to Secretary, Home Department for onward transmission to Government of India for taking further steps for securing presence of accused in India from Hong Kong to undergo trial — Held, issue of warrant and procedure followed in transmitting warrant were not illegal not even irregular — Though provisions of Extradition Act could not be availed of, that did not bar the requisition made by External Affairs Ministry to authorities in Hong Kong — Fugitive Offenders Act is not rendered inapplicable because India is no more a British possession — AIR 1968 Cal 220, Reversed

SC 1171 (C N 216)

—S 107 — "Is informed" — No restriction as to source of information — Action on basis of police report and complaint petition — Action, held, not incompetent

Manipur 90 A (C N 26)

—Ss 107, 112 and Proviso to 114 — On facts, held, order passed under the above provisions was proper

Manipur 90 B (C N 26)

—Ss 112, 107 and Proviso to S. 114 — On facts, held, order passed under above provisions was proper — See Criminal P C (1898) S 107

Manipur 90 B (C N 26)

—S 112 — Composite order — Appending of order under S 117(3) to order under S 112 held illegal — See Criminal P C (1898), S 117(3)

Manipur 90 C (C N 26)

—S 112 — Order under — Subsequent order under S 117(3) on same evidence held not bad — See Criminal P C (1898), S. 117(3)

Manipur 90 D (C N 26)

—S 114 Proviso and Ss 107 and 112 — On facts, held order passed under above provisions was proper — See Criminal P C (1898) S 107

Manipur 90 B (C N 26)

CRIMINAL P. C. (contd)

—S 114 — Composite order — Appending of order under S 117(3) to order under S 112 held illegal — Impugned portion of order held could be construed as one under S 114 but it would be redundant — See Criminal P C (1898), S 117(3)

Manipur 90 C (C N 26)

—Ss 117(3), 112 and 114 — Composite order — Appending of an order under S 117(3) to an order under S 112, held, illegal

Manipur 90 C (C N 26)

—Ss 117(3) and 112 — Magistrate passing an order under S 112 — Subsequently, emergency compelling him to make an order under S 117(3) — Order under S 117(3) not bad for being on the same information and evidence as the order under S 112

Manipur 90 D (C N 26)

—S 117(3) — Illegal order under S 117(3) with consequential order under S 514 — One revision against composite order maintainable — See Criminal P C (1898), S 435

Manipur 90 E (C N 26)

—S 117(3) — Order under, to be with reasons in writing

Manipur 90 F (C N 26)

—Ss 162 and 164 — Judicial confession — Admissible without examining Magistrate before whom it was made

Orissa 289 E (C N 105)

—S 164 — Evidence Act (1872), Sections 145 and 157 — Statement of witness under Section 164 — Can be used for purposes of corroboration or contradiction of the witness

Orissa 289 B (C N 105)

—S 164 — Judicial confession — Admissible without examination of Magistrate before whom it was made — See Criminal P C (1898) S 162

Orissa 289 E (C N 105)

—Ss 167 and 344 — Distinction between — Order of remand under S 344 by a Magistrate having no jurisdiction to try case is illegal — Detention under such order is illegal — Accused subsequently produced by police before Magistrate having jurisdiction to try case and remanded to jail custody under S 344 — Subsequent detention is legal

Orissa 295 A (C N 109)

—S 173 — Filing of charge sheet and arresting accused can be said to be part of investigation — See Prevention of Corruption Act (1947), S 5A

Guj 362 E (C N 61)

—S 173 — Investigation illegal — Jurisdiction of Court to try case is not affected — See Prevention of Corruption Act (1947), S 5A

Guj 362 G (C N 61)

—S 173 (4) — Institution of case for offences under Railway Property (Unlawful Possession) Act — It is on complaint and compliance with S 173 (4) not neces-

CRIMINAL P. C. (contd.)

sary — See Railway Property (Unlawful Possession) Act (29 of 1966), S. 3
Cal 594 A (C N 102)
—S. 190(1)(b) — Officer of Railway Protection Force is not police officer — See Railway Property (Unlawful Possession) Act (29 of 1966), S. 3
Cal 594 A (C N 102)
—S. 202 — Scope — Issue of warrant against accused before conclusion of enquiry under S. 202 (1) — Not proper — Procedure to be adopted where it is necessary to put up person named as accused for identification
All 591 (C N 111)
—S. 251(b) — Report by officer of Railway Protection Force is not police report — See Railway Property (Unlawful Possession) Act (29 of 1966), S. 3
Cal 594 A (C N 102)
—S. 256 — 'Any remaining witnesses for the prosecution' — Expression also includes all such witnesses as may be produced by complainant, even though neither summoned nor named
All 583 (C N 110)
—S. 288 — Depositions before committing Court brought on record of Sessions Court are substantive evidence — Such statements conflicting with those made before Sessions Court — Duty of Court, pointed out
Orissa 289 A (C N 105)
—S. 288 — Statements before committing Court — Allegation that they were made under police pressure — Onus is on the accused to prove it
Orissa 289 C (C N 105)
—S. 344 — Order of remand under Section by Magistrate having no jurisdiction to try case is illegal — Detention under such order is illegal — Accused subsequently produced by police before Magistrate having jurisdiction to try case and remanded to jail custody under S. 344 — See Criminal P. C. (1898), S. 167
Orissa 296 A (C N 109)
—S. 367 — Criminal trial — Motive — Proof of, is always not necessary — See Penal Code (1860), Chap. IV Gen.
Tripura 53 A (C N 11)
—S. 367 — Circumstantial evidence — Appreciation of — Must be consistent only with guilt of accused — See Evidence Act (1872), Section 3
Tripura 57 A (C N 12)
—S. 369 — Order rejecting prayer of prosecution for cross-examining witness — Order is in the nature of interlocutory order and not judgment — Hence Court can allow the prayer on a second application, even on the same facts, in the ends of justice. Pat 415 A (C N 103)
—S. 423 — Conviction of accused under Ss. 302/34 Penal Code — Sentence of death held should be altered to one of R. I. for life — See Penal Code (45 of 1860), Ss. 302/34 Pat 411 (C N 102)

CRIMINAL P. C. (contd.)

—Ss. 435, 438, 117(3) and 514 — Composite order of Magistrate — Illegal order under S. 117(3) with consequential order under S. 514 — One revision petition challenging the composite order maintainable Manipur 90 E (C N 26)
—S. 438 — Composite order — Illegal order under S. 117 (3) with consequential order under S. 514 — One revision petition against composite order maintainable — See Criminal P. C. (1898), S. 435
Manipur 90 E (C N 26)
—S. 488(3), First proviso, Explanation — Applicability — Causes mentioned in explanation can be considered at the stage of an order under sub-section (1) of Sec. 488 — Expression "may make an order under this section" in first proviso, interpretation of — Object of proceedings under Section 488. AIR 1968 Pat 139, Dissented from.
Goa 136 (C N 33)
—S. 491 — Application under — Relevant date for considering legality of detention of applicant is not the date when application is filed but the date on which the court passes final order or at least the date on which State shows cause in answer to the rule issued — Accused cannot be released under S. 491 merely because of the antecedent illegality of detention when detention is legal at the relevant date
Orissa 296 B (C N 109)
—S. 514 — Illegal order under S. 117(3) with consequential order under S. 514 — One revision against composite order maintainable — See Criminal P. C. (1898), S. 435 Manipur 90 E (C N 26)
—S. 561-A — Inherent power of High Court under — Cannot be exercised in respect of executive or administrative orders
Andh Pra 444 (C N 110)
—S. 561-A — Order under section should only be passed where there is glaring defect on face of proceedings making prosecution untenable and where there is no reasonable chance of accused being convicted
J. & K. 132 (C N 28)
—S. 561-A — Powers under section have to be exercised with great care and circumspection and High Court does not ordinarily interfere at interlocutory stage of criminal proceedings in subordinate Court J. & K. 134 A (C N 29)
CRIMINAL TRIAL
—Motive — See Penal Code (1860), Chapter IV, General
CUSTOM (PUNJAB)
—Succession — Alienation of ancestral land without necessity by Hindu Jat — Suit by competent reversioner — Effect — Declaratory decree enures in favour of all heirs including female heirs. S. A. No. 254 of 1962, D/- 18-11-1963 (Punjab)

CUSTOMS (PUNJAB) (contd.)

Reversed — See Punjab Custom (Power to Contest), Act (2 of 1920), S 8

SC 1144 A (C N 209)

DEBT LAWS**—DISPLACED PERSONS (DEBTS ADJUSTMENT) ACT (70 of 1951)**

—S 13 — Involuntary assignment of debts — Joint Hindu family having cash deposits in bank in Pakistan — Pakistan (Administration of Evacuee Property) Ordinance (15 of 1949), S 45 — Effect — Liability of the Bank in India in respect of such deposits is extinguished. C R D 104-D of 1958 (Punj) D/- 12-9-1963 Reversed — See Constitution of India Art. 51

SC 1330 B (C N 244)

—PUNJAB RELIEF OF INDEBTEDNESS ACT (7 of 1934)

—S 31 — Tender of payment — Tenant depositing money under S 31 — Not a valid tender of payment — Civ Rev No 750 of 1962 D/- 18-3-1964 (Punj) Reversed; ILR (1964) 1 Punj 626 Overruled — See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S 13(2)(i) proviso

SC 1273 (C N 232)

—SAURASHTRA AGRICULTURAL DEBTORS RELIEF ACT (23 of 1954)

—S 29 — Saurashtra Land Reforms Act (25 of 1951), Sections 6 and 20 — Mortgagee, not otherwise tenant under Section 6 of Land Reforms Act, in possession of land — Land, held by Mamlatdar to be Khalsa and full assessment ordered under Sec. 20 of Land Reforms Act — Occupancy rights not granted — Rights of mortgagor not extinguished under Land Reforms Act — Court can scale down debts under Debtors Relief Act

SC 1196 (C N 220)

DEED

—Construction — Recitals as to area and boundaries — See T P. Act (1882), S. 8

DEFENCE OF INDIA RULES (1939)

—R 94A — Instrument creating charge — Interpretation of — Rule including within its ambit diverse things — No genus is discernible — Principle of ejusdem generis cannot be applied. AIR 1957 Trav-Co 6, Dissented from

Cal 578 B (C N 101)

—R 94-A (1) — Word 'charge' in Rule 94-A(1) — Word used in generic sense — It embraces mortgages within meaning of words "instrument creating a charge on the assets of Company."

Cal 578 A (C N 101)

—R 94A, sub rules (2), (7), (10) — Mortgage by deposit of title deeds —

DEFENCE OF INDIA RULES (contd.)

Mortgage created in contravention of Rule 94A(2) — Transaction is illegal — Mortgagee cannot recover money from mortgagor

Cal 578 D (C N 101)

—R 94-A(9) — Notification No D 4114-E C I 144 issued under — Exemption under notification — Claim for exemption — That transaction has been entered in ordinary course of normal business and it is strictly and solely for the purpose of that business, must be established

Cal 578 E (C N 101)

DELHI AND AJMER RENT CONTROL ACT (38 of 1952)

See under Houses and Rents

DELHI RENT CONTROL ACT (59 of 1958)

See under Houses and Rents

DISPLACED PERSONS (COMPENSATION AND REHABILITATION) ACT (41 of 1954)

—S 20B — Section is unconstitutional being ultra vires Arts 14 and 19(1)(f) of the Constitution — See Constitution of India Art 14

SC 1126 A (C N 206)

—S 20B — Section is ultra vires Art. 31(2) — See Constitution of India, Art. 31(2)

SC 1126 B (C N 206)

DISPLACED PERSONS (DEBTS ADJUSTMENT) ACT (70 of 1951)

See under Debt Laws

DIVORCE ACT (4 of 1869)

—S 10 — Desertion — Essential conditions to prove — See Hindu Marriage Act (1955), S 10

Cal 573 A (C N 92)

EAST PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)

See under Houses and Rents

EDUCATION

See also Constitution of India, Art 14 and Art 29(2)

—ORISSA EDUCATION CODE

—Art 336 — Procedure — Managing Committee of school resolving to recommend termination of services of headmistress—Appeal of headmistress against that resolution rejected — No personal hearing given to her despite her prayer for such opportunity: Held that an opportunity should have been given to her to meet the charges against her — Procedure adopted by authorities not regular and was against principle of natural justice and that rejection of appeal was unsustainable

Orissa 293 (C N 106)

ELECTRICITY (SUPPLY) ACT (54 of 1918)

—S 57 (as amended in 1956) and Schedule VI — License granted prior to amendment — Charges fixed by Government can be enhanced unilaterally by

ELECTRICITY (SUPPLY) ACT (contd.)

licensee by virtue of amendment of Section 57 — Right to pay charges fixed previously is not vested right

SC 1225 (C N 222)

—Schedule VI (as amended in 1956) — Licence granted prior to amendment of S. 57 — Right to pay charges fixed previously is not vested right — See Electricity (Supply) Act (1948), S. 57 (as amended in 1956)

SC 1225 (C N 222)

EMPLOYEES' PROVIDENT FUNDS ACT (19 of 1952)

—S. 1(3)(a) and (b) — Composite factory engaged in manufacturing and other commercial activities — Test to determine whether it comes within purview of Act indicated Mys 355 A (C N 86)

—S. 1(3)(b) — Notification No. GER 346 dated 7-3-1962 under — Is not ultra vires power of Central Government delegated under Cl. (b). Mys 355 B (C N 86)

EVIDENCE ACT (1 of 1872)

—S. 3 — Criminal trial — Motive — Proof of, is not always necessary — See Penal Code (1860) Chap. IV General

Tripura 53 A (C N 11)

—S. 3 — Penal Code (1860), S. 364 — Circumstantial evidence — Appreciation of — Must be consistent only with guilt of accused Tripura 57 A (C N 12)

—S. 5 — Permission to cross-examine witness by itself is not enough to discredit him — See Evidence Act (1 of 1872), S. 154 Pat 415 C (C N 103)

—S. 9 — Procedure under S. 202 (1) Cr. P. C. is to be adopted where it is necessary to put up person named as accused for identification — See Criminal P. C. (1898), S. 202 All 591 (C N 111)

—Ss. 18, 21, 115 — Admission in the pleading of a previous suit — Admission binds the party making it in subsequent suit — Admission can be used against him in the subsequent suit — Admission by agent without instigation of or without benefit to principal is not binding on principal Pat 385 A (C N 100)

—S. 21 — Admission by agent without instigation of or without benefit to principal is not binding on principal — See Evidence Act (1 of 1872), S. 18 Pat 385 A (C N 100)

—S. 24 — Judicial confession — Admissible without examining magistrate before whom it was made — See Criminal P. C. (1898), S. 162 Orissa 289 E (C N 105)

—S. 32(2) — Commissioner dying after filing his report — His report is admissible in evidence under the provision Pat 385 B (C N 100)

—S. 45 — Medical evidence — Injury report is an admissible piece of evidence in proof or disproof of the theory of accident Orissa 289 F (C N 105)

EVIDENCE ACT (contd.)

—Ss. 35 and 74 — Record of rights — Entries in — Admissible even though the record is not finally published

Manipur 84 B (C N 25)

—Ss. 60, 63 — News item published by newspapers — No further proof of what had actually happened — It is of no value

SC 1201 D (C N 221)

—S. 63 — News item published in Newspaper — It is at best a second hand secondary evidence — See Evidence Act (1 of 1872), S. 60 SC 1201 D (C N 221)

—S. 74 — Record of rights — Entries in — Admissible though record not finally published — See Evidence Act (1872), S. 35 Manipur 84 B (C N 25)

—Ss. 101-104 — Presumption and onus — Adoption recognised by all members of family for over fifty years — Strong presumption in favour of its validity arises — Heavy burden lies on reversioner challenging it to prove his allegation that it is invalid on the ground of the adoptive mother lacking competence to adopt — See Hindu Law — Adoption SC 1359 (C N 250)

—Ss. 101-104 — Statements before committing Court alleged to be made under police pressure — Onus is on accused to prove — See Criminal P. C. (1898), S. 288 Orissa 289 C (C N 105)

—S. 106 — Railways Act (1890), S. 74E (Old) — Wagon catching fire in transit — Negligence of railway servant is presumed — Railway administration must prove how wagon was handled on way — See Railways Act (1890), S. 74-E (old) Bom 401 A (C N 69)

—S. 114 — Adoption — Recognition of adopted person by members of family for over fifty years — Strong presumption arises in favour of its validity — See Hindu Law — Adoption SC 1359 (C N 250)

—S. 114 — Goods booked on Central Railway — Destination on S. E. Railway — Presumption in respect of notice sent by ordinary post — See Railways Act (1890), S. 74-E Bom 401 E (C N 69)

—S. 114 — Existence of industrial dispute — Reference reciting satisfaction of Government — Regularity of reference must be presumed — See M. P. Industrial Relations Act (27 of 1960), S. 51 Madh Pra 248 B (C N 63)

—S. 115 — Decree holder creditors applying for rateable distribution of assets held by executing court in respect of another decree passed by High Court cannot challenge the decree under which the assets were held, as invalid, on the ground that High Court had no territorial jurisdiction under Cl. 12 of Letters Patent to pass decree for sale of properties outside its local limits of its ordinary original jurisdiction — See Civil P. C. (1908) S. 73 SC 1147 D (C N 210)

EVIDENCE ACT (contd.)

—S 115 — Pleadings — Suit against Railways by plaintiff 1 the consignee and plaintiff 2 the insurer as subrogee of rights of plaintiff 1 — Railway, in their pleading, denying the subrogation and the right of plaintiff 2 — In appeal against decree in favour of plaintiff 1, Railway cannot turn round and utilise allegations of subrogation made by plaintiffs, as ground for non-suiting plaintiffs
Bom 401 C (C N 69)

—S 115 — Estoppel — There can be no estoppel against law — No amount of admission contrary to law could create such estoppel
Cal 565 D (C N 98)

—S 115 — On facts, held estoppel did not operate
Manipur 84 H (C N 25)

—S 115 — Admission in the pleading of a previous suit — Admission binds the party making it in subsequent suit and can be used against him — See Evidence Act (1 of 1872), S 18 Pat 385 A (C N 100)

—S 145 — Statement of witness under S 164 Cr P C — Can be used for purposes of corroboration or contradiction of the witness — See Criminal P C (1898), S 164 Orissa 289 B (C N 103)

—S 154 — Hostile witness — Witness only tendered before but not examined — Still Court can declare him hostile and allow party to cross-examine him — Power of Court to declare witness hostile is not limited by section to cases where there is any previous statement of the witness and from which he is alleged to have departed
Pat 415 B (C N 103)

—Ss 154 and 5 — Permission to cross-examine witness by itself is not enough to discredit the witness
Pat 415 C (C N 103)

—S 154 — A party can cross-examine even a witness tendered by it
Pat 415 D (C N 103)

—S 157 — Statement of witness under S 164 Cr P C — Can be used for purposes of corroborations or contradiction of the witness—See Criminal P C (1898), S 164 Orissa 289 B (C N 105)

EXTRADITION ACT (34 of 1962)

—S 3 — Securing presence of accused in India from Hong Kong — Though provision of Act could not be availed of that did not bar requisition made by External Affairs Ministry to authorities in Hong Kong AIR 1968 Cal 220 Reversed — See Criminal Procedure Code (5 of 1898), S 82 SC 1171 (C N 216)

FOREST ACT (16 of 1927)

—S 2(4) — Transit Rules respecting timber and other forests produce — Chief Commissioner is possessed of ample powers to make rules relating to transit of all timber and other forest produce whether found in or brought from reserved forests or private lands — See Forest Act (1927), S 41 Tripura 62 B (C N 13)

FOREST ACT (contd.)

—Ss 41, 42, 2(4) — Transit Rules respecting timber and other forest produce — Chief Commissioner is possessed of ample powers to make rules relating to transit of all timber and other forest produce whether found in or brought from reserved forests or private lands
Tripura 62 B (C N 13)

—S 42 — Transit Rules respecting timber and other forests produce — Chief Commissioner is possessed of ample powers to make rules relating to transit of all timber and other forest produce whether found in or brought from reserved forests or private lands — See Forest Act (1927), S 41 Tripura 62 B (C N 13)

FUGITIVE OFFENDERS ACT (1881) (44 & 45 VICT C 69)

—S 13 — Extradition — Fugitive Offenders Act is not rendered inapplicable because India is no more a British possession AIR 1968 Cal 220 Reversed — See Criminal Procedure Code (5 of 1898), S 82 SC 1171 (C N 216)

—S 26 — Extradition — Fugitive Offenders Act is not rendered inapplicable because India is no more a British possession AIR 1968 Cal 220 Reversed — See Criminal Procedure Code (5 of 1898), S 82 SC 1171 (C N 216)

FUNDAMENTAL RULES

See under Civil Services

GENERAL CLAUSES ACT (10 of 1897)

—S 6 — Repeal of Act and its replacement by new Act — Vested rights under repealed Act continue — See Electricity (Supply) Act (1948), S 57 (as amended in 1956) SC 1225 (C N 222)

—S 6(c) and (e) — Power to levy penalty under S 18A of Income-tax Act (1922) is saved by S 6(c) and (e) — See Income-tax Act (1963), S 298 All 566 B (C N 108)

GOA, DAMAN AND DIU (JUDICIAL COMMISSIONER'S COURT) REGULATION (10 of 1963)

—S 7(2) proviso — Proviso is not bad in law merely because it provides for confirmation of order or sentence of lower Court in case of difference of opinion between two Judges, though presence of third Judge to resolve conflict would be better alternative
Goa 142 A (C N 34)

GUARDIANS AND WARDS ACT (6 of 1890)

—Ss 17, 19 and 25 — Hindu Minority and Guardianship Act (1956), S 13 — Hindu minor boy aged more than five years in custody of mother — Claim by father for custody — S 19 of former Act to be read as subject to S 13 of latter Act — Welfare of minor should be prime and sole consideration — Change in law so far as Hindus are concerned pointed out
Cal 573 B (C N 99)

GUARDIANS & WARDS ACT (contd.)

—S. 19 — Section 19 has to be read subject to S. 13 of Hindu Minority and Guardianship Act (1956) — See Guardians and Wards Act (1890), S. 17

Cal 573 B (C N 99)

—S. 25 — Welfare of minor is sole consideration—See Guardians and Wards Act (1890), S. 17

Cal 573 B (C N 99)

HIGH COURT RULES AND ORDERS — CALCUTTA HIGH COURT CRIMINAL RULES AND ORDERS

—R. 43(5) — Time allowed by A. D. M. to accused in contravention of R. 43(5)

—Contempt proceedings — Apology—See Contempt of Courts Act (1952), S. 1

Cal 602 (C N 103)

HINDU ADOPTIONS AND MAINTENANCE ACT (78 of 1956)

—S. 19 — Section governs rights of widowed daughter-in-law to maintenance after its enactment — See Civil P. C. (1908), O. 23, R. 1

SC 1118 (C N 204)

HINDU LAW

—Adoption—Adoption by widow under authority from husband—Adoption made in 1904 — Adoptee recognised by every member of the family as the adopted son of deceased husband — Reversioner challenging validity of adoption after a lapse of fifty years on the ground that the widow was a minor at the time of adoption — All parties to the adoption and all those who could give evidence in support of its validity not alive at the time of suit — Burden lies heavily on reversioner to rebut the strong presumption in favour of validity of the adoption which arises in the case by showing that the widow was a minor at the time of adoption and therefore was not competent to make the adoption

SC 1359 (C N 250)

—Bombay School — Applicability — Lex loci — Parties claiming to be Maharashtrian Mahars—Indications that their ancestors immigrated from Bombay region into Nagpur and Berar plain, though migration in sense of its exact origin not proved—Family retaining its identity as Maharashtrian by clinging to its language, dress, social customs and manners, mode of worship and like — Until contrary is shown presumption would be that the family had migrated from Bombay region — Presumption being not rebutted, parties held governed by Bombay School of Hindu law.

Madh Pra 241 B (C N 61)

—Joint Hindu family — Coparcenership — Incidents — Joint Hindu family under Hindu law is not an individual but a body of individuals contemplated by Notification dated 15-2-52 issued by Government of Pakistan under S. 45 of Pakistan (Administration of Evacuee Property) Ordinance

SC 1330 A (C N 244)

—Religious Endowments — Relinquishment of office of Mahantship cannot be

HINDU LAW (contd.)

made in favour of person other than the person next entitled to succeed

All 571 B (C N 109)

—Religious Endowments — Head of religious or charitable institution has no power to bargain away his office or alter constitution of institution

All 571 C (C N 109)

—Religious endowment — Shebait Document purporting to be by deity represented by shebait — Not executed by shebait in such capacity or as representing the deity — Admission of execution by shebait not as shebait of the deity but by one holding power of attorney from him — Held, that the document would not bind the deity but the shebait in his individual capacity

Cal 565 A (C N 98)

HINDU MARRIAGE ACT (25 of 1955)

—S. 3(b) — In Manipur territory expression "District Court" in S. 3(b) includes a court of Additional Dist. Judge — See Hindu Marriage Act (1955), S. 19

Manipur 93 (C N 27)

—S. 10 — Desertion — Meaning of — Factum of separation and intention to bring cohabitation permanently to an end — Two essential conditions to prove desertion

Cal 573 A (C N 99)

—S. 12(1)(d) and S. 12(2)(b)(ii) — Petition under S. 12(1)(d) filed beyond period mentioned in S. 12(2)(b)(ii) — Petition is not maintainable — What is laid down in Sec. 12(2)(b)(ii) is condition subject to which alone petition can be entertained — It is not period of limitation — Section 5 of Limitation Act has no application

Mad 479 (C N 112)

—S. 12(2)(b)(ii) — What is laid down in S. 12(2)(b)(ii) is condition subject to which alone petition can be entertained — It is not period of limitation — See Hindu Marriage Act (1955), S. 12(1)(d)

Mad 479 (C N 112)

—Ss. 19, 3(b) — In Manipur territory expression "District Court" in S. 3(b) includes a Court of Additional District Judge

Manipur 93 (C N 27)

—S. 21 — Right of appeal is substantive right and is not a mere matter of procedure — It is the procedure only which is to be regulated by Civil P. C. — See Hindu Marriage Act (1955), S. 28

All 601 (C N 113)

—S. 24 — Order under S. 24 — Appeal lies under S. 28 — F. A. F. O. No. 244 of 1959 D/- 19-5-1960 (All) Overruled, AIR 1960 Bom 315 and AIR 1962 Cal 455; Dissented from. — See Hindu Marriage Act (1955), S. 28

All 601 (C N 113)

—Ss. 28, 21, 24 — Scope of — Order under S. 24 — Appeal lies under S. 28 — F. A. F. O. No. 244 of 1959, D/- 19-5-1960 (All), Overruled; AIR 1960 Bom 315 & AIR 1962 Cal 455, Dissented from

All 601 (C N 113)

HINDU MARRIAGE ACT (contd)

—S 28 — Provision is *pari materia* with S 39 of Special Marriage Act

All 603 (C N 114)

HINDU MINORITY AND GUARDIANSHIP ACT (32 of 1956)

—S 13 — S 19 of Guardians and Wards Act is subject to S 13 — See Guardians and Wards Act (1890), S 17

Cal 573 B (C N 99)

HINDU SUCCESSION ACT (30 of 1956)

—S 2 — Alienation of ancestral land without necessity by Hindu Jat — Suit by competent reversioner — Effect — Declaratory decree enures in favour of all heirs including female heirs S A No 254 of 1962, D/- 18-11-1963 (Punj) Reversed — See Punjab Custom (Power to Contest) Act (2 of 1920), S 8

SC 1144 A (C N 209)

—S 4 — Alienation of ancestral land without necessity by Hindu Jat in 1916 — Decree obtained by competent reversioner in 1920 declaring alienation ineffective against his reversionary interest — Death of alienor after Hindu Succession Act — Held that the latter Act did not retrospectively enlarge the power of the holder of ancestral land and did not nullify the decree obtained before the Act — See Punjab Custom (Power to Contest) Act (2 of 1920), S 8

SC 1144 C (C N 209)

—S 4 (1) — Alienation of ancestral land without necessity by Hindu Jat — Suit by competent reversioner — Effect — Declaratory decree enures in favour of all heirs including female heirs S A No 254 of 1962, D/- 18-11-1963 (Punj) Reversed — See Punjab Custom (Power to Contest) Act (2 of 1920), S 8

SC 1144 A (C N 209)

—S 14 — Explanation — Explanation contemplates a situation where a female Hindu could be in possession of Joint Family property in lieu of maintenance — See Civil P C. (1908), O 23 R 1

SC 1118 (C N 204)

HOUSES AND RENTS**BOMBAY RENTS, HOTEL AND LODGING HOUSE RATES CONTROL ACT (57 of 1947)**

—S 26 — Provisions of section not affected by S 91, Maharashtra Co-operative Societies Act (32 of 1961) — See Co-operative Societies — Maharashtra Co-operative Societies Act (32 of 1961), S 91

SC 1320 D (C N 243)

DELHI AND AJMER RENT CONTROL ACT (38 of 1952)

—S 13 (1) (h) — Effect of first proviso on proceedings pending under 1952 Act, stated — See Houses and Rents — Delhi Rent Control Act (59 of 1958), S 14 (1) (h)

SC 1258 A (C N 235)

HOUSES AND RENTS — DELHI & AJMER RENT CONTROL ACT (contd.)

—S 13 (1) (h) — Premises let out to predecessors-in-interest of tenants for residence-cum-business or professional purposes — No eviction could be ordered merely on ground that tenants had built a large residential house — See Houses and Rents — Delhi Rent Control Act (59 of 1958) S 14 (1) (h)

SC 1288 B (C N 235)

—S 13 (1) (k) — Eviction of tenant under — Delhi Rent Control Act passed during pendency of appeal against order — Relief under S 14 (1) (i) of new Act cannot be claimed — See Houses and Rents — Delhi Rent Control Act (1958) S 57(2) First proviso

SC 1165 (C N 214)

DELHI RENT CONTROL ACT (59 of 1958)

—Sections 14 (1) (h) and 57 (2) First proviso — Delhi and Ajmer Rent Control Act (38 of 1952), Section 13 (1) (h) — Effect of first proviso on proceedings pending under 1952 Act

SC 1288 A (C N 235)

—S. 14 (1) (h) — Delhi and Ajmer Rent Control Act (38 of 1952), S 13 (1) (h) — Premises let out to predecessors-in-interest of tenants for residence-cum-business or professional purposes — Suit for eviction under Section 13 (1) (h) — No eviction could be ordered merely on ground that tenants had built a large residential house SC 1288 B (C N 235)

—S 14 (1) (h) — Eviction suit — Concurrent findings that premises were taken for residential-cum-business purposes — Finding being one of fact must be accepted as final in special appeal to Supreme Court — See Constitution of India Art 136

SC 1288 C (C N 235)

—S 14 (1) (i), 14 (10) — Tenant's Eviction under S 13 (1) (k), Delhi and Ajmer Rent Control Act, 1952 — Delhi Rent Control Act passed during pendency of appeal against order — Relief under S 14 (1) (i) is not available — See Houses and Rents — Delhi Rent Control Act (1958), S 57 (2) First proviso

SC 1165 (C N 214)

—Ss. 57 (2), First Proviso, 14 (1) (i) and 14 (10) — Tenant's eviction under S 13 (1) (k), Delhi and Ajmer Rent Control Act, 1952 — Delhi Rent Control Act passed during pendency of appeal against order — In revision tenant claiming relief under S 14 (1) (i) of new Act — Premises situated in area subjected to Slum Areas (Improvement and Clearance) Act, 1956 — Proviso to S 57 (2) of new Act does not apply to case — Matter is governed by the repealed Delhi and Ajmer Rent Control Act and hence order for eviction of the tenant was the proper order to be made

SC 1165 A (C N 214)

HOUSES AND RENTS — DELHI RENT CONTROL ACT (contd.)

—S. 57 (2) First Proviso — Effect of First Proviso on proceedings pending under Act (38 of 1952) — See Houses and Rents — Delhi Rent Control Act (59 of 1958) S. 14 (1) (h)

SC 1288 A (C N 235)

—EAST PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)

—S. 13 (2) (i), Proviso — Tender of payment — Tenant depositing money under S. 31, East Punjab Relief of Indebtedness Act, 1934—Not a valid tender of payment — Civil Revn. No. 750 of 1962, D/- 18-3-1964 (Punjab), Reversed; ILR (1964) 1 Punjab 626, Overruled.

SC 1273 (C N 232)

—MADRAS BUILDINGS (LEASE AND RENT CONTROL) ACT (18 of 1960)

—S. 5 — Fair rent not fixed—Agreement for enhancing rent is valid—Scope of Section, explained — See Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), S. 7

Mad 787 B (C N 110)

—S. 6 — Fair rent not fixed — Agreement for enhancing rent is valid—Scope of Section, explained — See Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), S. 7

Mad 473 B (C N 110)

—Sections 7, 5, 6 — Variation of rent — Validity — Fair rent not fixed — Agreement for enhancing rent is valid — Section 7 (2) does not invalidate such agreement — Scope of Sections 5, 6 and 7 explained — "Agreed rent" — Meaning explained

Mad 473 B (C N 110)

—Section 7(2) — Words "Premium or other like sums" — They are sums paid in excess of agreed rent in consideration of grant, continuance or renewal of tenancy — The Act does not define rent but makes clear distinction between rent and premium or other like sums

Mad 473 C (C N 110)

— RAJASTHAN PREMISES (CONTROL OF RENT AND EVICTION) ACT (17 of 1950)

—Section 13 (1) (c) — Realisation of rent by landlord after subletting of premises — Permission for subletting cannot be inferred — Knowledge of subletting is essential SC 1291 B (C N 236)

—Section 13 (1) (e) — Subletting without permission of landlord — Eviction is proper — Premises whether sublet before or after commencement of Act is immaterial

SC 1291 C (C N 236)

— WEST BENGAL PREMISES RENT CONTROL (TEMPORARY PROVISIONS) ACT (17 of 1950)

—Ss. 12 (1) (i) and 14 — Acceptance of rent after default by landlord and continuance of old tenancy — Default

HOUSES AND RENTS — W. B. PREMISES RENT CONTROL (TEMP. PROV.) ACT (contd.)

under old tenancy also continues—Landlord is entitled to use S. 12 (1) (i) and proviso to sub-sec. (3) of S. 14

SC 1187 A (C N 218)

—S. 14 — Acceptance of rent after default by landlord and continuance of old tenancy — Default under old tenancy also continues — Landlord is entitled to use S. 12 (1) (i) and proviso to sub-s. (3) of S. 14 — See Houses and Rents—West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950) S. 12 (1) (i)

SC 1187 A (C N 218)

—WEST BENGAL PREMISES TENANCY ACT (12 of 1956)

—S. 24 — Section is not retrospective but operates from the date when it came into force as it impinges on substantive rights of landlords and tenants and there is nothing in its language from which retrospectivity can be gathered

SC 1187 B (C N 218)

HYDERABAD CITY POLICE ACT (9 of 1348 FASLI)

—S. 26(1) — Though the Commissioner of Police, Hyderabad functions as first Class Magistrate for limited purpose, his order under S. 26 (1) is an executive order — See Criminal P. C. (1898), S. 561-A Andh Pra 444 (C N 110)

INCOME-TAX ACT (11 of 1922)

—Sections 3, 4 — Rule of diversion of income by an overriding title — Applicability — Amount of compensation paid by assessee, the selling agents to ex agents who were replaced by assessee— Absence of proof of precise terms of agreement between assessee and its principal — Payment was not by overriding title created either by act of parties or by operation of law — (1965) 1 ITJ 98 (Cal), Reversed SC 1160 C (C N 213)

—S. 4 — Rule of diversion of income by an overriding title — Applicability— Amount of compensation paid by assessee, the selling agents to ex agents who were replaced by assessee — Absence of proof of precise terms of agreement between assessee and its principal — Payment was not by overriding title created either by act of parties or by operation of law — (1965) 1 ITJ 98 (Cal) Reversed — See Income Tax Act (1922), S. 3

SC 1160 C (C N 213)

—Ss. 4, 6 — Receipts arising from business — Disposal of part or whole of assets — Nature of realisation — Test — Sale of Colliery after prospecting and developing — Income held taxable as business income SC 1241 A (C N 225)

—S. 5 (7-C) — Proceedings under S. 28 — Transfer of from one I. T. Officer to another—Latter Officer has to give op

INCOME-TAX ACT (1922) (contd.)

portunity of being heard — (1969) 42 ITR 129 (Pat) Diss. — See Income-tax Act (1922) S 28 Punj 429 (C N 73)

—S 6 — Business — Sale of Colliery after prospecting and developing — Income held taxable as business income — See Income-tax Act (1922) S 4

SC 1241 A (C N 225)
—Section 10 — Business — Assessee dealer in shares — Issuance of bonus shares to assessee in respect of ordinary shares held by him — Bonus shares — Mode of valuation I T Ref No 65 of 1954, D/- 27-4 1963 (Cal), Reversed

SC 1183 (C N 217)
—Section 10—Income-tax Rules (1922), Rule 33—Claim of non resident assessee for additional depreciation — Additional depreciation is a statutory allowance in determination of taxable profits

SC 1262 B (C N 229)
—S 10 (2) (vi) and (vi-a) — Income tax Rules (1922), R 33 — Assessee non-resident Company engaged in shipping business — Computation of taxable business income — Profits of the business taxable under the Act and are to be determined under R 33

SC 1262 A (C N 229)
—S 10 (2) (vi) — Assessee non-resident company — Computation of taxable business income — Observation of High Court that "no relief in any shape or form can be enjoyed by any assessee under the Income-tax Act in respect of a source of income unless the income from that source is taken into consideration for the purpose of that Act" when that was not the plea of the commissioner held on facts was wrong (1965) 57 ITR 774 (Cal) Reversed

SC 1262 D (C N 229)
—S 10 (2) (xv) — Assessee selling agents in India for principal company in London for variety of goods such as chemicals, dyes explosives etc.—Amount paid by assessee as compensation to ex agents whom it replaced — Absence of proof of exact terms and conditions of agreement between assessee and its principal in England — Amount held could not be said to be "expenditure laid out wholly and exclusively for the purpose of the business" under Section 10 (2) (xv) — (1963) 1 ITJ 98 (Cal), Reversed

SC 1160 B (C N 217)
—S 24 (1) — Sale transaction on 1-10-1948 — Price finally settled in December 1949 resulting in loss to assessee — Year in which loss can be taken into account is account year 1949-50 for purposes of S 24 (1) — Decision in I T Ref. No 33 of 1969 D/- 29-8-1963 (Cal) Reversed

SC 1241 B (C N 225)
—S. 26 — Dissolution of Firm — Continuance of its business by newly constituted firm — Case falls under S 26 and not under S 44 — Newly constituted firm can be legally assessed to penalty

INCOME-TAX ACT (1922) (contd.)

under S 23 for the default of the original firm—(1966) ILR 45 Pat 121 Reversed — See Income Tax Act (1922), S 28 SC 1352 A (C N 248)

—Ss 28, 26, 44 — Dissolution of firm — Continuance of its business by newly constituted firm — Case falls under Section 26 and not under Section 44 — Newly constituted firm can be legally assessed to penalty under Section 28 for default of original firm (1966) ILR 45 Pat 121, Reversed

SC 1352 A (C N 248)
—Ss 28, 5 (7-C) — Proceeding under S 28 — Transfer of from one Income tax Officer to another — Latter's failure to give opportunity of being heard — Imposition of penalty is bad — Fact that assessee is already heard by previous Officer or did not specifically request for re-hearing is immaterial — (1961) 42 ITR 129 (Pat), Dissented from

Punj 429 (C N 73)
—Section 33 (4) — Appeal against assessment for a certain year — Tribunal has no jurisdiction to reopen the concluded assessment for the preceding year SC 1122 (C N 203)

—S 35 (5) — Scope — Individual assessment of a partner in a firm made prior to 1-4-1952 wherein his share of income from firm was also included — Assessment of firm completed after 1-4-1952 — Income-tax officer has jurisdiction to reopen assessment of partner — Sub section (5) becomes operative as soon as it is found on assessment or re-assessment of firm that share of partner in profit or loss of firm was not included in assessment or if included was not correct — Completion of assessment of partner as individual need not happen after 1-4-1952 — Completed assessment is subject matter of rectification and this may have preceded 1-4-1952 — Such completion does not control operation of sub-section (5) (1962) 46 ITR 609 (SC) held overruled by AIR 1968 SC 623 W P. No 1126 of 1962, D/- 1-2-1968 (AP) Reconsidered and order therein set aside in AIR 1968 SC 623 which had not been fully reported and was not brought to the notice of the previous Bench

Andh Pra 441 (C N 100)
—S 44 — Dissolution of Firm — Continuance of its business by newly constituted firm — Case falls under S 26 and not under S 44 — Newly constituted firm can be legally assessed to penalty under S 23 for the default of the original firm — (1966) ILR 45 Pat 121 Reversed — See Income Tax Act (1922) S 28 SC 1352 A (C N 248)

—S. 66 — Reference under — Questions not raised and argued before Tribunal cannot be answered in reference SC 1352 B (C N 248)

INCOME-TAX ACT (1922) (contd.)

—Sec. 66 (1) — Reference under Section 66 (1) — High Court cannot embark upon reappraisal of evidence and arrive at findings of fact contrary to those of Appellate Tribunal — (1965) 1 ITJ 98 (Cal), Reversed SC 1160 A (C N 213)

—S. 66A — Powers of Supreme Court — In appeal from order of High Court in Income-tax reference Supreme Court exercises only advisory jurisdiction and has only to answer question referred by the Tribunal

SC 1262 C (C N 229)

INCOME TAX ACT (43 of 1961)

—S. 298 — Section is valid — See Constitution of India, Art. 141

All 566 A (C N 108)

—S. 298 — Income-tax (Removal of Difficulties) Order (No. 2 of 1963) — Order is not in excess of powers conferred by S. 298 or discriminatory in nature

All 566 B (C N 108)

INCOME TAX (REMOVAL OF DIFFICULTIES) ORDER (NO. 2 of 1963)

—Order is not in excess of powers conferred by S. 298 of Income tax Act or discriminatory in nature—See Income Tax Act (1963) S. 298

All 566 B (C N 108)

INCOME-TAX RULES (1922)

—R. 33 — Assessee non-resident Company engaged in shipping business — Computation of taxable business income — Profits of business are to be determined under R. 33 — See Income-Tax Act (1922), S. 10(2)(vi) and (vi-a)

SC 1262 A (C N 229)

—R. 33 — Additional depreciation is a statutory allowance in determination of taxable profits — See Income Tax Act (1922), S. 10

SC 1262 B (C N 229)

INDIAN POLICE SERVICE (APPOINTMENT BY PROMOTION) REGULATION (1955)

See under Civil Services.

INDIAN POLICE SERVICE (REGULATION OF SENIORITY) RULES (1954)

See under Civil Services.

INDUSTRIAL DISPUTES ACT (14 of 1947)

—S. 2 (j) — Company — Shares held by Union Government, State Government and private individuals — Union Government being largest share holder nominating Company's director — Held, the Company being registered under the Companies Act and governed by the provisions of that Act, it was a separate legal entity and could not be said to be either a Government corporation or an industry run by or under the authority of the Union Government — See Companies Act (1956), S. 2 (18)

SC 1306 B (C N 240)

INDUSTRIAL DISPUTES ACT (contd.)

—S. 2 (k) — Workman concerned becoming member of Union long back after his dismissal — Dispute sponsored by Union — Government declining to make reference on ground of belatedness — Held, action of Government was not unreasonable or perverse — See Industrial Disputes Act (1947), S. 10

Mad 477 C (C N 111)

—S. 2 (p)—Settlement arrived at before conciliation officer, between management and association of workmen — Settlement is one as defined under S. 2 (p) — See Industrial Disputes Act (1947), S. 12 (3)

SC 1280 A (C N 234)

—Sections 10 and 12 (5) — Reference of disputes to Boards etc. — Matters which government may take into consideration

Mad 477 A (C N 111)

—Sections 10 and 12 (5) — Constitution of India, Art. 226 — Mandamus — Writ of — Powers of High Court — Court cannot direct a reference — No bar of limitation applies to reference — Union can always agitate for fresh reference on conditions of employment

Mad 477 B (C N 111)

—Sections 10, 12 (5) and 2 (k)—Reference of disputes to Boards etc. — Workman concerned becoming member of Union long back after his dismissal — Dispute sponsored by Union — Government declining to make reference on the ground of belatedness — Held, the action of Government was not unreasonable or perverse

Mad 477 C (C N 111)

—Sections 12 (3), 18 (3) and 2 (p) — Settlement arrived at before conciliation officer, between management and association of workmen — Binding on workmen until validly terminated — Settlement by association held was in representative capacity

SC 1280 A (C N 234)

—S. 12 (5) — Reference of dispute to Boards etc. — Matters which Government may take into consideration — See Industrial Disputes Act (1947), S. 10

Mad 477 A (C N 111)

—S. 12 (5) — No bar of limitation applies to reference — Union can always agitate for fresh reference on conditions of employment — See Industrial Disputes Act (1947), S. 10

Mad 477 B (C N 111)

—S. 12 (5) — Workman concerned becoming member of Union long back after his dismissal — Dispute sponsored by Union — Government declining to make reference on ground of belatedness — Held, action of Government was not unreasonable or perverse — See Industrial Disputes Act (1947), S. 10

Mad 477 C (C N 111)

—S. 18 (3) — Settlement arrived at before conciliation officer, between management and association of workmen —

INDUSTRIAL DISPUTES ACT (contd)

Binding on workmen until validly terminated — See Industrial Disputes Act (1947), S 12 (3)

SC 1280 A (C N 234)

—Ss 23, 24 and 25 — U S Case — Railway Labor Act — Peaceful picketing by rail employees — State Courts have no jurisdiction to interfere

USSC 87 (C N 16)

—Sections 23 (c), 29, 24 and 26 — Strike envisaged by Sections 23 (c) and 29 — Distinction pointed out — Held on facts that strike in question was not in respect of one of the matters covered by settlement but in contravention of one of the clauses of settlement arrived at between management and workers association and was illegal and punishable under Section 29 and was not illegal under Section 24 read with S 23 (c)

SC 1280 B (C N 234)

—S 24 — Held on facts that strike in question was in contravention of one of the clauses of settlement arrived at between management and workers association and not on one of the matters covered by settlement and was illegal and punishable under S 29 and was not illegal under S 24 read with S 23 (c) — See Industrial Disputes Act (1947) S 23 (c)

SC 1280 B (C N 234)

—S 24 — U S Case—Railway Labor Act — Peaceful picketing by rail employees — State Courts have no jurisdiction to interfere — See Industrial Disputes Act (1947) S 23

USSC 87 (C N 16)

—S 25 — U S Case—Railway Labor Act — Peaceful picketing by rail employees — State Courts have no jurisdiction to interfere — See Industrial Disputes Act (1947) S 23

USSC 87 (C N 16)

—S 26 — Distinction between Ss 26 and 29, pointed out — See Industrial Disputes Act (1947), S 23 (c)

SC 1280 B (C N 234)

—S 29 — Strike envisaged by Ss 23 (c) and 29 — Distinction pointed out — See Industrial Disputes Act (1947) S 23 (c)

SC 1280 B (C N 234)

—S 33 — Appointment of employee on probation — His removal from service on ground of unsuitability a few days after expiry of probation period — Does not amount to alteration of service condition

Ker 313 (C N 76)

—S 23 (2) (b) — Decision to dismiss employee taken on 7-6-1965 — Application under S 33 (2) (b) made on 15-7-1965 (i.e. before decision to dismiss was actually communicated on 8-12-1965 — One month's salary sent by money order on 8-12-1965 — Held decision became effective only when it was communicated and application made before communication of decision to employee was maintainable — Further held that wages need

INDUSTRIAL DISPUTES ACT (contd)

not have been paid on 7-6-1966 or before application for approval was made on 15-7-1966, tender of wages when decision became effective was sufficient Case law Ref

Ker 310 (C N 75)

—Section 33C (2) — Application claiming computation of benefit for overtime work and work done on weekly off day, at certain rates — Rates pleaded in application not disputed by employer — Jurisdiction of Labour Court to entertain application not barred by S 20 (1) Minimum Wages Act

SC 1335 B (C N 245)

—S 33C (2) — Application under — Article 137, Limitation Act, 1963 does not apply 70 Bom L R 500 Overruled — See Limitation Act (1963), Art 137

SC 1335 C (C N 245)

—Sch 2 Item 6 — Domestic enquiry — Victimization — Discrimination — Strike by workers — Management dismissing three workers for misconduct by incitement, intimidation and riotous and disorderly behaviour considering them as very grave in nature — No action was taken for striking or stopping or for loitering about in company's premises as a large number of 'misguided' workmen had stopped work. Held on facts that once a misconduct graver than that of rest was found proved against those workers and for which punishment was dismissal, victimization could not be attributed to management — Having been found to be leaders of crowd, action taken against them could not on any principle be regarded as discriminatory or unequal — (Constitution of India Article 14)

SC 1280 D (C N 234)**(J & K) LIMITATION ACT (9 of 1955)**

—S 23 — Suit for perpetual injunction for prevention of wrong — Case, one of continuing wrong — S 23 held applicable — See Limitation Act (1908) S 23

J & K 140 (C N 31)

—Art 84 — Suit land purchased by A on 23-1-2006 (BK) from B and C — They undertaking to close door and window of house opening on suit land — Subsequently B and C selling their house to D — D declaring to close door and window — Suit by A against D, B and C filed on 2-4-1960 (AD) held, not barred by limitation — S 23 held applicable — See Limitation Act (1908) S 23

J & K 140 (C N 31)

—Art 119 — Suit land purchased by A on 23-1-2006 (BK) from B and C — They undertaking to close door and window of house opening on suit land — Subsequently B and C selling their house to D — D declaring to close door and window — Suit by A against D, B and C filed on 2-4-1960 (AD) held, not barred by limitation — S 23, held applicable — See Limitation Act (1908), S 23

J & K 140 (C N 31)

JAMMU AND KASHMIR PREVENTIVE DETENTION ACT (13 of 1964)

See under Public Safety

J. & K. REPRESENTATION OF THE PEOPLE ACT (4 of 1957)

—S. 47(2)(a) — Filing of nomination paper — Failure to subscribe oath or affirmation before authorized officer — Nomination paper is liable to be rejected — See Constitution of Jammu and Kashmir (1956), S. 51(a) SC 1111 (C N 202)

KERALA CIVIL SERVICES (CLASSIFICATION, CONTROL AND APPEAL) RULES (1960)

See under Civil Services

LAND ACQUISITION ACT (1 of 1894)

—S. 3(a) — Lease-hold interests in land come within definition of expression 'land', (1908) ILR 35 Cal 525 & AIR 1916 Pat 330 (1) Held no longer good law in view of AIR 1968 SC 1045 & AIR 1955 SC 298 All 604 A (C N 115)

—Ss. 4, 8 and 9 — Marking and measuring of land on spot have to be taken before notice under S. 9 is issued

All 604 B (C N 115)

—S. 8 — Issue of notice under S. 9 — Marking and measuring of land on spot is essential — See Land Acquisition Act (1894), S. 4 All 604 B (C N 115)

—S. 9 — Issue of notice under S. 9 — Marking and measuring of land on spot is essential — See Land Acquisition Act (1894), S. 4 All 604 B (C N 115)

—Ss. 23(1) and (2), 28 and 35 — Solatium is part of the compensation — Interest is payable on the solatium amount as well J. & K. 142 B (C N 32)

—Ss. 28 & 35 — Payment of interest obligatory J. & K. 142 A (C N 32)

—S. 28 — Interest is payable on the solatium amount as well — See Land Acquisition Act (1894), S. 23(1) & (2)

J. & K. 142 B (C N 32)

—S. 35 — Payment of interest is obligatory — See Land Acquisition Act (1894), S. 28 J. & K. 142 A (C N 32)

—S. 35 — Interest is payable on the solatium amount as well — See Land Acquisition Act (1894), S. 23(1) & (2)

J. & K. 142 B (C N 32)

LETTERS PATENT

—(Bom.) Cl. 12—Suit for injunction — Value of property exceeding Rs. 25,000 — Suit is within jurisdiction of Bombay High Court on its original side — See Court-fees and Suits Valuations — Bombay Court Fees Act (36 of 1959), S. 6(ix) Bom 423 C (C N 70)

—(Mad.) Cl. 12 — Decree holder creditors applying for rateable distribution of assets held by executing court in respect of another decree passed by High Court cannot challenge the decree under which the assets were held, as invalid, on the ground that High Court had no territorial jurisdiction under Cl. 12 of Letters Patent

LETTERS PATENT (MAD) (contd.)

to pass decree for sale of properties outside its local limits of its ordinary original jurisdiction — See Civil P. C. (1908), S. 73 SC 1147 D (C N 210)

—(Bom.) Cl. 15 — Procedure prescribed by O. 21, Rr. 97 to 102 of Civil P. C. is summary—Findings by Single Judge of High Court — Appeal under Cl. 15 — Division Bench will not interfere with those findings — See Civil P. C. (1908), O. 21, R. 97 Bom 447 (C N 74)

LIMITATION ACT (9 of 1908)

—S. 3 — Amendment of plaint — Suit originally instituted misdescribing the plaintiff — Amendment of plaint substituting real plaintiff — No question of limitation arises — Plaint must be deemed on such amendment to have been instituted in the name of the real plaintiff, on the date on which it was originally instituted SC 1267 B (C N 230)

—S. 23, Arts. 113, 120 — Suit for perpetual injunction for prevention of wrong — Maintainability — Suit land purchased by A on 23-1-2006 (BK) from B and C — B and C undertaking to close door and window of the house opening on suit land — Subsequently B & C selling their house to D — D declining to close door and window — Suit by A against D, B and C filed on 2-4-1960 (A.D.) — Case, one of continuing wrong—S. 23 held applicable and suit was not barred by limitation — (J. & K.) Limitation Act (9 of 1995), S. 23, Arts. 84, 119) J. & K. 140 (C N 31)

—Arts. 56 and 120 — Boiler along with road-roller sent for repairs — Work cannot be deemed to have been done until repairs are tested by boiler inspector and accepted — Boiler not tested — Art. 56 held did not apply for suit to recover price for such work — Where, however it was because of the defendant District Board that the boiler inspector could not inspect it, plaintiff was entitled to payment for work done by him — There being no specific provision in Limitation Act for such matters, case would be governed by Art. 120 of the Limitation Act of 1908 Cal 564 B (C N 97)

—Art. 102 — Dismissal of Government servant found illegal and set aside — Servant reinstated — Suit for recovery of arrears of salary — Can claim salary only for a period of three years and two months before the suit — R. 52 of the fundamental Rules does not apply — ILR (1966) 1 Punj 302 & R. F. A. No. 8-D of 1964, D/- 6-9-1966 (Punj) & (1967) 1 Ser LR 594 (Punj) Overruled; AIR 1961 Mad 486 & AIR 1963 Mad 425, Dissented from Punj 441 A (C N 75) (FB)

—Art. 113 — Suit land purchased by A on 23-1-2006 (BK) from B and C — B and C undertaking to close door and window of house opening on suit land — Subsequently B and C selling their house

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to D — D declining to close door and window — Suit by A against D, B and C filed on 2-4-1960 (A D) — S 23 held applicable and suit was not barred by limitation — See Limitation Act (1908), S 23

J & K 140 (C N 31)
 — Art 120 — Boiler along with road-roller sent for repairs — Work cannot be deemed to have been done until repairs are tested by boiler inspector and accepted — Non testing because of defendant — Art 120 applies — See Limitation Act (1908), Art 56 Cal 564 B (C N 97)
 — Art 120 — Suit land purchased by A on 23-1-2006 (BK) from B and C — B and C undertaking to close door and window of house opening on suit land — Subsequently B and C selling their house to D — D declining to close door and window — Suit by A against D, B and C filed on 2-4-1960 (A D) — S 23 held applicable and suit was not barred by limitation — See Limitation Act (1908), S 23 J & K 140 (C N 31)

— Arts 142 and 144 — Tenant or his heirs holding over after expiry of lease are in juridical possession protected by law — Dispossession by person alleged to be heir of deceased lessor is dispossession by trespasser without any title — Suit for possession filed within 12 years from date of dispossession held maintainable — (Transfer of Property Act (1882), S 116) Bom 429 (C N 71)

— Art 144 — Tenant or his heirs holding over after expiry of lease — Dispossession by person alleged to be heir of deceased lessor is dispossession by trespasser without any title — Suit for possession filed within 12 years from date of dispossession, held maintainable — See Limitation Act (1908), Art 142 Bom 429 (C N 71)

— Art 149 — Suit for declaration of title to disputed plots and for correction of entry in settlement records for showing status of plaintiff as that of "Ravat Sarkar" — Plaintiffs' failure to establish their title by prescription for statutory period of sixty years — Suit brought by plaintiff against State Government must be dismissed — First Appeal No 217 of 1959 D/- 16-4-1963 (M. P.) Reversed SC 1256 B (C N 228)

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— S 5 — Petition under S 12(1)(d), Hindu Marriage Act filed beyond period mentioned in S 12(2)(b) (ii) — S 5 Limitation Act has no application — See Hindu Marriage Act (1955), S 12(1)(d) Mad 479 (C N 112)

— Art. 119(a) — Production of award in Court (b) Arbitrator — Art 119(a) does not apply Mys 361 (C N 83)

— Art. 137 — Application under other Acts — Application under Section 33C(2) Industrial Disputes Act — Article does

LIMITATION ACT (1963) (contd)

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MADHYA PRADESH INDUSTRIAL RELATIONS ACT (27 of 1960)

— Ss 2 (17), 31, 51 — Industrial Dispute — Notice of change under Section 31 — No prerequisite for giving rise to

Madh Pra 248 A (C N 63)
 — Ss 2 (17) 51 and 82 — Closure can be subject-matter of Industrial Dispute — Scope of provisions stated

Madh Pra 248 C (C N 63)
 — S 2 (17) — Closure of part of machinery or discontinuance of a shift may give rise to an Industrial Dispute

Madh Pra 248 D (C N 63)
 — S 31 — Notice of change under Section 31 — No prerequisite for giving rise to industrial dispute — See Madhya Pradesh Industrial Relations Act (27 of 1960), Section 2(17)

Madh Pra 248 A (C N 63)
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 — S 51 — Existence of industrial dispute — Reference rectifying satisfaction of Government — Regularity of reference must be presumed — Company pleading absence of dispute has to prove it

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M. P. PRISONERS' RELEASE ON PROBATION ACT (15 of 1954)

— S 2 — Transfer of Prisoners to M P State — Powers of State Government under Section 2 to release prisoners — Are not subject to prior concurrence of State of conviction — See Transfer of Prisoners' Act (1950), Section 3

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M. P. PRISONERS' RELEASE ON PROBATION RULES 1954

— R 3 — Release of prisoners under Section 2 of M. P. Act 16 of 1954 — Conditions — Rule 3 imports other require-

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MADRAS DISTRICT MUNICIPALITIES ACT (5 of 1920)

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—R. 3—None of the provisions of Madras District Municipalities Act or the relevant rules made thereunder, refers to Section 35 of Stamp Act and makes it applicable to duty on transfers of property — See Municipalities — Madras District Municipalities Act (5 of 1920), Section 78-A

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—R. 4 — Mention of Sections 27 and 64 but not of Section 35, Stamp Act in R. 4 — Effect of — See Municipalities — Madras District Municipalities Act (5 of 1920), Section 78-A

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—R. 5 — None of the provisions of Madras District Municipalities Act or relevant rules made thereunder, refers to Section 35 of Stamp Act and makes it applicable to duty on transfer of property

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Andh Pra 417 B (C N 106)

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—S. 2 (iii) — In Manipur territory expression "District Court" in Section 3(b) of the Hindu Marriage Act includes a Court of Additional District Judge — See Hindu Marriage Act (1955), Section 19

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—S. 16 — In Manipur territory expression "District Court" in Section 3 (b) of the Hindu Marriage Act includes a Court of Additional District Judge—See Hindu Marriage Act (1955), Section 19

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—S. 17 — In Manipur territory expression "District Court" in Section 3 (b) of the Hindu Marriage Act includes a Court of Additional District Judge — See Hindu Marriage Act (1955), S. 19

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—S. 18 — In Manipur territory expression "District Court" in Section 3(b) of the Hindu Marriage Act includes a Court (December) 1969 Indexes/3

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of Additional District Judge—See Hindu Marriage Act (1955), Section 19

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—S. 19 — In Manipur territory expression "District Court" in Section 3(b) of the Hindu Marriage Act includes a court of Additional District Judge — See Hindu Marriage Act (1955), Section 19

Manipur 93 (C N 27)

—S. 20 — In Manipur territory expression "District Court" in Section 3(b) of the Hindu Marriage Act includes a Court of Additional District Judge — See Hindu Marriage Act (1955), Section 19

Manipur 93 (C N 27)

MANIPUR LAND REVENUE AND LAND REFORMS ACT (33 of 1960)

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MANIPUR LAND REVENUE AND LAND REFORMS RULES (1961)

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MINIMUM WAGES ACT (11 of 1948)

—S. 20 — Application for computation of benefit for overtime and work done on weekly off days at certain rates — Rates pleaded in application not disputed — Section cannot be invoked — Powers of authority under Section indicated — See Industrial Disputes Act (1947), Section 33C (2)

SC 1335 B (C N 245)

MOTOR VEHICLES ACT (4 of 1939)

—S. 31 (1) — Person holding permanent stage carriage permit allowing bus being operated by another person — Cancellation of permit — In absence of condition under Section 59(3) and contingency under Section 60(1)(c) cancellation is erroneous — See Motor Vehicles Act (1939), Section 60(1)(a)

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—Ss. 47 (3) and 57 (3) — Grant of stage carriage permit — Procedure — Question of number of stage carriages on the route cannot be decided while entertaining application for stage carriage permit

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—Ss. 47 (3), 57 (3) — Proceedings under Section 57 (3) without prior determination of number of permits to be granted under Section 47 (3) — Failure of petitioner to make representations under Section 57 (3) within prescribed time — Proceedings if vitiated

Mad 458 (C N 107)

—S. 57(3) — Question of number of stage carriages on the route cannot be decided while entertaining application for stage carriage permit — See Motor Vehicles Act (1939), Section 47(3)

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—S. 57(3) — Proceedings under Section 57 (3) without prior determination of per-

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mits to be granted under Section 47 (3) — Failure of petitioner to make representations under Section 57(3) within prescribed time — Proceedings if vitiated — See Motor Vehicles Act (1939) Section 47 (3) Mad 458 (C N 107)

—S 59 (3) — Person holding permanent stage carriage permit allowing bus being operated by another person — Cancellation of permit — In absence of condition under Section 59 (3) and contingency under Section 60(1) (c) cancellation is erroneous — See Motor Vehicles Act (1939) Section 60(1)(a)

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—Ss 60 (1) (a), 31 (1), 59 (3) — Cancellation of permit — Breach of rights and privileges does not warrant cancellation — Person holding permanent stage carriage permit allowing bus being operated by another person — Cancellation of permit on ground of breach of condition of Section 60 (1) (a) — In absence of condition under Section 59 (3) and contingency under Section 60 (1) (c), cancellation held to be erroneous

Cal 607 (C N 105)

—S 96 — Insurance claim — Insured negligent in defending suit — Right reserved in policy for insurer to defend actions in insured's name — Insured should be allowed to do so under Section 151 Civil P C — See Civil P C (1908) Section 151

Raj 315 (C N 59)

—S 110 — Claims Tribunal constituted after 60 days of accident — Suit for compensation after constitution of tribunal — Jurisdiction of Civil Court held barred — See Motor Vehicles Act (1939), S 110-F

Raj 316 (C N 60)

—S 110-A (3) — Tribunal has discretion to entertain application even after expiry of sixty days — See Motor Vehicles Act (1939), Section 110-F

Raj 316 (C N 60)

—Ss 110-F, 110 and 110-A (3) — Scope — Accident — Change of forum from Civil Court to Claims Tribunal — No vested right in litigant — Claims Tribunal constituted after 60 days of accident — Suit for compensation after constitution of Tribunal — Jurisdiction of Civil Court held barred — By virtue of Section 110-A (3) Tribunal has discretion to entertain application even after expiry of sixty days — AIR 1964 Madh Pra 133 and 1962 MPLJ 465 Dissented from: AIR 1962 Punj 307 held overruled by AIR 1965 Punj 102

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MUNICIPALITIES**—MADRAS DISTRICT MUNICIPALITIES ACT (5 of 1920)**

—Ss 78-A, 116-A, 116-B and 116-C — Madras Local Authorities (Duty on Transfer of Property) Rules (1948), Rr 3, 4, 5 — Scope and applicability — Mention of

MUNICIPALITIES — MADRAS DISTRICT MUNICIPALITIES ACT (contd.)

Sections 27 and 64 but not of Section 35 of Stamp Act in Section 116-B and R 4 — Effect of — Penal provision like Section 35 of Stamp Act cannot be applied by inference — Civil Court has no power to levy or exact duty on transfer and penalty thereof — (Stamp Act (1899), Sections 35, 27, 64) — (Civil P C (1908), Pre — Interpretation of Statutes — Penal Provision) Andh Pra 417 B (C N 105)

—S 116-A — Civil Court has no power to levy or exact duty on transfer and penalty thereof — See Municipalities — Madras District Municipalities Act (5 of 1920), Section 78-A

Andh Pra 417 B (C N 105)

—S 116-B — Mention of Sections 27 and 64 but not of Section 35 Stamp Act in Section 116-B — Effect of — See Municipalities — Madras District Municipalities Act (5 of 1920) Section 78-A

Andh Pra 417 B (C N 106)

—S 116-C — None of the provisions of the Act confer any power on any Civil Court to levy and exact transfer duty or any penalty in respect thereof — See Municipalities — Madras District Municipalities Act (5 of 1920), Section 78-A

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PAKISTAN (ADMINISTRATION OF EVACUEE PROPERTY) ORDINANCE (15 of 1949)

—S 45 — Notification dated 15-2-1952 — Joint Hindu family under Hindu Law is not an individual but a body of individuals contemplated by Notification dated 15-2-1952 issued by Government of Pakistan under Section 45 of Pakistan (Administration of Evacuee Property) Ordinance — See Hindu Law — Joint family SC 1330 A (C N 244)

—S 45 — Involuntary assignment of debts — Joint Hindu family having cash deposits in a bank in Pakistan — Liability of the Bank in India in respect of such deposits is extinguished CRD 104-D of 1958, D/- 12-9-1963 (Punj) Reversed — See Constitution of India Art 51

SC 1330 B (C N 244)

PANCHAYATS**—VAHARASHTRA ZILLA PARISHADS AND PANCHAYAT SAMITIS ACT (5 of 1962)**

—S 27 — Scope — Election petition under Section 27(1) merely challenging validity of election of declared candidate — Judge can only declare that election of returned candidate was void — He cannot declare any other candidate to be duly elected in his place in absence of any pra-

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yer in election petition — Rule equally applies even in cases falling under second proviso to Section 27(5)(b) — (Representation of the People Act (1957), Sections 100 and 101)

Bom 433 A (C N 72)

PARTITION ACT (4 of 1893)

—S. 4 — Partition between two brothers A and B — Dwelling house not partitioned by metes and bounds — Death of A — Sale of undivided half share by widow of A — Suit for partition by transferee of share — Wife, sons and daughter of B cannot claim any right under Section 4 — Though they were members of undivided family of defendant, qua the dwelling house they were not co-sharers of A or his widow as A died in a separated status — Further, they having no locus standi to exercise right of pre-emption under Section 4, time to repurchase cannot be extended at their instance when B to whom opportunity was given to repurchase did not ask for any extension — They are not necessary parties to proceedings under Section 4

Orissa 294 A (C N 107)

PAYMENT OF WAGES ACT (4 of 1936)

—S. 15 — No dispute as to rate of wages — Only question whether particular payment at agreed rate for overtime and work on weekly off days is due to a workman or not — Appropriate remedy is under the Act — Where this remedy is not adequate, remedy can be sought under Industrial Disputes Act — See Industrial Disputes Act (1947), Section 33C (2)

SC 1335 B (C N 245)

PENAL CODE (45 of 1860)

—S. 40 — Motive — See Penal Code (1860) Chapter IV, General

—Chapter IV, General (Ss. 76 to 106)

—Motive — Proof of, is not always necessary

Tripura 53 A (C N 11)

—Chapter IV, General, (Ss. 76 to 106)

Sections 364, 302 — Prosecution for murder — Motive — Proof of, whether essential

Tripura 57 B (C N 12)

—S. 102 — Right of private defence of person — Exceeding right — Effect — See Penal Code (1860), Section 304 Part II

Tripura 53 B (C N 11)

—S. 302 — Sentence — Accused an aborigin — Aborigines are more or less of animal instinct — Accused having volatile temperament — Accused using gun and killing deceased on his being chastised for doing no work in the fields — Held, that the ends of justice would be met if the extreme penalty of death was not imposed but imprisonment for life only was imposed

Orissa 289 D (C N 105)

—Ss. 302/34 — Common intention — Enmity between A and C — Deceased D was helping Mst. A in her cultivation —

PENAL CODE (contd.)

On date of occurrence when B and C were forcibly harvesting Tori crop, there was exchange of hot words between D and C — Later on in the day B and C came together armed concealing weapons in their clothes — They caused injuries to three prosecution witnesses and seriously assaulted D — The suddenly developed common intention to kill gathered from conduct of B and C, the weapon they used and the injuries they caused to D — Conviction of accused under Sections 302/34 I. P. C. held to be proper — However, under the circumstances sentence of death was altered to one of rigorous imprisonment for life

Pat 411 (C N 102)

—S. 302 — Prosecution for murder — Motive — Proof of whether essential — See Penal Code (1860), Chapter IV, General

Tripura 57 B (C N 12)

—Ss. 304, Part II and 102 — Accused inflicting blows on deceased after latter had fallen on ground and weapon wrested from him — Held, that the accused had over-stepped the legal limits of defence of person and was punishable under Part II of Section 304 — In view of grave nature of injury inflicted on deceased the accused could be attributed knowledge that his act was likely to cause death

Tripura 53 B (C N 11)

—S. 304, Part II — Sentence — Number of injuries inflicted by accused on deceased smack of barbarism and nature thereof indicating barbarity — There cannot be any leniency in punishment — R. I. for 3 years and fine of Rs. 2,000 imposed

Tripura 53 C (C N 11)

—S. 364 — Offence under Section 364 — No enmity between the two accused persons and two deceased — Third co-accused P who was alleged to have procured services of accused for abduction of deceased, exonerated of charge under Section 364 read with Section 109, I. P. C. and acquitted — It is futile for prosecution to contend that either of the two accused had any motive for committing double murder — If the co-accused P had not engaged them for alleged abduction, charge of abduction against accused must fall ipso facto inasmuch as it was the basis of prosecution story that it was P who procured abduction of deceased

Tripura 57 C (C N 12)

PEPSU TENANCY AND AGRICULTURAL LANDS ACT (13 of 1955)

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**PREVENTION OF CORRUPTION ACT
(2 of 1947)**

—S. 5-A — Power of Magistrate to grant sanction to investigate to officer below rank designated in Section 5-A — Power is not dependent on availability or non-availability of officers designated in Section 5-A

Guj 362 A (C N 61)

PREVENTION OF CORRUPTION ACT (contd.)

—S 5-A — By establishment of Special Branch to investigate cases relating to bribery, powers of local District Superintendent of Police are not taken away

Guj 362 C (C N 61)

—S 5A — Magistrate on being satisfied about existence of prima facie case granting sanction after taking into consideration advisability to permit Police Sub-Inspector, member of Special and independent unit, to investigate on basis of administrative convenience — Held, it could not be said that Magistrate had not applied his mind or had taken into consideration extraneous factors while granting permission

Guj 362 D (C N 61)

—S 5A — Filing of charge-sheet and arresting accused can be said to be part of investigation

Guj 362 E (C N 61)

—S 5A — General sanction to investigate is not contemplated by Section — Permission to investigate crime granted to A — Held, permission could not enure to benefit of B — Provisions of Section 5A being mandatory, B had to obtain permission to investigate crime

Guj 362 F (C N 61)

—S 5A — Illegal investigation does not affect jurisdiction of Court to try case

Guj 362 G (C N 61)

PREVENTION OF FOOD ADULTERATION ACT (37 of 1954)

—S 2 (i) (a), (b), (c)—Food article not of nature, substance or quality which it purports or is represented to be — Amounts to "adulterated food" within Section 2(i) (a)

Andh-Pra 445 A (C N 111)

—S 13 (5) — Report of Public Analyst — When not binding on Court

Andh-Pra 445 B (C N 111)

PROVINCIAL INSOLVENCY ACT (5 of 1920)

—Ss 4, 53 and 54 — Scope — Joint Hindu family — Untainted debts of father — Suit for partition by sons before the declaration of insolvency — Question whether son's share could be brought in to meet the creditor's demand against father by virtue of doctrine of pious obligation under Hindu Law is within the direction of Insolvency Court — Remedy of official Receiver to have the properties of sons sold by private sale is lost, but his right to enforce debts against sons remains.

Andh-Pra 437 (C N 108)

—S 11 — While in view of Section 11 read with Section 36 it may not be objectionable to file concurrently two petitions for adjudication of same debtor, but once property vests in official receiver any order of adjudication subsequently passed would not divest property already vested — See Provincial Insolvency Act (1920) Section 28(4)

Andh-Pra 446 C (C N 112)

PROVINCIAL INSOLVENCY ACT (contd.)

—S 27 — Order of adjudication passed under Section 27 — Effects provided under Section 28 whether automatically ensue — See Provincial Insolvency Act (1920), Section 28

Andh-Pra 446 B (C N 112)

—Ss 28, 27 — Order of adjudication passed under Section 27 — Effects provided under Section 28 whether automatically ensue

Andh-Pra 446 B (C N 112)

—Ss 28 (4), 11, 36 — Property vesting in Official Receiver — Any order of adjudication subsequently passed would not divest property already vested

Andh-Pra 446 C (C N 112)

—S 36 — Petitions for insolvency presented concurrently in more than one Court — Section vests discretion in Court to annul adjudication or stay proceedings and if discretion is not exercised, proceedings in both the Courts can without any objection, be continued

Andh-Pra 446 A (C N 112)

—S 36 — While in view of Section 11 read with Section 36, it may not be objectionable to file concurrently two petitions for adjudication of same debtor, but once property vests in official receiver, any order of adjudication subsequently passed would not divest property already vested — See Provincial Insolvency Act (1920), Section 28 (4)

Andh-Pra 446 C (C N 112)

—S 53 — Finding of District Court in appeal that impugned mortgage is supported by consideration and is a genuine transaction — High Court acting under Section 75 first proviso, cannot review finding Civ Rev Petns Nos 981 and 982 of 1956 (Mad) D/- 17-1-1956, Reversed as the High Court reviewed the finding of the District Court — See Provincial Insolvency Act (1920), Section 75 (1), first Proviso

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—S 53 — Mortgage impeached as not supported by consideration — Onus is on party challenging its validity to prove absence of consideration — But where mortgages do not stand by the recitals as to the manner in which consideration was paid it is for them to prove the passing of consideration

SC 1344 B (C N 246)

—S 53 — Joint Hindu family — Untainted debts of father — Suit for partition by sons before declaration of insolvency — Remedy of official receiver to have the properties of sons sold by private sale is lost but his right to enforce debts against sons remains — See Provincial Insolvency Act (1920), Section 4

Andh-Pra 437 (C N 108)

—S 54 — Joint Hindu Family — Untainted debts of father — Suit for partition by sons before declaration of insolvency — Remedy of official Receiver to have the properties of sons sold by private

PROVINCIAL INSOLVENCY ACT (contd.)

sale is lost, but his right to enforce debts against sons remains — See Provincial Insolvency Act (1920), S. 4

Andh Pra 437 (C N 108)

—S. 75 (1) first Proviso and S. 53 — Powers of High Court — Findings of fact by District Court — High Court cannot de novo examine those findings. Civil Revn. Petns. Nos. 981 and 982 of 1956. D/- 17-1-1958 (Mad), Reversed.

SC 1344 A (C N 246)

PROVINCIAL SMALL CAUSE COURTS ACT (9 of 1887)

—S. 25 — Powers under Section 75 (1), first proviso of Provincial Insolvency Act are similar to those under S. 25 — See Provincial Insolvency Act (1920), Section 75 (1) first proviso

SC 1344 A (C N 246)

PUBLIC SAFETY

—JAMMU AND KASHMIR PREVENTIVE DETENTION ACT (13 of 1964)

—S. 3 — Detention — Restrictions to be imposed on detenu — Extent of

SC 1153 D (C N 211)

—S. 3 (1) (a) (i) — Detention under — Detention for more than three months but not more than six months — No necessity to obtain opinion of Advisory Board — See Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), S. 13-A

SC 1153 A (C N 211)

—S. 3 (1) (a) (i) — Detention under Section 3 (1) (a) (i) for six months — Opinion of Advisory Board not obtained by virtue of Section 13-A (1) — On expiry of six months fresh order of detention issued after cancellation of original order — No proof that Government's action was actuated by illwill or taken for some collateral purpose — Grounds for detention supplied to the detenu along with both orders of detention found not to be identical — Held Government could not be said to have acted mala fide in passing original or fresh order of detention

SC 1153 B (C N 211)

—S. 3 (1) (a) (i) — Order of detention under Section 3 (1) (a) (i) — Grounds for detention specified in annexure appended to order — Facts relevant except those which the Government considered to be against public interest to disclose, intimated to the detenu — Order held was legal — See Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), S. 8 (2)

SC 1153 C (C N 211)

—Ss. 8 (2), 3 (1) (a) (i) — Order of detention under Section 3 (1) (a) (i) — Grounds for detention specified in annexure appended to order — Order clearly stating that facts relevant to grounds, except those which the Government considered to be against public interest to

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disclose, intimated to the detenu — Grounds, held, could not be said to be vague and indefinite merely because annexure was somewhat indefinite and vague due to withholding of those facts

SC 1153 C (C N 211)

—S. 10 — Section 13-A is an exception to Section 10 and other relevant sections — Order of detention with a view to detain for more than three months but not more than six months — No necessity to obtain opinion of Advisory Board — See Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), Section 13-A

SC 1153 A (C N 211)

—Ss. 13-A, 10 and 3 (1) (a) (i) — Section 13-A is an exception to Section 10 and other relevant sections — Order of detention with view to detain for more than three months but not more than six months — No necessity to obtain opinion of Advisory Board

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PUNJAB CUSTOM (POWER TO CONTEST) ACT (2 of 1920)

—S. 8 — Alienation of ancestral land without necessity by Hindu Jat — Suit by competent reversioner — Effect—Declaratory decree enures in favour of all heirs including female heirs — Unreported decision in S. A. No. 254 of 1962, D/- 18-11-1963 (Punj), Reversed

SC 1144 A (C N 209)

—S. 8 — Alienation of ancestral land without necessity by Hindu Jat in 1916 — Decree obtained by competent reversioner in 1920 declaring alienation ineffective against his reversionary interest — Death of alienor after Hindu Succession Act — Held, that the latter Act did not retrospectively enlarge the power of the holder of ancestral land and did not nullify the decree obtained before the Act

SC 1144 C (C N 209)

PUNJAB POLICE RULES (1934)

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PUNJAB PRE-EMPTION ACT (1 of 1913)

—S. 4 — Suit for pre-emption — See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), S. 19-A

Punj 422 (C N 72) (FB)

—S. 15 (1) (a) — Pre-emption suit — See Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), S. 19-A

Punj 422 (C N 72) (FB)

PUNJAB RELIEF OF INDEBTEDNESS ACT (7 of 1934)

See under Debts Laws.

PUNJAB SECURITY OF LAND TENURES ACT (10 of 1953)

See under Tenancy Laws.

PUNJAB TENANCY ACT (16 of 1887)

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RAILWAY ESTABLISHMENT CODE

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RAILWAY PROPERTY (UNLAWFUL POSSESSION) ACT (29 of 1966)

—Ss 3, 5 and 8 — Institution of case for offences mentioned in the Act is on complaint — Section 173 (4), Criminal P C need not be complied with

Cal 594 A (C N 102)

—S 5 — Institution of case for offence under is on complaint — Section 173 (4) Criminal P C need not be complied with — See Railway Property (Unlawful Possession) Act (29 of 1966), S 3

Cal 594 A (C N 102)

—S 8 — Institution of case for offence under is on complaint — Compliance with Section 173 (4), Criminal P C not necessary — See Railway Property (Unlawful Possession) Act (29 of 1966), S 3

Cal 594 A (C N 102)

RAILWAYS ACT (9 of 1890)

—S 3 (6) (old) — Definition in Sec 3 (6) does not give independent legal existence to separate Zonal Railways — See Railways Act (1890) S 74-E

Bom 401 E (C N 69)

—S 72 (old) — Loss of goods in transit due to fire — Negligence of railway servants — Damages — Assessment — Joint survey by Railway Inspector and Insurance Company made immediately — Figure of quantum agreed upon — Damages at the agreed figure would be decreed in case Railway were held liable

Bom 401 B (C N 69)

—S 72 (old) — Section deals with limits of liability of Railway Administration — Section does not create responsibility — It arises out of contract of carriage the Railway Administration makes

Bom 401 F (C N 69)

—S 74-E (old) — Wagon catching fire in transit — Duty of Railway Administration to prove how the wagon was handled on way — Negligence of Railway servant — Burden of proof

Bom 401 A (C N 69)

—Ss. 74-E, 77, 80, 140 3 (6) (old) — Goods booked on Central Railway — Destination on South Eastern Railway — Notice — Presumption under Section 140 in respect of notice sent by ordinary post — Presumption under Section 114 Evidence Act — Purpose of notice — Notice sent to destination railway — Loss on Central Railway — Notice on Central Railway held not necessary

Bom 401 E (C N 69)

—S 77 (old) — Consignee entitled to damages from Railway — Payment made by insurer of goods — Insurer subrogated to right of consignee but policy requiring consignee to join in the legal actions taken by insurer — Notice of claim by consignee after being paid by insurer is valid — Contract between him and railway is not

RAILWAYS ACT (contd)

affected — (Contract Act (1872), Sections 2, 69) — (T P Act (1882), S 92)

Bom 401 D (C N 69)

—S 77—Goods booked on Central Railway — Destination on S E Railway — Loss on Central Railway — Notice sent to destination railway — Notice on Central Railway held not necessary — See Railways Act (1890) S 74-E

Bom 401 E (C N 69)

—S 80 — Goods booked on Central Railway — Destination on S E Railway — Notice sent to destination railway — Loss on Central Railway — Notice on Central Railway held not necessary — See Railways Act (1890), S 74-E

Bom 401 E (C N 69)

—S 140 — Goods booked on Central Railway — Destination on S E Railway — Notice — Presumption in respect of notice sent by ordinary post — See Railways Act (1890) S 74-E

Bom 401 E (C N 69)

RAJASTHAN PREMISES (CONTROL OF RENT AND EVICTION) ACT (17 of 1950)

See under Houses and Rents

RAJASTHAN SALES TAX ACT (29 of 1954)

See under Sales Tax

REGISTRATION ACT (16 of 1908)

—S 17 — Documents of which registration is necessary under T P Act but not under Registration Act — Documents fall within scope of Section 49 AIR 1928 All 726 (FB) & AIR 1921 Mad 337 (FB) & AIR 1917 Bom 203, held no longer good law in view of T P (Amendment) Supplementary Act (21 of 1929) — See Registration Act (1908), S 49

SC 1316 A (C N 242)

—S 17 — Equitable mortgage — Mortgagor depositing title deeds with mortgagee — Subsequent agreement forming integral part of transaction — Agreement is instrument creating charge — Needs registration — See Transfer of Property Act (1882), S. 58

Cal 578 C (C N 101)

—S 17 (1) — Purchase of immoveable property by promoter of company — Absence of conveyance by promoter in favour of company under registered document — No effect on transfer of title to company — See Transfer of Property Act (1882), Section 9

Mad 462 C (C N 108)

—S 17 (1) (b) — Non-testamentary instrument creating charge of value of Rs 100 or upwards must be registered under Section 17 (1) (b) — But there is no provision requiring that instrument creating charge must be attested AIR 1939 Mad 202 & AIR 1940 Mad 140 Overruled: O S A Nos. 65, 70, 71 of 1956, D/-28-7-1961 (Mad) Reversed — See Transfer of Property Act (1882), S 100

SC 1147 B (C N 210)

REGISTRATION ACT (contd.)

—Ss. 49, 17 — Transfer of Property Act (1882), Sections 54, 4 — Documents of which registration is necessary under T. P. Act but not under Registration Act — Documents fall within scope of S. 49 of Registration Act — AIR 1928 All 726 (FB) & AIR 1921 Mad 337 (FB) & AIR 1917 Bom 203, Held no longer good law in view of T. P. (Amendment) Supplementary Act (21 of 1929)

SC 1316 A (C N 242)

—S. 58 (1) (c) and (2) — Power of Registrar under Section 72 — He cannot impose payment of consideration as condition precedent for registration—See Registration Act (1908), S. 72

Mys 360 (C N 87)

—S. 59 — Identifier or registering officer is not attesting witness — See Transfer of Property Act (1882), S. 3

SC 1147 A (C N 210)

—S. 59 — Second part of Section 100, T. P. Act does not attract Section 59 of Registration Act — Security bond is not required to be attested. AIR 1939 Mad 202 & AIR 1940 Mad 140, Overruled; O. S. A. Nos. 65, 70, 71 of 1956, D/-28-7-1961 (Mad), Reversed — See Transfer of Property Act (1882), S. 100

SC 1147 B (C N 210)

—S. 59 — Procedure under section has to be followed by Registrar — See Registration Act (1908), S. 72

Mys 360 (C N 87)

—S. 60 — Registrar acting under Section 72 has to follow procedure under Section 60 — See Registration Act (1908), Section 72

Mys 360 (C N 87)

—Ss. 72, 75 (1), (2), 58 (1), (c) and (2), 59 and 60 — Powers of District Registrar under Section 72 — Powers same as that of original authority — He cannot impose payment of consideration as a condition precedent for registration

Mys 360 (C N 87)

—S. 75 (1), (2) — Registrar cannot impose payment of consideration as condition precedent for registration — See Registration Act (1908), S. 72

Mys 360 (C N 87)

REPRESENTATION OF THE PEOPLE ACT (43 of 1951)

—S. 36 (2) (a) — Filing of nomination paper — Failure to subscribe oath or affirmation before authorised officer — Nomination paper is liable to be rejected — See Constitution of Jammu and Kashmir (1956), S. 51 (a) SC 1111 (C N 202)

—Ss. 81, 86 (1) — Election challenged on ground of corrupt practice — Omission of petitioner to supply copies of annexures for being served to respondents — Effect — Petition is liable to be dismissed — Requirement of Section 81 (3) is mandatory Madh Pra 243 A (C N 62)

—S. 81 — Election petition — Amendment of — Limitations — Cannot be

REPRESENTATION OF THE PEOPLE ACT (contd.)

allowed to remove defect of presentation under S. 81 — See Representation of the People Act (1951), S. 86 (5)

Madh Pra 243 B (C N 62)

—S. 83—Section is mandatory—Distinction between material facts and particulars — The entire and complete cause of action must be stated in the petition in the shape of material facts — Function of particulars is to give necessary information to present full picture of the cause of action

SC 1201 B (C N 221)

—S. 86 (1) — Non-compliance with Section 81 (3) — Petition is liable to be dismissed — See Representation of the People Act (1951), S. 81

Madh Pra 243 A (C N 62)

—S. 86 (5) — Power of amendment — Corrupt practice by an agent other than election agent alleged in the petition — Particulars alleging corrupt practice by returned candidate, cannot be supplied by way of amendment

SC 1201 C (C N 221)

—Ss. 86 (5), 81 — Election petition — Amendment of — Power of High Court — Extent of — Amendment when can be allowed — Principles of, stated — Civil P. C. (1908), O. 6, R. 17

Madh Pra 243 B (C N 62)

—S. 100 — Election petition under Section 27 (1) of Maharashtra Zilla Parishads and Panchayat Samitis Act—Relief that can be granted by judge — See Panchayats — Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), S. 27

Bom 433 A (C N 72)

—Ss. 100 (1) (b), 100 (1) (d), 123 (4) — Corrupt practice charged against an agent other than election agent — Petitioner must prove consent on the part of returned candidate to the commission of corrupt practice — Consent on the part of returned candidate if not proved, case will fall under Section 100 (1) (d) and not under Section 100 (1) (b) — Proof that the corrupt practice materially affected the poll must be adduced

SC 1201 A (C N 221)

—S. 100 (1) (d) (ii) — Election to be void under — That the election was materially affected, in so far as the returned candidate was concerned, requires proof, and cannot be considered on possibility

SC 1201 F (C N 221)

—S. 101 — Election petition under Section 27 (1) of Maharashtra Zilla Parishads and Panchayat Samitis Act — Relief that can be granted by judge — See Panchayats — Maharashtra Zilla Parishads and Panchayats Samitis Act (5 of 1962), Section 27

Bom 433 A (C N 72)

—S. 123 — Corrupt practice charged against an agent other than election agent — Consent on part of returned candidate if not proved case will fall under S. 100

REPRESENTATION OF THE PEOPLE ACT (contd)

(1) (d) and not under S 100 (1) (b) — See Representation of the People Act (1951), S 100 (1) (b) SC 1201 A (C N 221)

—S 123 (4) — Corrupt practice by an agent other than election agent — Consent of returned candidate to the commission of — Direct or circumstantial evidence necessary to prove consent — Mere knowledge or connivance or similarities of ideas not enough to infer consent

SC 1201 E (C N 221)

SALE OF GOODS ACT (3 of 1930)

—S 4 — Contract of sale and work and labour contract — Tests laid down — Transactions undertaken by photographer — Supplying of negative of photograph with three prints excluding contract for taking photographs and that for developing negative amounts to sale AIR 1957 Madh Pra 76, Dist from

Bom 437 (C N 73)

SALES TAX

—**BOMBAY SALES TAX ACT (51 of 1959)**

—S 52 — Transactions undertaken by photographer if amount to sale AIR 1957 Madh Pra 76, Dissented from — See Sale of Goods Act (1930), Section 4

Bom 437 (C N 73)

—**M. P. GENERAL SALES TAX ACT (2 of 1959)**

—S 2 (d) — 'Dealer' — Who is — Person carrying on business of buying is also a dealer SC 1276 B (C N 233)

—S 7 — Purchase of taxable commodities in course of business by dealer — Consumption thereof otherwise than in manufacture of goods for sale — Purchase price of commodities is liable to tax

SC 1276 C (C N 233)

—S 18(5) — M. P. General Sales Tax Rules (1959), Rule 33 — Requirement under, of giving 15 day's period to show cause against assessment — Non-compliance with — Does not invalidate notice under Section 18 (5) in absence of any prejudice to assessee

SC 1276 A (C N 233)

—**M. P. GENERAL SALES TAX RULES (1959)**

—R. 33 — Requirement of giving 15 days period to show cause against assessment — Non-compliance with — Does not invalidate notice under Section 18 (5) of M. P. General Sales Tax Act in absence of any prejudice to assessee — See Sales Tax — M. P. General Sales Tax Act (2 of 1959) Section 18 (5)

SC 1276 A (C N 233)

—**ORISSA SALES TAX ACT (14 of 1947)**

—S 6 — Ginger is vegetable — Sales tax not leviable — 'Vegetable,' what is.

SALES TAX — ORISSA SALES TAX ACT (contd)

ILR (1961) Cuttack 175, held no good law Orissa 299 A (C N 110)

—**RAJASTHAN SALES TAX ACT (29 of 1954)**

—S 2 (o) — Sale — Works contract — Contract for fixing special type of steel windows as per specifications — Predominant idea being fixing of windows — Fixing held would require special technical skill and contract is a works contract and not contract of sale

SC 1245 (C N 226)

SAURASHTRA AGRICULTURAL DEBTORS RELIEF ACT (23 of 1954)

See under Debt Laws

SAURASHTRA LAND REFORMS ACT (25 of 1951)

See under Tenancy Laws

SPECIAL MARRIAGE ACT (43 of 1954)

—S 36 — Order under Section 36 — Appeal lies under Section 39 — See Special Marriage Act (1954), Section 39

All 603 (C N 114)

—Ss 39 and 36 — Order under Section 36 — Appeal lies under S 39

All 603 (C N 114)

SPECIFIC RELIEF ACT (1 of 1877)

—S 3 — Purchase of immovable property by promoter for company — Benefit of purchase passes to company on its incorporation — Promoter stands in fiduciary position — See Trusts Act (1882), S 94

Mad 462 B (C N 108)

—S 21 — Contract Act (1872), Ss 2 (d) 11 and 10 — Agreement for resale of properties in favour of minor plaintiffs' father — Father assigning his rights to plaintiffs — Suit for specific performance in favour of plaintiffs can be decreed — Doctrine of want of mutuality — Test — Must be judged as on date of contract

Mad 470 (C N 109)

SPECIFIC RELIEF ACT (47 of 1963)

—Ss 34, 37, 38 — Relative scope

Bom 423 A (C N 70)

—S 37 — Relative scope of Sections 34, 37, 38 — See Specific Relief Act (1963), S 34

Bom 423 A (C N 70)

—S 37 — Suit, not for declaration but for injunction only — Section 6 (iv) (d) of Bombay Court-fees Act has no application — See Court-fees and Suits Valuations — Bombay Court-fees Act (36 of 1959), S 6 (iv) (d)

Bom 423 B (C N 70)

—S 38 — Relative scope of Ss 34 37, 38 — See Specific Relief Act (1963), Section 34

Bom 423 A (C N 70)

STAMP ACT (2 of 1899)

See under Stamp Duty.

STAMP DUTY

—STAMP ACT (2 of 1899)

—S. 1 — Scope — Provisions are not meant to arm a litigant with technicalities to defeat the claim of the opponent

SC 1238 B (C N 224)

—S. 27 — Specific mention of Ss. 27 and 64 in Section 116-B of Madras District Municipalities Act would lead to inference that legislature did not contemplate application of Section 35 of Stamp Act to levy and collection of transfer duty under Madras Act — See Municipalities — Madras District Municipalities Act (5 of 1920), S. 78-A

Andh Pra 417 B (C N 106)

—Ss. 35 and 36 — Provisions of S. 36 do not create any bar against an instrument not duly stamped being acted upon — AIR 1952 All 996, Overruled

SC 1238 A (C N 224)

—S. 35 — A penal provision like S. 35, Stamp Act cannot be made applicable by inferences — See Municipalities — Madras District Municipalities Act (5 of 1920), S. 78-A

Andh Pra 417 B (C N 106)

—S. 35 — Admissibility or inadmissibility of document in evidence is matter of procedure — See Civil P. C. (1908), Section 115 Raj 313 A (C N 58)

—Ss. 35 and 45 — Civil P. C. (1908), S. 115 — Order making document inadmissible in evidence under Section 35 — Order whether revisable

Raj 313 B (C N 58)

—S. 36 — Section does not create any bar against an instrument not duly stamped being acted upon — AIR 1952 All 996, Overruled — See Stamp Duty — Stamp Act (1899), S. 35 SC 1238 A (C N 224)

—S. 36 — "Where an instrument has been admitted in evidence" — Document provisionally admitted, subject to final orders — Such tentative reception of document does not amount of admission of document within S. 36

Andh Pra 417 A (C N 106)

—S. 45 — Remedy provided by section is not as efficacious as one provided by S. 115, Civil P. C. — See Stamp Duty — Stamp Act (1899), S. 35

Raj 313 B (C N 58)

—S. 64 — Specific mention of Ss. 27 and 64 in S. 116-B of Madras District Municipalities Act would lead to inference that legislature did not contemplate application of S. 35 of Stamp Act to levy and collection of transfer duty under Madras Act — See Municipalities — Madras District Municipalities Act (5 of 1920), S. 78-A

Andh Pra 417 B (C N 106)

—Sch. 1, Arts. 5 and 23 — Document relating to sale of truck — Document providing for payment of price in instalments and also for interest on unpaid price — Document also entitling seller to seize truck and keep it with him if instalments

STAMP DUTY — STAMP ACT (contd.)

are not paid in time and sell it thereafter — Held, document was not exclusively agreement or memorandum of agreement relating to sale of goods falling within exemption (a) to Art. 5 — Document was chargeable with duty as agreement and not as conveyance Raj 313 C (C N 58)

—Sch. 1, Art. 23 — Document relating to sale of truck providing for payment of price in instalments and also for interest on unpaid price — Seller entitled to seize and keep truck if instalments are not paid and sell it thereafter — Document held was chargeable with duty as agreement and not as conveyance — See Stamp Duty — Stamp Act (1899), Sch. 1, Art. 5 Raj 313 C (C N 58)

STATES REORGANISATION ACT (37 of 1956)

—S. 115 — Preparation of inter-State seniority list — Criteria for equation of posts laid down in conference of Chief Secretaries of States 1956 — Court can consider whether those criteria have been followed while preparing final inter-State Seniority list — Held criteria not followed — Seniority list set aside. AIR 1960 Punj 34, held not good law in view of AIR 1968 SC 850 Mys 362 (C N 89)

SUCCESSION ACT (39 of 1925)

—S. 105 — Will — Legatee dying during life time of testator — Express intention to exclude lapse not necessary

SC 1355 B (C N 249)

—S. 105 — Will — Bequest of properties for two purposes, namely, celebrating marriage of S. and constructing a temple — No allocation of amounts separately — Death of S during lifetime of testator — Held, that there was no joint bequest and it should be presumed that the fund was to be utilised in equal moieties for two purposes — Failure of one of the purposes by death of S. before testator's death would result in a moiety of the amount devised falling into the residue. L. P. A. No. 2 of 1963, D/-9-3-1964 (AP), Reversed. SC 1355 C (C N 249)

—S. 180 — Doctrine of election — Testator by his last will cancelling previous settlement which was acted upon in favour of his sons J and M and bequeathing some properties including items given to M by settlement — Residue bequeathed to M — A would be put to election, either to take under settlement or will. ILR (1965) 2 Ker 141, Reversed

SC 1311 (C N 241)

SUITS VALUATION ACT (7 of 1887)

See under Court-fees and Suits Valuations.

TENANCY LAWS

—BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (67 of 1948)

—S. 15 — Surrender invalid for want of writing and registration under S. 15

TENANCY LAWS — BOMBAY TENANCY AND AGRICULTURAL LANDS ACT (contd.)

— Tenant is entitled to restoration of possession—See Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (57 of 1948), S 29 SC 1190 (C N 219)

—Ss 29, 84, 15 and 37 — Scope and object — Surrender invalid for want of writing and registration under S 15 — Tenant is entitled to restoration of possession — His remedy is to apply under S 29 and not under S 84 — S 29(1) and S 84 do not provide alternative remedies SC 1190 (C N 219)

—S 37 — Restoration of possession — See Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (57 of 1948) S 29 SC 1190 (C N 219)

—S 84 — Surrender by tenant invalid — Restoration of possession—His remedy is to apply under S 29 and not under S 84 — See Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (57 of 1948), S 29 SC 1190 (C N 219)

—CENTRAL PROVINCES SETTLEMENT INSTRUCTIONS (REPRINT of 1953)

—Page 213 — Passage relating to proposed method of settlement of titles — Applicability — Passage does not apply to case where land is recorded as Government land SC 1256 C (C N 228)

—MANIPUR LAND REVENUE AND LAND REFORMS ACT (33 of 1960)

—S 11(4) — Provision does not bar filing of writ petition — See Constitution of India, Art 226 Manipur 84 I (C N 25)

—S 14(1) and (2) — Manipur Land Revenue and Land Reforms Rules, 1961, R 6 — Deputy Commissioner alone can allot land for purposes of agriculture or construction of dwelling houses — The Administrator can, however, direct the Deputy Commissioner to allot the land — Impugned order, a direct allotment by the Administrator and not a direction to Deputy Commissioner — Allotment held illegal Manipur 84 E (C N 25)

—S 94(1)(a) — Manipur Land Revenue and Land Reforms Rules, 1961, R 135 — Revenue Court to follow procedure under Civil P. C — Order by Settlement Officer without hearing party is void and can be ignored — Hence an appeal against can be filed even beyond the 30 days period prescribed under S 94(1)(a) Manipur 84 F (C N 25)

—S. 96 — Manipur Land Revenue and Land Reforms Allotment of Land Rules, 1962, Rr 6 and 8 — Landless agricultural worker is to be preferred in allotting land for agricultural purposes — A registered Co operative Society to be preferred to the individual — Allotment ignoring the above is liable to be set aside Manipur 84 D (C N 25)

TENANCY LAWS — MANIPUR LAND REVENUE AND LAND REFORMS ACT (contd.)

—S 159 — Provision does not bar filing of writ petition — See Constitution of India, Art 226

—Ch V — Record of rights — Entries in — Admissible though record not finally published — See Evidence Act (1872), S 35 Manipur 84 B (C N 25)

—MANIPUR LAND REVENUE AND LAND REFORMS ALLOTMENT OF LAND RULES (1962)

—R 6 — Allotment whom to be made, stated — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960) S 98 Manipur 84 D (C N 25)

—R 6 — Administrator can direct Deputy Commissioner to allot land — Impugned order, a direct allotment by Administrator and not direction to Deputy Commissioner — Allotment held illegal — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960) S 14(1) and (2) Manipur 84 E (C N 25)

—R 8 — Allotment whom to be made, stated — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), S 98 Manipur 84 D (C N 25)

—MANIPUR LAND REVENUE AND LAND REFORMS RULES (1961)

—R 135 — Revenue Court to follow procedure under Civil P C — Order without hearing party is void—See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960) S 94 (1)(a) Manipur 84 F (C N 25)

—PEPSU TENANCY AND AGRICULTURAL LANDS ACT (13 of 1955)

—S 39 — Financial Commissioner acting under is court subordinate to High Court for purposes of S 3, Contempt of Courts Act — See Contempt of Courts Act (32 of 1952) S 3 Punj 435 (C N 74)

—PUNJAB SECURITY OF LAND TENURES ACT (10 of 1953)

—S 19-A — Does not bar pre-emption suit by landlord holding maximum permissible area (1967) 69 Pun LR 319 Overruled Punj 422 (C N 72) (FB)

—PUNJAB TENANCY ACT (16 of 1887)

—S 84(5) — Specific provision for giving a hearing to party — Effect — See Contempt of Courts Act (32 of 1952) S 3 Punj 435 (C N 74)

—SAURASHTRA LAND REFORMS ACT (25 of 1951)

—S 6 — Mortgagee, not otherwise tenant under S 6 in possession of land — Land held by Mamlatdar to be Khalsa and full assessment ordered under S 20 — Occupancy rights not granted — Rights of mortgagor not extinguished under Act — Court can scale down debts

TENANCY LAWS — SAURASHTRA LAND REFORMS ACT (contd.)

under Debtors Relief Act — See Debt Laws — Saurashtra Agricultural Debtors Relief Act (23 of 1954), S. 29

SC 1196 (C N 220)

—S. 20 — Mortgagee, not otherwise tenant under S. 6 in possession of land — Land, held by Mamlatdar to be Khalsa and full assessment ordered under S. 20 — Occupancy rights not granted — Rights of mortgagor not extinguished under Act — Court can scale down debts under Debtors Relief Act — See Debt Laws — Saurashtra Agricultural Debtors Relief Act (23 of 1954), S. 29

SC 1196 (C N 220)

— TRIPURA LAND REVENUE AND LAND REFORMS ACT (CENTRAL ACT '43 of 1960)

—Ss. 2(s), 99(1)(c), 135(d), 134(1), 133(d) — Jotedars are owners of lands as also trees thereon—Government cannot claim royalty respecting those trees

Tripura 62 A (C N 13)

—S. 99(1)(c) — Jotedars are owners of lands as also trees thereon — Government cannot claim royalty respecting those trees — See Tenancy Laws — Tripura Land Revenue and Land Reforms Act (Central Act 43 of 1960), S. 2(s)

Tripura 62 A (C N 13)

—S. 133(d) — Jotedars are owners of lands as also trees thereon — Government cannot claim royalty respecting those trees — See Tenancy Laws — Tripura Land Revenue and Land Reforms Act (Central Act 43 of 1960), S. 2(s)

Tripura 62 A (C N 13)

—S. 134(1) — Jotedars are owners of lands as also trees thereon — Government cannot claim royalty respecting those trees — See Tenancy Laws — Tripura Land Revenue and Land Reforms Act (Central Act 43 of 1960), S. 2(s)

Tripura 62 A (C N 13)

—S. 135(d) — Jotedars are owners of lands as also trees thereon — Government cannot claim royalty respecting those trees — See Tenancy Laws — Tripura Land Revenue and Land Reforms Act (Central Act 43 of 1960), S. 2(s)

Tripura 62 A (C N 13)

—U. P. TENANCY ACT (17 of 1939)

—Ss. 168, 271(2) — Civil P. C. (1908), S. 47 — Rent decree — Order under S. 168 directing delivery of possession to decree-holder — Order relates to execution, discharge or satisfaction of decree and is appealable — ILR (1965) 2 All 383, Reversed

SC 1270 (C N 231)

—S. 271(2)—Rent decree—Order under S. 168 directing delivery of possession to decree-holder — Order relates to execution, discharge or satisfaction of decree and is appealable — ILR (1965) 2 All 383 Reversed — See Tenancy Laws — U. P.

TENANCY LAWS — U. P. TENANCY ACT (contd.)

Tenancy Act (17 of 1939), S. 168

SC 1270 (C N 231)

—U. P. ZAMINDARI ABOLITION AND LAND REFORMS ACT, 1950 (1 of 1951)

—S. 21 as amended by U. P. Land Reforms (Amendment) Act (20 of 1954) — S. 21 as amended has retrospective operation — See Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1950) (1 of 1951), S. 157

SC 1114 A (C N 203)

—Ss. 157 and 21 (as amended by U. P. Land Reforms (Amendment) Act (20 of 1954), Ss. 5 and 27) — S. 157 as amended has retrospective operation

SC 1114 A (C N 203)

—S. 240-H — Compensation officer himself Assistant Collector — Compensation officer not referring to himself case after framing issue — Order should be held to have been passed in the capacity of Compensation Officer and not in the capacity of Assistant Collector

SC 1114 B (C N 203)

—WEST BENGAL ESTATES ACQUISITION ACT, 1953 (1 of 1954)

—Ss. 6(1)(h) and (i), 27, 28, 29 — Expression "directly worked by him" in Section 28 — Means directly worked by intermediary himself — Provisions of S. 28 are contrary to provisions of S. 6(1)(h) and (i) and would prevail over them

Cal 565 C (C N 98)

—S. 27 — Provisions of S. 6(1)(h) and (i) are subject to the provisions of S. 27 — See Tenancy Laws — West Bengal Estates Acquisition Act 1953 (1 of 1954), S. 6(1)(h) and (i)

Cal 565 C (C N 98)

—S. 28 — Expression "directly worked by him" — Means directly worked by intermediary himself — See Tenancy Laws — West Bengal Estates Acquisition Act 1953 (1 of 1954), S. 6(1)(h) and (i)

Cal 565 C (C N 98)

—S. 29 — Mine worked by intermediary through lessee — Intermediary has no right to recover mine from lessee by virtue of S. 29 — See Tenancy Laws — West Bengal Estates Acquisition Act 1953 (1 of 1954), S. 6(1)(h) and (i)

Cal 565 C (C N 98)

TRANSFER OF PRISONERS ACT (29 of 1950)

—S. 3 — M. P. Prisoners Release on Probation Act (16 of 1954), S. 2 — M. P. Prisoners Release on Probation Rules (1964), R. 3 — Transfer of prisoners to M. P. State — Powers of State Government under S. 2 to release such prisoner — Are not subject to prior concurrence of State of conviction — Expression "in due course of law" in Section 3 — Meaning

Madh Pra 252 (C N 64)

TRANSFER OF PROPERTY ACT (4 of 1882)

—S 3 — Word "attested" — Meaning — Essential conditions of valid attestation — Identifier or registering officer is not attesting witness — Registration Act (1908), Section 59 SC 1147 A (C N 210)

—S 3 — Charge on immovable property by registered instrument — Subsequent transferee will have notice of charge in view of S 3 — See Transfer of Property Act (1882), S 100

SC 1147 B (C N 210)

—S 5 — "Transfer of property" — See Transfer of Property Act (1882), S 9

Mad 462 C (C N 108)

—S 8 — Deed, construction — Real intention, of parties must be judged from contents of document as a whole and not from use of any specific word or phrase therein All 571 A (C N 109)

—S 8 — Interpretation of deed — Document must be read as whole

Guj 362 B (C N 61)

—S 8 — Construction of documents — Settlement of land describing the boundaries — Recital about extent found incorrect — Boundaries to prevail over extents Manipur 84 A (C N 25)

—Ss 9, 5, 54 — Purchase of immovable property by promoter of company — Adoption of benefit of purchase by Company — Absence of conveyance by promoter in favour of Company under registered document — No effect on transfer of title to Company

Mad 462 C (C N 108)

—S 35 — Doctrine of election — See Succession Act (1925), S 180

—S 54 — Documents of which registration is necessary under T P Act but not under Registration Act — Documents fall within scope of S 49 of Registration Act AIR 1928 All 726 (FB), AIR 1921 Mad 337 (FB) and AIR 1917 Bom 203, held no longer good law in view of T P (Amendment) Supplementary Act (21 of 1929) — See Registration Act (1908), S 49

SC 1316 A (C N 242)

—S 54 — Purchase of immovable property by promoter of Company — Absence of conveyance by promoter in favour of Company under registered document — No effect on transfer of title to company — See Transfer of Property Act (1882), S 9

Mad 462 C (C N 103)

—S 58 — Mortgage is within ambit of R 94A(1) of Defence of India Rules (1939) — See Defence of India Rules (1939), R 94A(1) Cal 578 A (C N 101)

—S 58 — Equitable mortgage — Registration — Mortgagor depositing title deeds with mortgagee — Subsequent agreement between mortgagor and mortgagee — Agreement forming integral part of transaction — Agreement is instrument creating charge — Needs registration — Time factor of making agreement is immaterial Cal 578 C (C N 101)

TRANSFER OF PROPERTY ACT (contd.)

—S 58 — Mortgage valid — Mortgage not registered under S 109 Companies Act 1913 — Mortgage will be void against liquidator and creditors — See Companies Act (1913), S 109

Cal 578 F (C N 101)

—S 58 (f) — Mortgage by deposit of title deeds — Mortgage in contravention of R 94A(2) of Defence of India Rules 1939 — Transaction is illegal and mortgagee cannot recover money from mortgagor — See Defence of India Rules (1939) R 94A, Sub-rules (2), (7), (10)

Cal 578 D (C N 101)

—S 92 — Consignee entitled to damages from railway — Payment made by insurer of goods — Insurer subrogated to rights of consignee — See Railways Act (1890), S 77 (Old) Bom 401 D (C N 69)

—Ss 100, 3 — Scope of Section 100 — Second part of Section 100 does not attract Section 59 of Registration Act — Security bond is not required to be attested — AIR 1939 Mad 202 and AIR 1940 Mad 140, Overruled; O S A Nos 65, 70, 71 of 1956, D/- 28-7-1961 (Mad) Reversed SC 1147 B (C N 210)

—S 100 — Word charge in R 94A(1) of Defence of India Rules 1939 — Not to be construed in restricted sense as under S 100 — See Defence of India Rules (1939), R 94A (1) Cal 578 A (C N 101)

—S 105 — Words "Premium or other like sums" — They are sums paid in excess of agreed rent in consideration of grant, continuance or renewal of tenancy — See Houses and Rents—Madras Buildings (Lease and Rent Control) Act (18 of 1960), S 7(2) Mad 473 C (C N 110)

—Ss 106 and 107 — Lease of place for making steel trunks — Notice of termination giving 15 days' time invalid — No conflict between Sections 106 and 107. AIR 1952 Cal 320, Diss.

Assam 134 B (C N 30)

—Ss 106, 107 — Defendant occupying land for extracting sand under oral agreement for a certain period on payment of certain amount as rent annually — Execution of an agreement during continuance of the tenancy to the effect that defendant was inducted into land as tenant for first time under it — Occupation of defendant of land, admitted to be from before the agreement came into existence — Held, that what was created in favour of defendant was not a lease under Section 107 but only a monthly lease i.e. monthly tenancy under Section 106 — Defendant could not be held to have been brought into occupation for the first time under subsequent agreement

Cal 565 B (C N 98)

—S 107 — Lease of place for making steel trunks — Notice of termination giving 15 days' time invalid — No conflict

TRANSFER OF PROPERTY ACT (contd.)
between Ss. 106 and 107 — See T. P. Act (1882), S. 106 Assam 134 B (C N 30)

—S. 107 — Land occupied by defendant for extracting sand under oral agreement on payment of annual rent for certain period — Execution of agreement during continuance of tenancy to the effect that defendant was inducted into law as tenant for first time — Held, that it was not a lease under S. 107 but only monthly tenancy under S. 106 — See T. P. Act (1882), S. 106

Cal 565 B (C N 98)

—S. 108 (j) — Sub-letting without permission of landlord — Eviction of tenant under S. 13(1)(e) of Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950) — Right of tenant under S. 108(j) is immaterial — See Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), S. 13(1)(e)

SC 1291 C (C N 236)

—S. 108 (l) — Tender of payment — Tenant depositing money under S. 31 E. P. Relief of Indebtedness Act (7 of 1934) — Not a valid tender — Civ. Rev. No. 750 of 1962, D/- 18-3-1964 (Punjab) Reversed. ILR (1964) 1 Punjab 626, Overruled — See Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 13(2)(i) Proviso SC 1273 (C N 232)

—S. 111 — Surrender of lease — Agreement as to reduction or increase in rent — Inference of surrender of existing lease and grant of new lease cannot be drawn — Agreement must show intention to terminate old tenancy

SC 1291 A (C N 236)

—S. 113 — Acceptance of rent after default by landlord and continuance of old tenancy — Default under old tenancy also continues — See Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), S. 12(1)(i) SC 1187 A (C N 218)

—S. 114 — Covenant of forfeiture of tenancy for non-payment of rent — Nature of — Passing of decree for ejectment of tenant by trial Court — No bar to jurisdiction of appellate Court to grant relief against forfeiture

SC 1349 A (C N 247)

—S. 114 — Relief against forfeiture of tenancy for non-payment of rent — Discretion used in favour of tenants by lower appellate courts — Appeal by Special leave — Ordinarily Supreme Court will not interfere with the order

SC 1349 B (C N 247)

—S. 116 — Tenant or his heirs holding over after expiry of lease are in juridical possession protected by law — See Limitation Act (1908), Art. 142

Bom 429 (C N 71)

TRAVANCORE SERVICE REGULATIONS

See under Civil Services

TRIPURA LAND REVENUE AND LAND REFORMS ACT (CENTRAL ACT 43 of 1960)

See under Tenancy Laws

TRUSTS ACT (2 of 1882)

—S. 3 — Purchase of immovable property by promoter for Company — No trust as defined by S. 3 is brought about by the purchase — See Trusts Act (1882), S. 94 Mad 462 B (C N 108)

—S. 88 — Purchase of immovable property by promoter for Company — Benefit of purchase passes to company on its incorporation — See Trusts Act (1882), S. 94 Mad 462 B (C N 108)

—S. 88 — Purchase of immovable property by promoter of Company — Adoption of benefit of purchase by Company — Absence of Conveyance by promoter in favour of Company under registered document — No effect on transfer of title to Company — See Transfer of Property Act (1882), S. 9

Mad 462 C (C N 108)

—S. 92 — Purchase of immovable property by promoter for company under incorporation — Promoter stands in a fiduciary position — S. 92 not attracted — See Trusts Act (1882), S. 94

Mad 462 B (C N 108)

—Ss. 94, 92, 88, 3 — Promoter of Company — Status of — Purchase of immovable property by promoter for Company — Benefit of purchase passes to Company on its incorporation

Mad 462 B (C N 108)

UNITED KHASI-JAINTIA HILLS AUTONOMOUS DISTRICT (APPOINTMENT AND SUCCESSION OF CHIEF AND HEADMEN) ACT (2 of 1959)

See (Assam) United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chief and Headmen) Act (2 of 1959)

U. P. HIGHER JUDICIAL SERVICE RULES (1953)

See under Civil Services

U. P. TENANCY ACT (17 of 1939)

See under Tenancy Laws

U. P. ZAMINDARI ABOLITION AND LAND REFORMS ACT (1 of 1951)

See under Tenancy Laws

WEALTH TAX ACT (27 of 1957)

—S. 7(2) — Allowance of depreciation — Matter of discretion of the tribunal — Books showing cost price — Assessee cannot claim depreciation as of right — Finality of exercise of discretion by Tribunal Raj 310 (C N 57)

WEST BENGAL ESTATES ACQUISITION ACT (1 of 1954)

See under Tenancy Laws.

WEST BENGAL PREMISES RENT CONTROL (TEMPORARY PROVISIONS) ACT (17 of 1950)

See under Houses and Rents

WEST BENGAL PREMISES TENANCY ACT (12 of 1956)

See under Houses and Rents

WORDS & PHRASES

— "Agreed Rent" — See Houses & Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), S 7

Mad 473 B (C N 110)

— "Attested", meaning of — See Transfer of Property Act (1882), S 3

SC 1147 A (C N 210)

— Decision "Contrary to law" and decision "not according to law" — Distinction — The expression "not according to law" is wider than the expression "contrary to law" — Instances of decision "not according to law" given — See Provincial Insolvency Act (1920), S 75(1), first proviso

SC 1344 A (C N 246)

— Desertion — See Hindu Marriage Act (1955), S 10

Cal 573 A (C N 99)

— "Directly worked by him" in S 28 of W B Estates Acquisition Act 1953, (1 of 1954) — See Tenancy Laws — West Bengal Estates Acquisition Act 1953 (1 of 1954), S 6(1)(h) & (i)

Cal 565 C (C N 98)

— "Extradition" — See Criminal Procedure Code (5 of 1898), S 82

SC 1171 (C N 216)

— Falsa demonstratio — See T P. Act (1882), S 8

Manipur 84 A (C N 25)

— "In due course of law" — See Transfer of Prisoners Act (1950), S 3

Madh Pra 252 (C N 64)

WORDS & PHRASES (Contd.)

— "Personal rights" and "Private properties" — See Constitution of India, Art 363

Andh Pra 423 A (C N 107)

— "Premium or other like sums" — See Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), S 7(2)

Mad 473 C (C N 110)

— "Probationer" — Probationer continuing after expiry of period of probation — He will continue as probationer — See Industrial Disputes Act (14 of 1947), S 33

Ker 313 (C N 76)

— Service — Expression "the service" in Art 232(2) can only mean "judicial service" as defined in Art 236(b) of Constitution — See Constitution of India, Art 232(2)

All 594 A (C N 112) (FB)

— Vegetable — Ginger is vegetable — See Sales Tax — Orissa Sales Tax Act (14 of 1947), S 6

Orissa 299 A (C N 110)

— "Void" judgment — See Tenancy Laws — Manipur Land Revenue and Land Reforms Act (23 of 1960), S 94(1)

(a) Manipur 84 F (C N 25)

— "Where an instrument has been admitted in evidence" — See Stamp Duty

Stamp Act (1899), S 36

Andh Pra 417 A (C N 106)

— "Which ought to have been passed"

— Meaning of — See Civil P. C (1908) O 41 R 33

SC 1144 B (C N 209)

SUBJECTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC., IN A. I. R 1969 DECEMBER

DISS = Dissented from in; Not F. Not Followed in, OVER = Overruled in, REVERS. = Reversed in.

CITIZENSHIP ACT (57 of 1955)

— S 9 — AIR 1963 All 260 — OVER. AIR 1969 SC 1234 A (C N 223).

— S 9 — S A No 3809 of 1958, D/- 11-12-1963 (All) — REVERS. AIR 1969 SC 1234 A (C N 223)

CITIZENSHIP RULES (1956)

— R 30 — AIR 1963 All 260 — OVER. AIR 1969 SC 1234 A (C N 223).

— R 30 — S A No 3809 of 1958, D/- 11-12-1963 (All) — REVERS. AIR 1969 SC 1234 A (C N 223)

CIVIL PROCEDURE CODE (5 of 1908)

— S 47 — ILR (1965) 2 All 383 — REVERS. AIR 1969 SC 1270 (C N 231)

— S 80 — F. A No 217 of 1959 D/- 16-4-1963 (MP) — REVERS AIR 1969 SC 1256 A (C N 228).

— S 107 — ('64) S As Nos 4940 and 3660 of 1961, D/- 27-4-1964 (All) — REVERS AIR 1969 SC 1316 B (C N 242).

— S 153 — AIR 1965 All 586 — REVERS. AIR 1969 SC 1267 A (C N 230)

— O 6 R 17 — AIR 1965 All 586 — REVERS AIR 1969 SC 1267 A (C N 230).

— O. 23, R 14 (1) (b) — (1967) 69 Punj

CIVIL P. C. (contd.)

LR 319 — OVER. AIR 1969 Punj 422 (C N 72) (FB).

— O 23 R 1 — Misc Appeal No 22 of 1962, D/- 17-9-1962 (MP) — REVERS. AIR 1969 SC 1118 (C N 204).

— O 23 R 3 — Misc Appeal No 22 of 1962 D/- 17-9-1962 (MP) — REVERS. AIR 1969 SC 1118 (C N 204)

— O 30 R 1 — AIR 1965 All 586 — REVERS. AIR 1969 SC 1267 A (C N 230)

— O 41, R 33 — ('64) S As Nos 4940 and 3660 of 1961 D/- 27-4-1964 (All) — REVER. AIR 1969 SC 1316 B (C N 242).

— O 42, R 1 — ('64) S As Nos 4940 and 3660 of 1961, D/- 27-4-1964 (All) — REVERS. AIR 1969 SC 1316 B (C N 242).

CIVIL SERVICES**FUNDAMENTAL RULES**

— R 52 — ILR (1966) 1 Punj 302 — OVER. AIR 1969 Punj 441 A (C N 75) (FB).

— R 52 — R F A No 8 D of 1964 D/- 6-3-1966 (Punj) — OVER. AIR 1969 Punj 441 A (C N 75) (FB)

CIVIL SERVICES — FUNDAMENTAL RULES (Contd.)

—R. 52 — (1967) 1 Ser LR 594 (Punj) — OVER. AIR 1969 Punj 441 A (C N 75) (FB).

—INDIAN POLICE SERVICE (APPOINTMENT BY PROMOTION) REGULATION (1955)

—Regn. 5—ILR (1967) Cut 735 —REVERS. AIR 1969 SC 1249 A (C N 227).

—INDIAN POLICE SERVICE (REGULATION OF SENIORITY) RULES (1954)

—R. 3 (3) (b) — ILR (1967) Cut 735 — REVERS. AIR 1969 SC 1249 A, B, C (C N 227).

CONSTITUTION OF INDIA

—Art. 14 — ILR (1967) Cut 735 — REVERS. AIR 1969 SC 1249 C (C N 227).

—Art. 31 (2) — L. P. A. No. 37 of 1967, D/- 3-5-1967 (Punj) — REVERS. AIR 1969 SC 1126 B (C N 206).

—Art. 51 — ('63) C. R. 1049 of 1958, D/- 12-9-1963 (Punj) — REVERS. AIR 1969 SC 1330 B (C N 244).

—Art. 142—AIR 1969 All 230—REVERS. AIR 1969 All 594 C (C N 112) (FB).

—Art. 144—AIR 1969 All 230—REVERS. AIR 1969 All 594 C (C N 112) (FB).

—Art. 226 — ILR (1967) Andh Pra 361 —REVERS. AIR 1969 SC 1306 A (C N 240).

—Art. 226 — (1961) 42 ITR 129 (Pat) — DISS. AIR 1969 Punj 429 (C N 73).

—Art. 233-A — AIR 1969 All 230 — REVERS. AIR 1969 All 594 C (C N 112) (FB).

CONTRACT ACT (9 of 1872)

—S. 2 (b) — Reg. Appeal No. 231 of 1960 D/- 19-6-1963 (Mys) — REVERS. AIR 1969 SC 1157 (C N 212).

—S. 7 — Reg. Appeal No. 231 of 1960 D/- 19-6-1963 (Mys) — REVERS. AIR 1969 SC 1157 (C N 212).

—S. 25 Sub. S. (3) — AIR 1963 Andh Pra 337 — DISS. AIR 1969 Orissa 301 A (C N 111).

—S. 25 Sub-s. (3) — (1910) 20 Mad LJ 656 — DISS. AIR 1969 Orissa 301 A (C N 111).

CO-OPERATIVE SOCIETIES

—MAHARASHTRA CO-OPERATIVE SOCIETIES ACT (24 of 1961)

—S. 91 (1) — AIR 1961 Madh Pra 40 — OVER. AIR 1969 SC 1320 C (C N 243).

—S. 91 (1) — AIR 1946 Nag 16 — OVER. AIR 1969 SC 1320 C (C N 243).

CRIMINAL PROCEDURE CODE (5 of 1898)

—S. 82 — AIR 1968 Cal 220 — REVERS. AIR 1969 SC 1171 (C N 216).

—S. 488 (3) — AIR 1968 Pat 139—DISS. AIR 1969 Goa 136 (C N 33).

CUSTOM (PUNJAB)

—S. A. No. 254 of 1962, D/-18-11-1963 (Punj) — REVERS. AIR 1969 SC 1144 A (C N 209).

DEBT LAWS

—DISPLACED PERSONS (DEBTS ADJUSTMENT) ACT (70 of 1951)

—S. 13 — ('63) C. R. D. 104-D of 1958, D/- 12-9-1963 (Punj) — REVERS. AIR 1969 SC 1330 B (C N 244).

—PUNJAB RELIEF OF INDEBTEDNESS ACT (7 of 1934)

—S. 31 — ILR (1964) 1 Punj 626 — OVER. AIR 1969 SC 1273 (C N 232).

—S. 31 — Civ. No. 750 of 1962 (Punj) D/- 18-3-1964 — REVERS. AIR 1969 SC 1273 (C N 232).

DEFENCE OF INDIA RULES (1939)

—R. 94 A—AIR 1957 Trav Co. 6 —DISS. AIR 1969 Cal 578 B (C N 101).

EXTRADITION ACT (34 of 1962)

—S. 3 — AIR 1968 Cal 220 — REVERS. AIR 1969 SC 1171 (C N 216).

FUGITIVE OFFENDERS ACT (1881), (44 and 45 VICT, C 69)

—S. 13 — AIR 1968 Cal 220 — REVERS. AIR 1969 SC 1171 (C N 216).

—S. 26 — AIR 1968 Cal 220 — REVERS. AIR 1969 SC 1171 (C N 216).

HINDU MARRIAGE ACT (25 of 1955)

—S. 24 — F. A. F. O. No. 244 of 1959, D/- 19-5-1960 (All) — OVER. AIR 1969 All 601 (C N 113).

—S. 24 — AIR 1960 Bom 315 — DISS. AIR 1969 All 601 (C N 113).

—S. 24 — AIR 1962 Cal 455 — DISS. AIR 1969 All 601 (C N 113).

—S. 28 — F. A. F. O. No. 244 of 1959, D/- 19-5-1960 (All) — OVER. AIR 1969 All 601 (C N 113).

—S. 28 — AIR 1960 Bom 315 — DISS. AIR 1969 All 601 (C N 113).

—S. 28 — AIR 1962 Cal 455 — DISS. AIR 1969 All 601 (C N 113).

HINDU SUCCESSION ACT (30 of 1956)

—S. 2 — S. A. No. 254 of 1962 D/- 18-11-1963 (Punj) — REVERS. AIR 1969 SC 1144 A (C N 209).

—S. 4 (1) — S. A. No. 254 of 1962 D/- 18-11-63 (Punj) — REVERS. AIR 1969 SC 1144 A (C N 209).

HOUSES AND RENTS

—EAST PUNJAB URBAN RENT RESTRICTION ACT (3 of 1949)

—S. 13 (2) (i) — ILR (1964) 1 Punj 626 — OVER. AIR 1969 SC 1273 (C N 232).

—S. 13 (2) (i) — Civ. Revn. No. 750 of 1962 D/- 18-3-1964 (Punj) — REVERS. AIR 1969 SC 1273 (C N 232).

INCOME TAX ACT (11 of 1922)

—S. 3 — (1965) 1 ITJ 98 (Cal)—REVERS. AIR 1969 SC 1160 C (C N 213).

—S. 4 — (1965) 1 ITJ 98 (Cal)—REVERS. AIR 1969 SC 1160 C (C N 213).

—S. 5 (7-C) — (1961) 42 ITR 129 (Pat)—DISS. AIR 1969 Punj 429 (C N 73).

INCOME-TAX ACT (1922) (Contd.)

- S 10 — I T Ref No 65 of 1954 D/- 27-4-1963 (Cal) — REVERS. AIR 1969 SC 1183 (C N 217)
- S 10 (2) (vi) — (1965) 57 ITR 774 (Cal) — REVERS. AIR 1969 SC 1262 D (C N 229)
- S 10 (2) (xv) — (1965) 1 ITJ 98 (Cal) — REVERS. AIR 1969 SC 1160 B (C N 213).
- S 24 (1) — I T Ref No 38 of 1960 D/- 29-8-1963 (Cal) — REVERS. AIR 1969 SC 1241 B (C N 225)
- S 26 — (1966) ILR 45 Pat 121 — REVERS. AIR 1969 SC 1352 A (C N 248)
- S 28 — (1961) 42 ITR 129 (Pat) — DISS AIR 1969 Punj 429 (C N 73)
- S 28 — (1966) ILR 45 Pat 121 — REVERS. AIR 1969 SC 1352 A (C N 248)
- S 35 (5) — (1962) 46 ITR 609 (SC) — HELD OVERRULED BY AIR 1968 SC 623 as interpreted AIR 1969 Andh Pra 441 C (C N 109)
- S 44 — (1966) ILR 45 Pat 121 — REVERS. AIR 1969 SC 1352 A (C N 248)
- S 66 (1) — (1965) 1 ITJ 98 (Cal) — REVERS. AIR 1969 SC 1160 A (C N 213)
- INDUSTRIAL DISPUTES ACT (14 of 1947)**
- S 33-C (2) — (1968) 70 Bom LR 104 — OVER. AIR 1969 SC 1335 C (C N 245)
- LAND ACQUISITION ACT (1 of 1894)**
- S 3 (a) — (1908) ILR 35 Cal 525 — HELD NO LONGER GOOD LAW IN VIEW OF AIR 1968 SC 1045, as interpreted AIR 1969 All 604 A (C N 115)
- S 3 (a) — AIR 1916 Pat 330 (1) — HELD NO LONGER GOOD LAW IN VIEW OF AIR 1955 SC 298 as interpreted AIR 1969 All 604 A (C N 115)
- LIMITATION ACT (9 of 1908)**
- Art. 102 — AIR 1961 Mad 486 — DISS AIR 1969 Punj 441 A (C N 75) (FB)
- Art. 102 — AIR 1963 Mad 425 — DISS AIR 1969 Punj 441 A (C N 75) (FB)
- Art. 102 — ILR (1966) 1 Punj 302 — OVER. AIR 1969 Punj 441 A (C N 75) (FB).
- Art. 102 — R F A No 8-D of 1964 D/- 6-9-1966 (Punj) — OVER. AIR 1969 Punj 441 A (C N 75) (FB).
- Art. 102 — (1967) 1 Ser LR 594 (Punj) — OVER. AIR 1969 Punj 441 A (C N 75) (FB).
- Art. 149 — F. A No 217 of 1959 D/- 16-4-1963 (MP) — REVERS. AIR 1969 SC 1256 B (C N 228).
- LIMITATION ACT (36 of 1963)**
- Art. 137 — (1968) 70 Bom LR 104 — OVER. AIR 1969 SC 1335 C (C N 245).
- MOTOR VEHICLES ACT (4 of 1939)**
- S 110 F — 1962 MP LJ 465 — DISS. AIR 1969 Raj 316 (C N 60)
- S 110 F — AIR 1964 Madh Pra 133 — DISS. AIR 1969 Raj 316 (C N 60)
- S 110 F — AIR 1962 Punj 307 — HELD OVERRULED BY AIR 1965 Punj

MOTOR VEHICLES ACT (Contd.)

- 102 as interpreted AIR 1969 Raj 316 (C N 60)
- PAKISTAN (ADMINISTRATION OF EVACUEE PROPERTY) ORDINANCE (15 of 1949)**
- S 45 — ('63) C R D 104-D of 1953 D/- 12-9-1963 (Punj) — REVERS. AIR 1969 SC 1330 B (C N 244).
- PROVINCIAL INSOLVENCY ACT (5 of 1920)**
- S 53 — ('58) C R Petns Nos 981 and 982 of 1956, D/- 17-1-1958 (Mad) — REVERS. AIR 1969 SC 1344 A (C N 246)
- S 75 (1) first proviso — ('58) C R Petns Nos 981 and 982 of 1956, D/- 17-1-1958 (Mad) — REVERS. AIR 1969 SC 1344 A (C N 246).
- PUNJAB CUSTOM (POWER TO CONTEST) ACT (2 of 1920)**
- S 8 — S A No 254 of 1962 D/- 18-11-1963 (Punj) — REVERS. AIR 1969 SC 1144 A (C N 209).
- REGISTRATION ACT (16 of 1908)**
- S 17 — AIR 1928 All 726 (FB) — HELD NO LONGER GOOD LAW in view of T P (Amendment) supplementary Act 1929) AIR 1969 SC 1316 A (C N 212)
- S 17 — AIR 1917 Bom 203 — HELD NO LONGER GOOD LAW in view of T P (Amendment) Supplementary Act (1929) AIR 1969 SC 1316 A (C N 242).
- S 17 — AIR 1921 Mad 337 (FB) — HELD NO LONGER GOOD LAW in view of T P (Amendment) Supplementary Act (1929) AIR 1969 SC 1316 A (C N 242).
- S 17 (1) (b) — AIR 1939 Mad 202 — OVER AIR 1969 SC 1147 B (C N 210)
- S 17 (1) (b) — AIR 1940 Mad 140 — OVER. AIR 1969 SC 1147 B (C N 210)
- S 17 (1) (b) — O S A Nos 65 70, 71 of 1956 D/- 28-7-1961 (Mad) — REVERS. AIR 1969 SC 1147 B (C N 210).
- S 49 — AIR 1928 All 726 (FB) — HELD NO LONGER GOOD LAW in view of T P (Amendment) Supplementary Act (21 of 1929) AIR 1969 SC 1316 A (C N 242).
- S 49 — AIR 1917 Bom 203 — HELD NO LONGER GOOD LAW in view of T P (Amendment) Supplementary Act (1929) AIR 1969 SC 1316 A (C N 242)
- S 49 — AIR 1921 Mad 337 (FB) — HELD NO LONGER GOOD LAW in view of T P Act (Amendment) Supplementary Act (1929) AIR 1969 SC 1316 A (C N 242).
- S 59 — AIR 1939 Mad 202 — OVER. AIR 1969 SC 1147 B (C N 210)
- S 59 — AIR 1940 Mad 140 — OVER AIR 1969 SC 1147 B (C N 210).
- S 59 — O S A Nos 65, 70, 71 of 1956 D/- 28-7-1961 (Mad) — REVERS. AIR 1969 SC 1147 B (C N 210).
- SALE OF GOODS ACT (3 of 1930)**
- S 4 — AIR 1957 Madh Pra 76 — DISS. AIR 1969 Bom 437 (C N 73).

SALES TAX

- BOMBAY SALES TAX ACT (51 of 1959)
 —S. 52 — AIR 1957 Madh Pra 76—DISS.
 AIR 1969 Bom 437 (C N 73).
 — ORISSA SALES TAX ACT (14 of 1947)
 —S. 6 — ILR (1961) Cuttack 175 —
 HELD NOT GOOD LAW by reason of
 Supreme Courts Decisions AIR 1969
 Orissa 299 A (C N 110).

STAMP DUTY

- STAMP ACT (2 of 1899)
 —S. 35 — AIR 1952 All 996 — OVER
 AIR 1969 SC 1238 A (C N 224).
 —S. 36 — AIR 1952 All 996 — OVER
 AIR 1969 SC 1238 A (C N 224).

STATES REORGANISATION ACT (37 of 1956)

- S. 115 — AIR 1969 Punj 34 — HELD
 NOT GOOD LAW in view of AIR 1968
 SC 850 as interpreted AIR 1969 Mys
 362 (C N 89).

SUCCESSION ACT (39 of 1925)

- S. 105 — ('64) L. P. A. No. 2 of 1963,
 D/- 9-3-1964 (A.P.) — REVERS. AIR
 1969 SC 1355 C (C N 249).
 —S. 180 — ILR (1965) 2 Ker 141 —
 REVERS. AIR 1969 SC 1311 (C N 241).

TENANCY LAWS

- PUNJAB SECURITY OF LAND TE-
 NURES ACT (10 of 1953)
 —S. 19-A — (1967) 69 Pun LR 319 —
 OVER. AIR 1969 Punj 422 (C N 72)
 (FB).

TENANCY LAWS (contd.)

- U. P. TENANCY ACT (17 of 1939)
 —S. 168 — ILR (1965) 2 All 383 —
 REVERS. AIR 1969 SC 1270 (C N 231).
 —S. 271 (2) — ILR (1965) 2 All 383 —
 REVERS. AIR 1969 SC 1270 (C N 231).

TRANSFER OF PROPERTY ACT (4 of 1882)

- S. 54 — AIR 1928 All 726 (FB) HELD
 NO LONGER GOOD LAW in view of
 T. P. (Amendment) Supplementary Act
 (1929) AIR 1969 SC 1316 A (C N 242).
 —S. 54 — AIR 1917 Bom 203 — HELD
 NO LONGER GOOD LAW in view of
 T. P. (Amendment) Supplementary Act
 (1929) AIR 1969 SC 1316 A (C N 242).
 —S. 54 — AIR 1921 Mad 337 (FB) —
 HELD NO LONGER GOOD LAW in
 view of T. P. (Amendment) Supplemen-
 tary Act (1929) AIR 1969 SC 1316 A (C
 N 242).
 —S. 100 — AIR 1939 Mad 202 — OVER,
 AIR 1969 SC 1147 B (C N 210).
 —S. 100 — AIR 1940 Mad 140 — OVER.
 AIR 1969 SC 1147 B (C N 210).
 —S. 100 — O. S. A. Nos. 65, 70, 71 of
 1956 D/- 28-7-1961 (Mad) — REVERS
 AIR 1969 SC 1147 B (C N 210).
 —S. 106 — AIR 1952 Cal 320 — DISS
 AIR 1969 Assam 134 B (C N 30).
 —S. 108 (b) — ILR (1964) 1 Punj 626—
 OVER. AIR 1969 SC 1273 (C N 232).
 —S. 108 (l) — Civ. Rev. No. 750 of 1962
 D/- 18-3-1964 (Punj) — REVERS. AIR
 1969 SC 1273 (C N 232).

COURTWISE LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM, ETC. IN A. I. R. 1969 DECEMBER

DISS.=Dissented from in; NOT F.=Not followed in; OVER.=Overruled in; REVERS.=Reversed in.

SUPREME COURT

- (1962) 46 ITR 609 (SC) Second Additional
 Income-tax Officer, Guntur v. Atmala
 Nagaraj — HELD OVERRULED by
 AIR 1968 SC 623 as interpreted
 AIR 1969 Andh Pra 441 C (C N 109).

ALLAHABAD

- (1928) AIR 1928 All 726 = ILR 50 All 986
 (FB) Sohan Lal v. Mohan Lal —
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 (1952) AIR 1952 All 996 = ILR (1952) 2
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- (1960) F. A. F. O. No. 244 of 1959 D/- 19-5-
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- (1963) AIR 1963 All 260 = (1963) 1 Cri
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 (1963) S. A. No. 3809 of 1958 D/- 11-12-
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 (1964) S. As. Nos. 4940 and 3660 of 1961
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 (1965) AIR 1965 All 586, National Build-
 ing Material Supply v. Jai Jai Manoh-
 ar Lal — REVERS. AIR 1969 SC
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 (1965) ILR (1965) 2 All 383, Riazuddin,
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 (1969) AIR 1969 All 230 = 1969 Lab IC
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 N 112) (FB).

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- (63) AIR 1963 Andh Pra 337=(1963) 1 Andh LT 501, Sambayya v Shamsheer Khan — DISS. AIR 1969 Orissa 301 A (C N 111)
- (64) L P A No 2 of 1963 D/ 9-3-1964 (AP) — REVERS AIR 1969 SC 1353 C (C N 249)
- (67) ILR (1967) Andh Pra 361—REVERS. AIR 1969 SC 1306 A (C N 240).

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- (17) AIR 1917 Bom 203 = ILR 41 Bom 550, Dawal v Sharma — HELD NO LONGER good law in view of T P (Amendment) Supplementary Act (21 of 1929) AIR 1969 SC 1316 A (C N 242)
- (60) AIR 1960 Bom 315 = ILR (1960) Bom 164, Prithwi Raj Singh Man-singhji v Bai Shiv Prabhakumari—DISS AIR 1969 All 601 (C N 113)
- (68) 70 Bom LR 104 = 2 Lab LJ 503, Manager M/s P K Parwal v Labour Court, Nagpur — OVER AIR 1969 SC 1335 C (C N 245)

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- (1908) ILR 35 Cal 525 = 7 Cal LJ 445, Shyam Chunder Mardraj v Secy of State — HELD NO LONGER good law in view of AIR 1968 SC 1045 as interpreted AIR 1969 All 604 A (C N 115)
- (52) AIR 1952 Cal 320 = 86 Cal LJ 12, Sati Prasanna Mukherjee v Md Fazel — DISS. AIR 1969 Assam 134 B (C N 30)
- (62) AIR 1962 Cal 455 = 66 Cal WN 388, Gopendra Nath Basu Malik v Smt Prativa Ram — DISS. AIR 1969 All 601 (C N 113)
- (63) I. T. Ref No 65 of 1954 D/- 27-4-1963 (Cal)—REVERS. AIR 1969 SC 1183 (C N 217).
- (63) I. T. Ref. No 38 of 1960 D/- 29-8-1963 (Cal) — REVERS. AIR 1969 SC 1241 B (C N 225).
- (1965) 1 ITJ 98 (Cal), Imperial Chemical Industries (India) Pvt Ltd, Calcutta v Commr of I T, Calcutta REVERS AIR 1969 SC 1160 A, B, C (C N 213)
- (1965) 57 ITR 774 (Cal), Commr of I T West Bengal v Netherland Steam Navigation Co Ltd, REVERS AIR 1969 SC 1262 D (C N 229)
- (68) AIR 1968 Cal 220 Jugal Kishore More v Chief Presidency Magistrate Calcutta REVERS. AIR 1969 SC 1171 (C N 216)

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- (65) ILR (1965) 2 Ker 141, Mani Joshna v. Mani Mani REVERS. AIR 1969 SC 1311 (C N 241)

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- (57) AIR 1957 Madh Pra 76=(1957) 8 STC 370, D Masanda and Co v Commr of Sales Tax, DISS. AIR 1969 Bom 437 (C N 73)
- (61) AIR 1961 Madh Pra 40=1960 MP LJ 1209, Mishrimal v Dist. Co-operative Growers' Association Ltd, Balaghat, OVER. AIR 1969 SC 1320 C (C N 243)
- (62) 1962 MPLJ 465=1962 MPC 24, Iqbal Prakash v State of Madhya Pradesh, DISS. AIR 1969 Raj 316 (C N 60)
- (62) Misc Appeal No 22 of 1962, D/- 17-9-1962 (MP), REVERS AIR 1969 SC 1118 (C N 204)
- (63) F A No 217 of 1959, D/- 16-1-1963 (MP), REVERS AIR 1969 SC 1256 A, B (C N 228)
- (64) AIR 1964 Madh Pra 133=1962 MP LJ 876, Sushma Mehta v Central Provinces Transport Services Ltd, DISS AIR 1969 Raj 316 (C N 60)

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- (1910) 20 Mad LJ 656=7 Ind Cas 901, Ramaswami Pillai v Kuppuswami Pillai DISS. AIR 1969 Orissa 301 A (C N 111)
- (21) AIR 1921 Mad 337=ILR 44 Mad 55 (FB), Rama Sahu v Gowro Ratho HELD NO LONGER GOOD LAW in view of T. P. (Amendment) Supplementary Act (21 of 1929) AIR 1969 SC 1316 A (C N 242)
- (39) AIR 1939 Mad 202 = ILR (1939) Mad 199, Vishwanadham v M S Menon, OVER. AIR 1969 SC 1147 B (C N 210)
- (40) AIR 1940 Mad 140=ILR (1940) Mad 306, Shiva Rao v Shanmugha Sundaraswami, OVER AIR 1969 SC 1117 B (C N 210)
- (58) C R Petns Nos 981 and 982 of 1956, D/- 17-1-1958 (Mad), REVERS. AIR 1969 SC 1344 A (C N 246)
- (61) AIR 1961 Mad 486=ILR (1961) Mad 747, Union of India v R Akbar Sheriff, DISS. AIR 1969 Punj 441 A (C N 75) (FB)
- (61) O S A. Nos 65, 70, 71 of 1956, D/- 28-7-1961 (Mad), REVERS AIR 1979 SC 1147 B (C N 210)
- (63) AIR 1963 Mad 425=ILR (1963) Mad 1014, State of Madras v Anantha raman DISS. AIR 1969 Punj 441 A (C N 75) (FB)

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- (63) Reg Appeal No 231 of 1960, D/- 19-6-1963 (Mys), REVERS. AIR 1969 SC 1157 (C N 212)

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- (1946) AIR 1946 Nag 16=ILR (1945) Nag 677, Kisan Lal v Co-operative Central Bank Ltd, Seoni, OVER. AIR 1969 SC 1320 C (C N 243)

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- (1961) ILR (1961) Cuttack 175, Dhadi Sahu v. Commr. of Sales Tax, Orissa, **HELD NOT GOOD LAW** by reason of Supreme Court's decisions, AIR 1969 Orissa 299 A (C N 110)
- (1967) ILR (1967) Cut 735, Binode Kishore Mohapatra v. State of Orissa **REVERS.** AIR 1969 SC 1249 A, B, C (C N 227)

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- (1916) AIR 1916 Pat 330(1), Dashrath Sahu v. Secy. of State, **HELD NO LONGER GOOD LAW** in view of AIR 1955 SC 298 AIR 1969 All 604 A (C N 115)
- (1961) 42 ITR 129 = ILR 40 Pat 571 Murlidhar Tejpal v. Commr. of Income-tax Patna, **DISS.** AIR 1969 Punj 429 (C N 73)
- (1966) ILR 45 Pat 121, Kirkend Coal Company, Kursunda v. Commr. of I. T., Patna, **REVERS.** AIR 1969 SC 1352 A (C N 248)
- (1968) AIR 1968 Pat 139=1968 Cri LJ 539, Subagi Devi v. Murli Pradhan, **DISS.** AIR 1969 Goa 136 (C N 33)

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- (1962) AIR 1962 Punj 307=63 Pun LR 524, Mulak Raj Bhola Shah v. Northern India Goods Transport Corporation Ltd., **HELD OVERRULED** by AIR 1965 Punj 102 as interpreted AIR 1969 Raj 316 (C N 60)
- (1963) C. R. 104-D of 1958, D/- 12-9-1963 (Punj), **REVERS.** AIR 1969 SC 1330 B (C N 244)

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- (1963) S. A. No. 254 of 1962, D/- 18-11-1963 (Punj) **REVERS.** AIR 1969 SC 1144 A (C N 209)
- (1964) ILR (1964) 1 Punj 626=66 Pun LR 93, Mam Chand v. Chhotu Ram **OVER.** AIR 1969 SC 1273 (C N 232)
- (1964) Civ. Rev. No. 750 of 1962, D/- 18-3-1964 (Punj), **REVERS.** AIR 1969 SC 1273 (C N 232)
- (1966) ILR (1966) 1 Punj 302=67 Pun LR 1092, K. K. Jaggia v. State of Punjab **OVER.** AIR 1969 Punj 441 A (C N 75) (FB)
- (1966) R. F. A. No. 8-D of 1964, D/- 6-9-1966 (Punj), Union of India v. Maharaj, **OVER.** AIR 1969 Punj 441 A (C N 75) (FB)
- (1967) 69 Pun LR 319=1967 Cur LJ 200, Kartar Singh v. Ghukar Singh, **OVER.** AIR 1969 Punj 422 (C N 72) (FB)
- (1967) 1 Ser LR 594=69 Pun LR 430, State of Punjab v. Ram Singh Brar, **OVER.** AIR 1969 Punj 441 A (C N 75) (FB)
- (1967) L. P. A. No. 37 of 1967, D/- 3-5-1967 (Punj), **REVERS.** AIR 1969 SC 1126 B (C N 206)
- (1969) AIR 1969 Punj 34=ILR (1968) 1 Punj 204, K. C. Gupta v. Union of India, **HELD NOT GOOD LAW** in view of AIR 1968 SC 850, AIR 1969 Mys. 362 (C N 89)

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- (1957) AIR 1957 Trav-Co. 6=ILR (1956) Trav-Co. 1181, Ittiavira Thomas v. Joseph Tile Works Ltd. **DISS.** AIR 1969 Cal 578 B (C N 101)

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CORRECTIONS

- (1) A. I. R. 1969 S C. 1144 (V 55 C 209) (Dec.). Add at the end of the Short note and the Long note of Pt B "S. A. No. 254 of 1962 D. on 18.11.1968 (Punjab)" Reversed.
- (2) A. I. R. 1969 Mysore 362 (V 55 C 89) (Dec.) Page 266 col. 2 para. 29 line 18 Add the word "not" between the words "was" and "made".

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(c) the market value, as on the day immediately before the commencement of this Act, of any securities, shares, debentures, bonds and other investments, held by the bank concerned.

Explanation. — For the purposes of this clause —

(i) securities of the Central and State Governments [other than the securities specified in clauses (ii) and (iii) of this *Explanation*] maturing for redemption within five years from the commencement of this Act shall be valued at the face value or the market value, whichever is higher;

(ii) securities of the Central Government, such as Post Office Certificates and Treasury Savings Deposit Certificates and any other securities or certificates issued or to be issued under the Small Savings Schemes of the Central Government, shall be valued at their face value or the encashable value as on the day immediately before the commencement of this Act, whichever is higher;

(iii) where the market value of any Government security such as the zamindari abolition bond or other similar securities in respect of which the principal is payable in instalments, is not ascertainable or is, for any reason, not considered as reflecting the fair value thereof or as otherwise appropriate, the securities shall be valued at such an amount as is considered reasonable having regard to the instalments of principal and interest remaining to be paid, the period during which such instalments are payable, the yield of any security, issued by the Government to which the security pertains and having the same or approximately the same maturity, and other relevant factors;

(iv) where the market value of any security, share, debenture, bond or other investment is not considered reasonable by reason of its having been affected by abnormal factors, the investment may be valued on the basis of its average market value over any reasonable period;

(v) where the market value of any security, share, debenture, bond or other investment is not ascertainable, only such value, if any, shall be taken into account as is considered reasonable having regard to the financial position of the issuing concern, the dividend paid by it during the preceding five years and other relevant factors,

(d) the amount of advances (including loans, cash credits, overdrafts, bills purchased and discounted) and other debts, whether secured or unsecured, to the extent to which they are reasonably considered recoverable, having regard to the value of the security, if any, the operation on the account, the reported worth and respectability of the borrower, the prospects of realisation and other relevant considerations;

(e) the value of any land or buildings.

Explanation 1. — For the purpose of this clause, "value" shall be deemed to be the market value of the land or buildings, but where such market value exceeds the ascertained value, determined in the manner specified in *Explanation 2*, shall be deemed to mean such ascertained value.

Explanation 2. — Ascertained value shall be equal to, —

(1) in the case of any building (including the land on which it is erected or which is appurtenant thereto) which is wholly occupied on the date of the commencement of this Act, twelve times the amount of the annual rent or the rent for which the building may reasonably be expected to be let out from year to year, after deducting from such rent, —

(i) one-sixth of the amount thereof on account of maintenance and repairs,

(ii) the amount of any annual premium paid to insure the building against any risk of damage or destruction,

(iii) where the building is subject to any annual charge, not being a capital charge, the amount of such charge,

(iv) where the building is subject to a ground rent, the amount of such ground rent,

(v) where the building is subject to a mortgage or other capital charge, the amount of interest on such mortgage or charge,

(vi) where the building has been acquired constructed, repaired, renewed or re-constructed with borrowed capital, the amount of any interest payable on such capital, and

(vii) any sums paid on account of land revenue or other taxes in respect of such building;

(2) In the case of any building (including the land on which it is erected or which is appurtenant thereto) which is partially occupied on the date of the commencement of this Act, the value of the portion which is occupied, ascertained in accordance with the provisions of sub-clause (1) [the deductions under sub-clauses (ii) to (vii) being made on a proportionate basis] and multiplied thereafter by the ratio which the entire plinth area of the building bears to the plinth area of the portion of the building which has been occupied or let out;

(3) in the case of any land which has no building erected thereon or which is not appurtenant to any building, the value, determined with reference to the prices at which sales or purchases of similar or comparable lands have been made during the period of three years immediately preceding the date of the commencement of this Act, by instruments registered under the Indian Registration Act, 1908, in the city, town or village where such land is situated,

(f) the total amount of the premia paid, in respect of all leasehold properties, reduced in the case of each such premium by an amount which bears to such premium the same proportion as the expired term of the lease in respect of which such premium shall have been paid bears to the total term of the lease,

(g) the written down value as per books, or the realisable value, as may be considered reasonable of all furniture, fixtures and fittings,

(h) the market or realisable value, as may be appropriate, of other assets appearing on the books of the bank, no value being allowed for capitalised expenses, such as share selling commission, organisational expenses and brokerage, losses incurred and similar other items.

Part II.—Liabilities

For the purposes of this Part, "liabilities" means the total amount of all outside liabilities existing at the commencement of this Act, and all contingent liabilities which the corresponding new bank may reasonably be expected to be required to meet out of its own resources on or after the date of commencement of this Act.

CERTAIN DIVIDENDS NOT TO BE TAKEN INTO ACCOUNT

2. No separate compensation shall be payable for any dividend in respect of any period immediately preceding the commencement of this Act:

Provided that nothing in this paragraph shall preclude the payment of any dividend which was declared before such commencement.

THE THIRD SCHEDULE

(See sub-sections (2) and (3) of section 16)

DECLARATION OF FIDELITY AND SECRECY

I,, do hereby declare that I will faithfully, truly and to the best of my skill and ability execute and perform the duties required of me as Custodian, Director, member of Local Board, member of Local Committee, auditor, adviser, officer or other employee (as the case may be) of the *

and which properly relate to the office or position in the said * held by me.

I further declare that I will not communicate or allow to be communicated to any person not legally entitled thereto any information relating to the affairs of the *

or to the affairs of any person having any dealing with the *, nor will I allow any such person to inspect or have access to any books or documents belonging to or in the possession of the * and relating to the business of the * or to the business of any person having any dealing with the *

*Name of corresponding new bank to be filled in.

THE COAL BEARING AREAS (ACQUISITION AND DEVELOPMENT) AMENDMENT ACT, 1969 (Act 23 of 1959)

[11th August, 1959]

An Act further to amend the Coal Bearing Areas (Acquisition and Development) Act, 1957.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

1. Short title

This Act may be called the Coal Bearing Areas (Acquisition and Development) Amendment Act, 1969.

2 Amendment of section 28.

In the Coal Bearing Areas (Acquisition and Development) Act, 1957 (hereinafter referred to as the principal Act), in section 28,—

(a) in sub-section (3), for the portion beginning with "in respect of such land," and ending with "or any part thereof," the following shall be, and shall be deemed always to have been, substituted, namely:—

"in respect of such land or of any rights in or over such land, and the Central Government may at any time make a declaration under section 9 of this Act in respect of the land or any part thereof or any rights in or over such land or part."

(b) after sub-section (3), the following sub-section shall be, and shall be deemed always to have been, inserted, namely:—

"(3A) Where in respect of any land covered by any notification issued under section 4 of the said Act, no objection has been preferred

a. Received the assent of the President on 11-8-1959 Act published in Gaz. of Ind., 12-8-1959, Pt. ILS. 1, Ext. p. 253.

For Statement of Objects and Reasons, see Gaz. of Ind., 10-8-1957, Pt. ILS. 2, Ext. p. 720.

under section 5A thereof within the period specified in that section, then it shall be deemed that a notification had been issued under section 7 of this Act in respect of such land or of any rights in or over such land and that no objection to the acquisition of the land or any rights in or over the land had been preferred under section 8 of this Act, and accordingly the Central Government may at any time make a declaration under section 9 of this Act in respect of the land or any part thereof or any rights in or over such land or part."

3. Validation of certain acquisitions.

Notwithstanding any judgment, decree or order of any court, every acquisition of land or the rights in or over land made by the Central Government in pursuance of the notifications of the Government of India in the late Ministry of Steel, Mines and Fuel (Department of Mines and Fuel) Nos. S. O. 1759 and S. O. 25, dated the 7th August, 1958, and the 22nd December, 1959 respectively, made under section 9 of the principal Act, shall be, and shall be deemed always to have been, as valid as if the provisions of section 28 thereof as amended by this Act were in force at all material times when such acquisition was made and shall not be called in question in any court of law on the ground only that before issuing such notifications no notification was issued under section 7 of the principal Act in relation to the land or rights in or over such land covered by the said notifications Nos. S. O. 1759 and S. O. 25.

THE UNLAWFUL ACTIVITIES (PREVENTION) AMENDMENT ACT, 1969

(Act 24 of 1969)^a

[13th August, 1969]

An Act to amend the Unlawful Activities (Prevention) Act, 1967.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

1. Short title.

This Act may be called the Unlawful Activities (Prevention) Amendment Act, 1969.

2. Amendment of section 1.

In section 1 of the Unlawful Activities (Prevention) Act, 1967 (hereinafter referred

a. Received the assent of the President on 18.8.1969. Act published in Gaz. of Ind., 18.8.1969, Pt. II-S. 1, Ext. p. 257.

For Statement of Objects and Reasons, see Gaz. of Ind., 14.8.1969, Pt. II-S. 2, Ext. p. 825.

to as the principal Act), for sub-section (2), the following sub-section shall be substituted, namely:—

"(2) It extends to the whole of India:

Provided that it shall come into force in the State of Jammu and Kashmir on such date as the Central Government may, by notification in the Official Gazette, appoint."

3. Insertion of new section 2A.

In the principal Act, in Chapter I, after section 2, the following section shall be inserted, namely:—

Constructions of references to laws not in force in Jammu and Kashmir.

"2A. Any reference in this Act to a law which is not in force in the State of Jammu and Kashmir shall, in relation to that State, be construed as a reference to the corresponding law, if any, in force in that State."

THE SALARIES AND ALLOWANCES OF MEMBERS OF PARLIAMENT.^a (AMENDMENT) ACT, 1969

(Act 25 of 1969)^b

[21st August, 1969]

An Act further to amend the Salaries and Allowances of Members of Parliament Act, 1954.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called the Salaries and Allowances of Members of Parliament (Amendment) Act, 1969.

(2) This section and section 2 shall be deemed to have come into force on the 16th day of May, 1969 and the other provisions of this Act shall come into force at once.

2. Amendment of section 3.

In the Salaries and Allowances of Members of Parliament Act, 1954 (hereinafter referred to as the principal Act), in section 3, for the words "thirty-one rupees", the words "fifty-one rupees" shall be substituted.

3. Amendment of section 5.

In section 5 of the principal Act, for the second proviso, the following proviso shall be substituted, namely:—

"Provided further that nothing in the first proviso shall apply, if the member performs

b. Received the assent of the President on 21.8.1969. Act published in Gaz. of Ind., 21.8.1969, Pt. II-S. 1, Ext. p. 259.

For Statement of Objects and Reasons, see Gaz. of Ind., 21.7.1969, Pt. II-S. 2, Ext. p. 609.

the journey by air for visiting any place in India—

- (a) not more than four times during a session lasting more than seventy-five days,
- (b) not more than twice during a session lasting for seventy-five days or less, and
- (c) not more than once during a sitting of the committee."

4 Amendment of section 6

In section 6 of the principal Act, in the *Explanation* to sub-section (1), for the words "For the purposes of this sub-section", the words, figure and letter "For the purposes of this sub-section and section 6A" shall be substituted.

5. Insertion of new section 6A

After section 6 of the principal Act, the following section shall be inserted, namely:—
"Travel facilities to members

"6A Without prejudice to the other provisions of this Act, every member shall be entitled—

(i) to travel by any railway in India at any time in first class air conditioned on payment of the difference between the railway fares for first class air-conditioned and first class;

(ii) to one free third class railway pass for one person to accompany the member when he travels by rail, and

(iii) to one free non-transferable first class railway pass for the spouse, if any, of the member to travel from the usual place of residence of the member to Delhi and back, once during every session.

Provided that where a member travels by rail in first class air-conditioned and no person accompanies that member in that journey in third class, by virtue of the free third class railway pass referred to in clauses (ii), then, in determining the amount payable by the member under clause (i), the amount of third class fare for such journey shall be deducted from the difference referred to in that clause."

THE GOLD (CONTROL) AMENDMENT ACT, 1969

(Act 26 of 1969)"

(29th August, 1969)

An Act to amend the Gold (Control) Act, 1968.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows.

a. Received the assent of the President on 29.8.1969. Act published in Gaz. of Ind. 30.8.1969, Pt II S. 1, Ext p 233

For Statement of Objects and Reasons, see Gaz. of Ind., 23-7-1969, Pt. II-S. 2, Ext. 696.

1. Short title and commencement.

(1) This Act may be called the Gold (Control) Amendment Act, 1969

(2) It shall be deemed to have come into force on the 3rd day of July, 1969.

2 Amendment of section 5.

In section 5 of the Gold (Control) Act, 1968 (hereinafter referred to as the principal Act), in sub-section (2),—

(i) in clause (a), the word "and", occurring at the end, shall be omitted,

(ii) clause (b) shall be omitted.

3. Amendment of section 8

In section 8 of the principal Act, for sub-section (2), the following sub-section shall be, and shall be deemed always to have been, substituted, namely,—

"(2) Save as otherwise provided in this Act, a person may,—

(a) (i) acquire or agree to acquire the ownership, possession, custody or control of, or

(ii) buy, accept or otherwise receive or agree to buy, accept or otherwise receive, any ornament, unless he knows or has reason to believe that such ornament, being required to be included in a declaration, has not been so included,

(b) sell, deliver, transfer or otherwise dispose of, or agree to sell, deliver, transfer or otherwise dispose of, any ornament, but shall not do so if the ornament, being required to be included in a declaration, has not been so included."

4. Amendment of section 17.

In section 17 of the principal Act,—

(i) in sub-section (2), for clause (d), the following clause shall be, and shall be deemed always to have been, substituted, namely:—

"(d) shall be subject to such conditions and restrictions as may be prescribed"

(ii) for sub-section (6), the following sub-section shall be, and shall be deemed always to have been, substituted, namely:—

(6) (a) No application for the issue of a licence to commence or carry on business as a refiner shall be granted unless the Administrator, after making such inquiry as he may think fit, is satisfied with regard to the following matters, namely:—

(i) the security of the premises where the applicant intends to carry on business as a refiner, the suitability of such premises for being used as a refinery, and the existence therein of arrangements for the storage of gold before and after refining,

(ii) the existence, in such premises, of equipment for the manufacture of standard gold bars, or for assaying of gold, and the quality and adequacy of such equipment,

(iii) the existence, in such premises of facilities for the exercise of supervision and control by the Administrator or any other person authorised by him in this behalf;

(iv) the competence of the applicant to manufacture standard gold bars; and

(v) such other matters as may be prescribed.

(b) No application for the renewal of a licence to carry on business as a refiner shall be rejected unless—

(1) the holder of such licence has been given a reasonable opportunity of presenting his case, and

(2) the Administrator is satisfied that—

(i) the application for such renewal has been made after the expiry of the period specified therefor, or

(ii) the refinery does not continue to satisfy the matters specified in sub-clause (i), (ii), (iii) or (v) of clause (a), or

(iii) any statement made by the applicant at the time of the issue or renewal of the licence was incorrect or false in material particulars, or

(iv) the applicant has contravened any term or condition of the licence or any provision of this Act or any rule or order made thereunder or of any other law for the time being in force in so far as such law prohibits or restricts the bringing into or taking out of India of any goods (including coins, currency, whether Indian or foreign, and foreign exchange) or the dealing in such goods by way of acquisition or otherwise.

(c) Notwithstanding anything contained in clause (a) or clause (b), a licence to commence or carry on business as a refiner shall not be issued or renewed if the Administrator, after giving the applicant a reasonable opportunity of presenting his case, is satisfied that the entire volume of the refining business done, or proposed to be done, by the applicant may be conveniently done at a refinery established or run by Government or by a corporation owned or controlled by Government.

(d) Every order granting or rejecting an application for the issue or renewal of a licence shall be made in writing."

5. Amendment of section 26.

In section 26 of the principal Act, in clause (c), after the words "to a licensed dealer," the words "or to such other person or authority as may be specified by rule made in this behalf" shall be inserted.

6. Amendment of section 27.

In section 27 of the principal Act,—

(i) in sub-section (2), for clause (d), the following clause shall be, and shall be deemed always to have been, substituted, namely:—

"(d) shall be subject to such conditions and restrictions as may be prescribed.";

(ii) for sub-section (6), the following sub-section shall be, and shall be deemed always to have been substituted, namely:—

"(6) (a) No application for the issue of a licence to commence or carry on business as a dealer shall be granted unless the Administrator, having regard to such matters as may be prescribed in this behalf and after making such inquiry in respect of those matters as he may think fit, is satisfied that the licence should be issued.

(b) No application for the renewal of a licence to carry on business as a dealer shall be rejected unless the holder of such licence has been given a reasonable opportunity of presenting his case and unless the Administrator is satisfied that—

(i) the application for such renewal has been made after the expiry of the period specified therefor, or

(ii) any statement made by the applicant at the time of the issue or renewal of the licence was incorrect or false in material particulars, or

(iii) the applicant has contravened any term or condition of the licence or any provision of this Act or any rule or order made thereunder or of any other law for the time being in force in so far as such law prohibits or restricts the bringing into or taking out of India of any goods (including coins, currency, whether Indian or foreign, and foreign exchange) or the dealing in such goods by way of acquisition or otherwise, or

(iv) the applicant does not fulfil the prescribed conditions.

(c) Every order granting or rejecting an application for the issue or renewal of a licence shall be made in writing."

(iii) after sub-section (6), the following sub-section shall be inserted, namely:—

"(6A) Where the Central Government, having regard to the quantity of gold produced in India and the supply therein of gold through lawful channels, is of opinion that it is necessary or expedient in the interests of the general public so to do, it may, notwithstanding anything contained in this section, direct the Administrator to restrict or reduce the number of licensed dealers to such extent and in such manner as may be specified by rules made in this behalf:

Provided that no such rules shall come into force until the expiry of the period referred to in sub-section (8) of section 114 and if, before the expiry of the said period, both Houses of Parliament agree in making any modification in the rule or both Houses of Parliament agree that the rule should not be made, the rule shall come into

force only in such modified form or be of no effect, as the case may be."

7. Amendment of section 31.

In section 31 of the principal Act, in the first proviso, for clause (i), the following clause shall be, and shall be deemed always to have been substituted, namely:—

"(i) any ornament, unless he knows or has reason to believe that such ornament, being required to be included in a declaration, has not been so included."

8. Substitution of new section for section 32.

For section 32 of the principal Act, the following section shall be substituted, namely:—
Possession of primary gold by a licensed dealer.

"32. (1) Save as otherwise provided in this Act, no licensed dealer shall have, at any time, in his possession or custody primary gold in any form except in the form of standard gold bars:

Provided that nothing in this section shall apply to primary gold which is obtained in the process of, or in connection with, the making, manufacturing, preparing or repairing of one or more articles or ornaments. If the total quantity of such primary gold in the possession or custody of such dealer does not, at any time, exceed—

(a) four hundred grammes, if he does not employ any artisan,

(b) five hundred grammes, if he employs not more than ten artisans,

(c) one thousand grammes, if he employs more than ten but not more than twenty artisans.

(d) two thousand grammes, if he employs more than twenty artisans."

Provided further that the Central Government may, having regard to the needs of the trade, volume of business and the interests of the general public, increase the quantitative limits specified in the foregoing proviso.

(2) Where a licensed dealer has cut a standard gold bar and has transferred or delivered a part thereof to a certified goldsmith or an artisan for the purposes specified in section 25, he may, notwithstanding anything contained in sub-section (1), have in his possession or custody the remnant of such bar which is left with him, and in computing the quantities specified in the first proviso to sub-section (1), such remnant shall be excluded."

9. Amendment of section 39.

In section 39 of the principal Act,—

(i) in sub-section (2), for clause (c), the following clause shall be, and shall be deemed always to have been, substituted, namely:—

"(c) shall be subject to such conditions and restrictions as may be prescribed."

(ii) in sub-section (4), for clause (e) the following clause shall be, and shall be deemed always to have been, substituted, namely:—

"(e) a person who belongs to a prescribed category or class to which, in the opinion of the Central Government, the certificate may be granted."

(iii) after sub-section (4), the following sub-section shall be inserted, namely:—

"(4A) Where the Central Government, having regard to the interests of the general public is of opinion that for the continuance or development of the industry of semi-manufactures and manufactures of gold, it is necessary so to do, it may, notwithstanding anything contained in sub-section (4), by notification, empower the Administrator to entertain applications for the grant of certificates referred to in sub-section (1), from persons who possess such qualifications and fulfil such conditions as may be prescribed."

10. Substitution of new section for section 46.

For section 46 of the principal Act, the following section shall be substituted, namely:—

Limits on primary gold which an artisan may have in his possession.

"46. The total quantity of primary gold in the possession or custody, whether individually or collectively, of the artisans employed by a licensed dealer shall not, at any time, exceed the quantitative limit applicable, under sub-section (1) of section 32, to such dealer."

11. Amendment of section 50.

In section 50 of the principal Act in sub-section (1),—

(a) after the words "to such goods,—", the following words shall be, and shall be deemed always to have been, inserted, namely:—

suspend such licence or certificate, as the case may be, pending the completion of any inquiry or trial against the holder of such licence or certificate, for making such incorrect or false statement or for such contravention, as the case may be:

Provided that no such licence or certificate shall be suspended for a period exceeding ten days unless the holder thereof has been given a reasonable opportunity of showing cause against the proposed action."

(b) clause (i) shall be omitted,

(c) for clause (ii) and the proviso occurring after that clause, the following sub-section shall be, and shall be deemed always to have been, substituted, namely:—

"(1A) The Administrator may, if he is satisfied, after making such inquiry as he may think fit, that the holder of any licence or certificate issued, renewed or continued under this Act has made such incorrect or false statement as is referred to in sub-section (1) or has contravened the provisions of such law, rule or order as is referred to in that sub-section, cancel such licence or certificate, as the case may be :

Provided that no licence or certificate shall be cancelled unless the holder thereof has been given a reasonable opportunity of showing cause against the proposed action."

12. Substitution of new section for section 88.

For section 88 of the principal Act, the following section shall be substituted, namely :—

Dealers, etc., when to be deemed to have abetted an offence.

"88. (1) A dealer or refiner who knows or has reason to believe, that any person employed by him has, in the course of such employment, contravened any provisions of this Act or any rule or order made thereunder, shall be deemed to have abetted an offence against this Act :

Provided that no such abetment shall be deemed to have taken place if such dealer or refiner has, as expeditiously as possible, and in any case before the expiry of two days from the date on which he comes to know of the contravention or has reason to believe that such contravention has been made, intimated in writing to the Gold Control Officer, the name of the person by whom such contravention was made and the date and other particulars of such contravention.

(2) Whoever is deemed, under sub-section (1), to have abetted an offence against this Act, shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine."

13. Substitution of new section for section 100.

For section 100 of the principal Act, the following section shall be substituted, namely :—

Precautions to be taken by a licensed dealer, refiner or certified goldsmith before acquiring any gold.

"100. (1) Every licensed dealer or refiner or certified goldsmith, as the case may be, shall, before accepting, buying or otherwise receiving any gold from any person, take such steps as are specified by the Central Government by rules made in this behalf, to satisfy himself as to

the identity of the person from whom such gold is proposed to be accepted, bought or otherwise received by him.

(2) If on an inquiry made by a Gold Control Officer the person from whom a licensed dealer or refiner or certified goldsmith is purported to have accepted, bought or otherwise received any gold is not found at the address mentioned by the licensed dealer, refiner or certified goldsmith or at any other address ascertained from the first-mentioned address, the Gold Control Officer may call upon such dealer, refiner or certified goldsmith, as the case may be, to establish that he had taken the steps specified by the rules made under sub-section (1).

(3) If such dealer, refiner or certified goldsmith, as the case may be, omits or fails, when called upon so to do, to establish that he had taken the steps specified by rules made under sub-section (1), it shall be presumed, until the contrary is proved, that such gold was accepted, bought or otherwise received by such dealer, refiner or certified goldsmith, as the case may be, in contravention of the provisions of this Act.

(4) Nothing in this section shall apply to a petty transaction.

Explanation. — In this section, "petty transaction" means a transaction in which the total weight of any primary gold, article or ornament which is accepted, bought or otherwise received from the same person in the course of a day, does not exceed twenty-five grammes."

14. Amendment of section 114.

In section 114 of the principal Act, in sub-section (2), clause (j) shall be re-lettered as clause (k) and before clause (k) as so re-lettered, the following clause shall be inserted, namely :—

"(i) the types or classes of cases in which any authorisation may be made by the Administrator;"

15. Repeal and saving.

(1) The Gold (Control) Amendment Ordinance, 1969, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken, including any notification, order or rule made, direction given, notice, licence or certificate issued, permission, authorisation or exemption granted, whether under the Gold (Control) Act, 1968, or the Gold (Control) Amendment Ordinance, 1969, shall, in so far as it is not inconsistent with the provisions of the Gold (Control) Act, 1968, as amended by this Act, be deemed to have been done, taken, made, given, issued or grant-

ed, as the case may be, under the corresponding provisions of the Gold (Control) Act, 1968, as amended by this Act.

THE PRESS COUNCIL (AMENDMENT) ACT, 1969

(Act 27 of 1969)a

[29th August, 1969]

An Act to amend the Press Council Act, 1965.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows.—

1. Short title and commencement.

(1) This Act may be called the Press Council (Amendment) Act, 1969.

(2) It shall be deemed to have come into force on the 30th day of June, 1969

2. Amendment of section 5.

In section 5 of the Press Council Act, 1965 (hereinafter referred to as the principal Act), after sub-section (1), the following sub-section shall be inserted, namely—

"(1A) Notwithstanding the expiry of the period of office specified by sub-section (1), read with sub-section (4) or sub-section (5), as the case may be, the Chairman and other members holding office as such on the 1st day of July, 1969, shall continue to hold such office until the 31st day of March, 1970 :

Provided that nothing in this sub-section shall apply to a member who ceases to be a member before the 31st day of March, 1970, by reason of the provisions of sub-section (2), or whose term of office expires before that date by reason of the provisions of sub-section (8)."

3. Repeal and saving.

(1) The Press Council (Amendment) Ordinance, 1969, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the principal Act as amended by this Act.

THE CENTRAL SALES TAX (AMENDMENT) ACT, 1969

(AS PASSED BY THE HOUSES OF PARLIAMENT)

(Act 28 of 1969)^b

[30th August, 1969]

An Act further to amend the Central Sales Tax Act, 1956 and to provide for certain other matters.

Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

1. Short title.

This Act may be called the Central Sales Tax (Amendment) Act, 1969

2. Amendment of section 2.

In section 2 of the Central Sales Tax Act, 1956 (hereinafter referred to as the principal Act), in clause (j), for the words "and determined in the prescribed manner," the words "and determined in accordance with the provisions of this Act and the rules made thereunder" shall be, and shall be deemed always to have been, substituted.

3. Amendment of section 6.

In section 6 of the principal Act,—

(a) after sub-section (1), the following sub-section shall be, and shall be deemed always to have been, inserted, namely,—

"(1A) A dealer shall be liable to pay tax under this Act on a sale of any goods effected by him in the course of inter-State trade or commerce notwithstanding that no tax would have been leviable (whether on the seller or the purchaser) under the sales tax law of the appropriate State if that sale had taken place inside that State."

(b) in sub-section (2), for the word, brackets and figure "sub-section (1)," the words, brackets, figures and letter "sub-section (1) or sub-section (1A)" shall be, and shall be deemed to have been substituted with effect from the 1st day of October, 1958.

4. Amendment of section 8.

In section 8 of the principal Act, in sub-section (2A), for the words, brackets and figures "Notwithstanding anything contained in sub-section (1) or sub-section (2)", the words, brackets, figures and letter "Notwithstanding anything contained in sub-section (1A) of section 6 or in sub-section (1) or sub-section (2) of

a. Received the assent of the President on 29.8.1969. Act published in Gaz. of Ind., 30.8.1969, Pt. II, S. 1, Ext., p. 291.

For Statement of Objects and Reasons, see Gaz. of Ind., 5.8.1969, Pt. II-S. 2, Ext., p. 799.

b. Received the assent of the President on 30.8.1969. Act published in Gaz. of Ind., 30.8.1969, Pt. II S. 1, Ext., p. 293.

For Statement of Objects and Reasons, see Gaz. of Ind., 25.7.1969, Pt. II-S. 2, Ext., p. 621.

this section" shall be, and shall be deemed to have been, substituted with effect from the 1st day of October, 1958.

5. Insertion of new section 8A.

After section 8 of the principal Act, the following section shall be, and shall be deemed always to have been, inserted, namely:—

Determination of turnover.

"8A. (1) In determining the turnover of a dealer for the purposes of this Act, the following deductions shall be made from the aggregate of the sale prices, namely:—

(a) the amount arrived at by applying the following formula—

$$\frac{\text{rate of tax} \times \text{aggregate of sale prices}}{100 \text{ plus rate of tax}}$$

Provided that no deduction on the basis of the above formula shall be made if the amount by way of tax collected by a registered dealer, in accordance with the provisions of this Act, has been otherwise deducted from the aggregate of sale prices.

Explanation.—Where the turnover of a dealer is taxable at different rates, the aforesaid formula shall be applied separately in respect of each part of the turnover liable to a different rate of tax;

(b) the sale price of all goods returned to the dealer by the purchasers of such goods, —

(i) within a period of three months from the date of delivery of the goods, in the case of goods returned before the 14th day of May, 1966;

(ii) within a period of six months from the date of delivery of the goods, in the case of goods returned on or after the 14th day of May, 1966:

Provided that satisfactory evidence of such return of goods and of refund or adjustment in accounts of the sale price thereof is produced before the authority competent to assess or, as the case may be, re-assess the tax payable by the dealer under this Act; and

(c) such other deductions as the Central Government may, having regard to the prevalent market conditions, facility of trade and interests of consumers, prescribe.

(2) Save as otherwise provided in sub-section (1), in determining the turnover of a dealer for the purposes of this Act, no deduction shall be made from the aggregate of the sale prices."

6. Substitution of new section for section 9.

For section 9 of the principal Act, the following section shall be and shall be deemed always to have been, substituted, namely:—

Levy and collection of tax and penalties.

"9. (1) The tax payable by any dealer under this Act on sales of goods effected by him in the course of inter-State trade or commerce, whether such sales fall within clause (a) or clause (b) of section 3, shall be levied by the Government of India and the tax so levied shall be collected by that Government in accordance with the provisions of sub-section (2), in the State from which the movement of the goods commenced:

Provided that, in the case of a sale of goods during their movement from one State to another, being a sale subsequent to the first sale in respect of the same goods, the tax shall, where such sale does not fall within sub-section (2) of section 6, be levied and collected in the State from which the registered dealer effecting the subsequent sale obtained or, as the case may be, could have obtained, the form prescribed for the purposes of clause (a) of sub-section (4) of Section 8 in connection with the purchase of such goods.

(2) Subject to the other provisions of this Act and the rules made thereunder, the authorities for the time being empowered to assess, re-assess, collect and enforce payment of any tax under the general sales tax law of the appropriate State shall, on behalf of the Government of India, assess, re-assess, collect and enforce payment of tax, including any penalty, payable by a dealer under this Act as if the tax or penalty payable by such a dealer under this Act is a tax or penalty payable under the general sales tax law of the State; and for this purpose they may exercise all or any of the powers they have under the general sales tax law of the State; and the provisions of such law, including provisions relating to returns, provisional assessment, advance payment of tax, registration of the transferee of any business, imposition of the tax liability of a person carrying on business on the transferee of, or successor to, such business, transfer of liability of any firm or Hindu undivided family to pay tax in the event of the dissolution of such firm or partition of such family, recovery of tax from third parties, appeals, reviews, revisions, references, refunds, penalties, compounding of offences and treatment of documents furnished by a dealer as confidential, shall apply accordingly:

Provided that if in any State or part thereof there is no general sales tax law in force, the Central Government may, by rules made in this behalf make necessary provision for all or any of the matters specified in this sub-section.

(3) The proceeds in any financial year of any tax, including any penalty, levied and

collected under this Act in any State (other than a Union territory) on behalf of the Government of India shall be assigned to that State and shall be retained by it, and the proceeds attributable to Union territories shall form part of the Consolidated Fund of India".

7. Amendment of section 10A.

Section 10A of the principal Act shall be, and shall be deemed to have been, renumbered with effect from the 1st day of October, 1958 as sub-section (1) of that section and after the said sub-section (1), the following sub-section shall be, and shall be deemed to have been, inserted with effect from the said day, namely,—

"(2) The penalty imposed upon any dealer under sub-section (1) shall be collected by the Government of India in the manner provided in sub-section (2) of section 9—

(a) in the case of an offence falling under clause (b) or clause (d) of section 10, in the State in which the person purchasing the goods obtained the form prescribed for the purposes of clause (a) of sub-section (4) of section 8 in connection with the purchase of such goods,

(b) in the case of an offence falling under clause (c) of section 10, in the State in which the person purchasing the goods should have registered himself if the offence had not been committed."

8. Amendment of section 13.

In section 13 of the principal Act, in clause (f) of sub-section (1), for the word, brackets and figure "sub-section (8)", the word, brackets and figure "sub-section (2)" shall be, and shall be deemed always to have been, substituted.

9. Validation of assessments, etc.

(1) Notwithstanding anything contained in any judgment, decree or order of any court or other authority to the contrary, any assessment, re-assessment, levy or collection of any tax made or purporting to have been made, any action or thing taken or done in relation to such assessment, re-assessment, levy or collection under the provisions of the principal Act before the 9th day of June, 1969, shall be deemed to be as valid and effective as if such assessment, re-assessment, levy or collection or action or thing had been made, taken or done under the principal Act as amended by this Act and accordingly—

(a) all acts, proceedings or things done or taken by the Government or by any officer of the Government or by any other authority in connection with the assessment, re-assessment, levy or collection of such tax shall, for all purposes, be deemed to be, and to have always been, done or taken in accordance with law;

(b) no suit or other proceedings shall be maintained or continued in any court or before any authority for the refund of any such tax, and

(c) no court shall enforce any decree or order directing the refund of any such tax.

(2) For the removal of doubts, it is hereby declared that nothing in sub-section (1) shall be construed as preventing any person—

(a) from questioning in accordance with the provisions of the principal Act, as amended by this Act, any assessment, re-assessment, levy or collection of tax referred to in sub-section (1), or

(b) from claiming refund of any tax paid by him in excess of the amount due from him by way of tax under the principal Act as amended by this Act.

10. Exemption from liability to pay tax in certain cases.

(1) Where any sale of goods in the course of inter-State trade or commerce has been effected during the period between the 10th day of November, 1964 and the 9th day of June, 1969, and the dealer effecting such sale has not collected any tax under the principal Act on the ground that no such tax could have been levied or collected in respect of such sale or any portion of the turnover relating to such sale and no such tax could have been levied or collected if the amendments made in the principal Act by this Act had not been made, then, notwithstanding anything contained in section 9 or the said amendments, the dealer shall not be liable to pay any tax under the principal Act, as amended by this Act, in respect of such sale or such part of the turnover relating to such sale.

(2) For the purposes of sub-section (1), the burden of proving that no tax was collected under the principal Act in respect of any sale referred to in sub-section (1) or in respect of any portion of the turnover relating to such sale shall be on the dealer effecting such sale.

11. Repeal and saving.

(1) The Central Sales Tax (Amendment) Ordinance, 1969, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act as amended by the said Ordinance shall be deemed to have been done or taken under the principal Act as amended by this Act as if this Act had come into force on the 9th day of June, 1969.

THE APPROPRIATION (RAILWAYS)
No. 3 ACT, 1969
 (Act 29 of 1969)^a
 [30th August, 1969]

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of India for the service of the financial year 1969-70 for the purposes of railways.
 (The text of the Act is omitted).

THE APPROPRIATION (RAILWAYS)
No. 4 ACT, 1969
 (Act 30 of 1969)^b
 [30th August, 1969]

An Act to provide for the authorisation of appropriation of moneys out of the Consolidated Fund of India to meet the amounts spent on certain services for the purposes of Railways during the year ended on the 31st day of March, 1968, in excess of the amounts granted for those services and for that year.
 (The text of the Act is omitted).

THE APPROPRIATION (No. 4)
ACT, 1969
 (Act 31 of 1969)^c
 [30th August, 1969]

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of India for the services of the financial year 1969-70.
 (The text of the Act is omitted).

a. Received the assent of the President on 30.8.1969. Act published in Gaz. of Ind., 31.8.1969, Pt. II-S. 1, Ext., p. 299.
 b. Received the assent of the President on 30.8.1969. Act published in Gaz. of Ind., 31.8.1969, Pt. II-S. 1, Ext., p. 300.
 For Statement of Objects and Reasons, see Gaz. of Ind., 25.8.1969, Pt. II-S. 2, Ext., p. 862.
 c. Received the assent of the President on 30.8.1969. Act published in Gaz. of Ind., 31.8.1969, Pt. II-S. 1, Ext., p. 301.
 For Statement of Objects and Reasons, see Gaz. of Ind., 25.8.1969, Pt. II-S. 2, Ext., p. 865.

THE BIHAR STATE LEGISLATURE
(DELEGATION OF POWERS)
ACT, 1969
 (Act 32 of 1969)^d
 [31st August, 1969]

An Act to confer on the President the power of the Legislature of the State of Bihar to make laws.
 Be it enacted by Parliament in the Twentieth Year of the Republic of India as follows :—

1. Short title.
 This Act may be called the Bihar State Legislature (Delegation of Powers) Act, 1969.
2. Definition.
 In this Act, "Proclamation" means the Proclamation issued on the 4th day of July, 1969, under article 356 of the Constitution, by the Vice-President of India acting as the President and published with the notification of the Government of India in the Ministry of Home Affairs No. G. S. R. 1600 of the said date.
3. Conferment on the President of the power of the State Legislature to make laws.
 - (1) The power of the Legislature of the State of Bihar to make laws, which has been declared by the Proclamation to be exercisable by or under the authority of Parliament, is hereby conferred on the President.
 - (2) In the exercise of the said power, the President may, from time to time, whether Parliament is or is not in session, enact as a President's Act a Bill containing such provisions as he considers necessary:
 Provided that before enacting any such Act, the President shall, whenever he considers it practicable to do so, consult a committee constituted for the purpose consisting of forty members of the House of the People nominated by the Speaker and twenty members of the Council of States nominated by the Chairman.
 - (3) Every Act enacted by the President under sub-section (2) shall, as soon as may be after enactment, be laid before each House of Parliament.
 - (4) Either House of Parliament may, by resolution passed within thirty days from the date on which the Act has been laid before it under sub-section (3), which period may be
- d. Received the assent of the President on 31.8.1969. Act published in Gaz. of Ind., 31.8.1969.
 For Statement of Objects and Reasons, see Gaz. of Ind., 25.8.1969, Pt. II-S. 2, Ext., p. 855.

comprised in one session or in two successive sessions, direct any modifications to be made in the Act and if the modifications are agreed to by the other House of Parliament during the session in which the Act has been so laid before it or the session succeeding, such modifications shall be given effect to by the President by enacting an amending Act under sub-section (2)

Provided that nothing in this sub-section shall affect the validity of the Act or of any action taken thereunder before it is so amended.

THE FOREIGN MARRIAGE ACT, 1969 (Act 33 of 1969)

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THE FOREIGN MARRIAGE ACT, 1969

(Act 33 of 1969)

[31st August, 1969]

An Act to make provision relating to marriages of citizens of India outside India.

Enacted by Parliament in the Twentieth Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title.

This Act may be called the Foreign Marriage Act, 1969.

2. Definitions.

In this Act, unless the context otherwise requires,—

(a) "degrees of prohibited relationship" shall have the same meaning as in the Special Marriage Act, 1954,

a. Received the assent of the President on 31-8-1969. Act published in Gaz. of Ind., 31-8-1969, Pt. ILS. 1, Ext. p. 899.

For Statement of Objects and Reasons, see Gaz. of Ind., 10-5-1969, Pt. ILS. 2, Ext. p. 451; and for Joint Committee Report, see Gaz. of Ind., 12-7-1969, Pt. ILS. 2, Ext. p. 3.

(b) "district," in relation to a Marriage Officer, means the area within which the duties of his office are to be discharged;

(c) "foreign country" means a country or place outside India, and includes a ship which is for the time being in the territorial waters of such a country or place;

(d) "Marriage Officer" means a person appointed under section 8 to be a Marriage Officer;

(e) "official house," in relation to a Marriage Officer, means —

(i) the official house of residence of the officer;

(ii) the office in which the business of the officer is transacted;

(iii) a prescribed place; and

(f) "prescribed" means prescribed by rules made under this Act.

3. Marriage Officers.

For the purposes of this Act, the Central Government may, by notification in the Official Gazette, appoint such of its diplomatic or consular officers as it may think fit to be Marriage Officers for any foreign country.

Explanation — In this section, "diplomatic officer" means an ambassador, envoy, minister, high commissioner, commissioner, charged affairs or other diplomatic representative or a counsellor or secretary of an embassy, legation or high commission.

CHAPTER II

SOLEMNIZATION OF FOREIGN MARRIAGES

4. Conditions relating to solemnization of foreign marriages.

A marriage between parties one of whom at least is a citizen of India may be solemnized under this Act by or before a Marriage Officer in a foreign country, if, at the time of the marriage, the following conditions are fulfilled, namely:—

(a) neither party has a spouse living,

(b) neither party is an idiot or a lunatic,

(c) the bridegroom has completed the age of twenty-one years and bride the age of eighteen years at the time of the marriage and

(d) the parties are not within the degrees of prohibited relationship:

Provided that where the personal law or a custom governing at least one of the parties permits of a marriage between them, such marriage may be solemnized, notwithstanding that they are within the degrees of prohibited relationship.

5. Notice of intended marriage.

When a marriage is intended to be solemnized under this Act, the parties to the marriage shall give notice thereof in writing

in the form specified in the First Schedule to the Marriage Officer of the district in which at least one of the parties to the marriage has resided for a period of not less than thirty days immediately preceding the date on which such notice is given, and the notice shall state that the party has so resided.

6. Marriage Notice Book.

The Marriage Officer shall keep all notices given under section 5 with the records of his office and shall also forthwith enter a true copy of every such notice in a book prescribed for that purpose, to be called the "Marriage Notice Book", and such book shall be open for inspection at all reasonable times, without fee, by any person desirous of inspecting the same.

7. Publication of notice.

Where a notice under section 5 is given to the Marriage Officer, he shall cause it to be published—

(a) in his own office, by affixing a copy thereof to a conspicuous place, and

(b) in India and in the country or countries in which the parties are ordinarily resident, in the prescribed manner.

8. Objection to marriage.

(1) Any person may, before the expiration of thirty days from the date of publication of the notice under section 7, object to the marriage on the ground that it would contravene one or more of the conditions specified in section 4.

Explanation. — Where the publication of the notice by affixation under clause (a) of section 7 and in the prescribed manner under clause (b) of that section is on different dates, the period of thirty days shall, for the purposes of this sub-section, be computed from the later date.

(2) Every such objection shall be in writing signed by the person making it or by any person duly authorised to sign on his behalf, and shall state the ground of objection; and the Marriage Officer shall record the nature of the objection in his Marriage Notice Book.

9. Solemnization of marriage where no objection made.

If no objection is made within the period specified in section 8 to an intended marriage, then, on the expiry of that period, the marriage may be solemnized.

10. Procedure on receipt of objection.

(1) If an objection is made under section 8 to an intended marriage, the Marriage Officer shall not solemnize the marriage and shall inquire into the matter of the objection.

such manner as he thinks fit and is satisfied that it ought not to prevent the solemnization of the marriage or the objection is withdrawn by the person making it.

(2) Where a Marriage Officer after making any such inquiry entertains a doubt in respect of any objection, he shall transmit the record with such statement respecting the matter as he thinks fit to the Central Government, and the Central Government, after making such further inquiry into the matter and after obtaining such advice as it thinks fit, shall give its decision thereon in writing to the Marriage Officer, who shall act in conformity with the decision of the Central Government.

11. Marriage not to be in contravention of local laws.

(1) The Marriage Officer may, for reasons to be recorded in writing, refuse to solemnize a marriage under this Act if the intended marriage is prohibited by any law in force in the foreign country where it is to be solemnized.

(2) The Marriage Officer may, for reasons to be recorded in writing, refuse to solemnize a marriage under this Act on the ground that in his opinion, the solemnization of the marriage would be inconsistent with international law or the comity of nations.

(3) Where a Marriage Officer refuses to solemnize a marriage under the section, any party to the intended marriage may appeal to the Central Government in the prescribed manner within a period of thirty days from the date of such refusal, and the Marriage Officer shall act in conformity with the decision of the Central Government on such appeal.

12. Declaration by parties and witnesses.

Before the marriage is solemnized, the parties and three witnesses shall, in the presence of the Marriage Officer, sign a declaration in the form specified in the Second Schedule, and the declaration shall be countersigned by the Marriage Officer.

13. Place and form of solemnization.

(1) A marriage by or before a Marriage Officer under this Act shall be solemnized at the official house of the Marriage Officer with open doors between the prescribed hours in the presence of at least three witnesses.

(2) The marriage may be solemnized in any form which the parties may choose to adopt:

Provided that it shall not be complete and binding on the parties unless each party declares to the other in the presence of the Marriage Officer and the three witnesses and in any language understood by the parties,—
"I, (A), take thee (B), to be my lawful wife (or husband)";

Provided further that where the declaration referred to in the preceding proviso is made in any language which is not understood by the Marriage Officer or by any of the witnesses, either of the parties shall interpret or cause to be interpreted the declaration in a language which the Marriage Officer or, as the case may be, such witness understands.

14. Certificate of marriage.

(1) Whenever a marriage is solemnized under this Act, the Marriage Officer shall enter a certificate thereof in the form specified in the Third Schedule in a book to be kept by him for that purpose and to be called the Marriage Certificate Book, and such certificate shall be signed by the parties to the marriage and the three witnesses.

(2) On a certificate being entered in the Marriage Certificate Book by the Marriage Officer, the certificate shall be deemed to be conclusive evidence of the fact that a marriage under this Act has been solemnized, and that all formalities respecting the residence of the party concerned previous to the marriage and the signatures of witnesses have been complied with.

15. Validity of foreign marriages in India.

Subject to the other provisions contained in this Act, a marriage solemnized in the manner provided in this Act shall be good and valid in law.

16. New notice when marriage not solemnized within six months.

Whenever a marriage is not solemnized within six months from the date on which notice thereof has been given to the Marriage Officer as required under section 5 or where the record of a case has been transmitted to the Central Government under section 10, or where an appeal has been preferred to the Central Government under section 11, within three months from the date of decision of the Central Government in such case or appeal, as the case may be, the notice and all other proceedings arising therefrom shall be deemed to have lapsed, and no Marriage Officer shall solemnize the marriage until new notice has been given in the manner laid down in this Act.

CHAPTER III

REGISTRATION OF FOREIGN MARRIAGES SOLEMNIZED UNDER OTHER LAWS.

17. Registration of foreign marriages.

(1) Where—

(a) a Marriage Officer is satisfied that a marriage has been duly solemnized in a

foreign country in accordance with the law of that country between parties of whom one at least was a citizen of India; and

(b) a party to the marriage informs the Marriage Officer in writing that he or she desires the marriage to be registered under this section,

the Marriage Officer may, upon payment of the prescribed fee, register the marriage.

(2) No marriage shall be registered under this section unless at the time of registration it satisfies the conditions mentioned in section 4.

(3) The Marriage Officer may, for reasons to be recorded in writing, refuse to register a marriage under this section on the ground that in his opinion the marriage is inconsistent with international law or the comity of nations.

(4) Where a Marriage Officer refuses to register a marriage under this section the party applying for registration may appeal to the Central Government in the prescribed manner within a period of thirty days from the date of such refusal; and the Marriage Officer shall act in conformity with the decision of the Central Government on such appeal.

(5) Registration of a marriage under this section shall be effected by the Marriage Officer by entering a certificate of the marriage in the prescribed form and in the prescribed manner in the Marriage Certificate Book, and such certificate shall be signed by the parties to the marriage and by three witnesses.

(6) A marriage registered under this section shall, as from the date of registration, be deemed to have been solemnized under this Act.

CHAPTER IV

MATRIMONIAL RELIEF IN RESPECT OF FOREIGN MARRIAGES

18. Matrimonial reliefs to be under Special Marriage Act, 1954.

(1) Subject to the other provisions contained in this section, the provisions of Chapters IV, V, VI and VII of the Special Marriage Act, 1954, shall apply in relation to marriages solemnized under this Act and to any other marriage solemnized in a foreign country between parties of whom one at least is a citizen of India as they apply in relation to marriages solemnized under that Act.

Explanation. — In its application to the marriages referred to in this sub-section, section 24 of the Special Marriage Act, 1954, shall be subject to the following modifications namely :—

(i) the reference in sub-section (1) thereof to clauses (a), (b), (c) and (d) of section 4 of

that Act shall be construed as a reference to clauses (a), (b), (c) and (d) respectively of section 4 of this Act, and

(ii) nothing contained in section 24 aforesaid shall apply to any marriage—

(a) which is not solemnized under this Act; or

(b) which is deemed to be solemnized under this Act by reason of the provisions contained in section 17;

Provided that the registration of any such marriage as is referred to in sub-clause (b) may be declared to be of no effect if the registration was in contravention of sub-section (2) of section 17.

(2) Every petition for relief under Chapter V or Chapter VI of the Special Marriage Act, 1954, as made applicable to the marriages referred to in sub-section (1), shall be presented to the district Court within the local limits of whose ordinary civil jurisdiction—

(a) the respondent is residing at the time of the presentation of the petition; or

(b) the husband and wife last resided together; or

(c) the petitioner is residing at the time of the presentation of the petition provided that the respondent is at that time residing outside India.

Explanation. — In this section "district Court" has the same meaning as in the Special Marriage Act, 1954.

(3) Nothing contained in this section shall authorise any Court—

(a) to make any decree of dissolution of marriage except where—

(i) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(ii) the petitioner, being the wife, was domiciled in India immediately before the marriage and has been residing in India for a period of not less than three years immediately preceding the presentation of the petition;

(b) to make any decree annulling a voidable marriage except where—

(i) the parties to the marriage are domiciled in India at the time of the presentation of the petition; or

(ii) the marriage was solemnized under this Act and the petitioner being the wife, has been ordinarily resident in India for a period of three years immediately preceding the presentation of the petition;

(c) to make any decree of nullity of marriage in respect of a void marriage except where

(i) either of the parties to the marriage is domiciled in India at the time of the presentation of the petition, or

(u) the marriage was solemnized under this Act and the petitioner is residing in India at the time of the presentation of the petition ;

(d) to grant any other relief under Chapter V or Chapter VI of the Special Marriage Act, 1954, except where the petitioner is residing in India at the time of the presentation of the petition.

(4) Nothing contained in sub-section (1) shall authorise any Court to grant any relief under this Act in relation to any marriage in a foreign country not solemnized under it, if the grant of relief in respect of such marriage (whether on any of the grounds specified in the Special Marriage Act, 1954 or otherwise) is provided for under any other law for the time being in force.

CHAPTER V PENALTIES

19. Punishment for bigamy.

(1) Any person whose marriage is solemnized or deemed to have been solemnized under this Act and who, during the subsistence of his marriage contracts any other marriage in India shall be subject to the penalties provided in section 494 and section 495 of the Indian Penal Code and the marriage so contracted shall be void.

(2) The provisions of sub-section (1) apply also to any such offence committed by any citizen of India without and beyond India.

20. Punishment for contravention of certain other conditions for marriage.

Any citizen of India who procures a marriage of himself or herself to be solemnized under this Act in contravention of the condition specified in clause (c) or clause (d) of section 4 shall be punishable—

(a) in the case of a contravention of the condition specified in clause (c) of section 4, with simple imprisonment which may extend to fifteen days or with fine which may extend to one thousand rupees, or with both; and

(b) in the case of a contravention of the condition specified in clause (d) of section 4, with simple imprisonment which may extend to one month, or with fine which may extend to one thousand rupees, or with both.

21. Punishment for false declaration.

If any citizen of India for the purpose of procuring a marriage, intentionally—

(a) where a declaration is required by this Act, makes a false declaration, or

(b) where a notice or certificate is required by this Act, signs a false notice or certificate, he shall be punishable with imprisonment for a term which may extend to three years and shall also be liable to fine.

22. Punishment for wrongful action of Marriage Officer.

Any Marriage Officer who knowingly and wilfully solemnizes a marriage under this Act in contravention of any of the provisions of this Act shall be punishable with simple imprisonment which may extend to one year, or with fine which may extend to five hundred rupees or with both

CHAPTER VI MISCELLANEOUS

23. Recognition of marriages solemnized under law of other countries

If the Central Government is satisfied that the law in force in any foreign country for the solemnization of marriages contains provisions similar to those contained in this Act, it may, by notification in the Official Gazette, declare that marriages solemnized under the law in force in such foreign country shall be recognized by courts in India as valid.

24. Certification of documents of marriages solemnized in accordance with local law in a foreign country.

(1) Where—

(a) a marriage is solemnized in any foreign country specified in this behalf by the Central Government, by notification in the Official Gazette, in accordance with the law of that country between parties of whom one at least is a citizen of India, and

(b) a party to the marriage who is such citizen produces to a Marriage Officer in the country in which the marriage was solemnized—

(i) a copy of the entry in respect of the marriage in the marriage register of that country certified by the appropriate authority in that country to be a true copy of that entry, and

(ii) if the copy of that entry is not in the English language, a translation into the prescribed language of that copy, and

(c) the Marriage Officer is satisfied that the copy of the entry in the marriage register is a true copy and that the translation, if any, is a true translation,

the Marriage Officer, upon the payment of the prescribed fee, shall certify upon the copy that he is satisfied that the copy is a true copy of the entry in the marriage register and upon the translation that he is satisfied that the translation is a true translation of the copy and shall issue the copy and the translation to the said party.

(2) A document relating to a marriage in a foreign country issued under sub-section (1) shall be admitted in evidence in any proceedings as if it were a certificate duly issued by the appropriate authority of that country.

THE ALL INDIA LAWYERS CONFERENCE, 1969

APPEAL

To

All The Members of the Legal
Profession

The Advocates Association, Bangalore, is holding The First All India Lawyers Conference on 27th, 28th and 29th December, '69 at Bangalore. Hon'ble Shri Justice K. S. Hegde, Judge, Supreme Court is inaugurating the Conference on 27-12-1969 at 9 A. M. at Glass House, Lal-Bagh.

27th December }
'69: 9 A. M. } Inauguration.

27th & 28th }
December '69 } Discussion of subjects by
various Committees.

29.12.1969 }
9 A.M. } Plenary Session.

SUBJECTS FOR DISCUSSION

(1) Pros and Cons of Presidential Form of Government of India;

(2) Centre—State and Inter-State relations in the Indian context;

(3) Role of Intelligentsia in present day India;

(4) Rethinking on Re-organisation of States;

(5) Social security measures for members of the Bar.

The co-operation of all the Members of the Legal Profession is earnestly requested.

The following is the fee for various Memberships :

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(3) Delegate Rs. 100

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Donors, Reception Committee Members and delegates will be provided free lodging, boarding and transport facilities, on the evening of 26-12-1969 and up to 29-12-1969, (Breakfast and Lunch).

Sight-seeing on advance intimation and payment will be arranged to the Members of the Reception Committee, Donors and Delegates.

For more particulars and information, write to the ALL INDIA LAWYERS CONFERENCE, HIGH COURT Buildings Bangalore-1.

Tel. No. 26679.

G. E. Kotre,
General Secretary,
Advocates Association,
Bangalore.

G. R. Ethirajulu
Naidu, President,
Advocates Association,
Bangalore.

JOURNAL SECTION

1969 DECEMBER

CONSTITUTIONAL POSITION OF THE INDIAN PRESIDENT

(By RANGANATHA CHARI, M.A. B.L., Advocate, High Court, Domalguda, Hyderabad (A.P.))

In the Constituent Assembly, Pandit Jawaharlal Nehru said, "We did not want the President to be just a mere figurehead like the French President." In the most critical times in its history, France had to pay a heavy price for want of a President with authority and power and suffered an international eclipse, till General de Gaulle saved the situation and restituted his country to its pristine glory by sweeping the figurehead out of the scene. The Presidentship of India has remained till now an Office of ornament and ceremony. There is the assumption that the Constituent Assembly having chosen for the Centre a Cabinet form of Government as in U.K. and not a Presidential form as in U.S.A., the President can have only the status of the King or Queen in the United Kingdom and could not carry on the administration without advice of a Council of Ministers. The inescapable consequence of the political domination of a single party at the Centre and the States for a long period is that a convention has developed that the Union Government should decide and the President should sign on the dotted line. An elected President could never enjoy any real authority and status if he, by usage or convention, gives up or is made to give up, the powers and functions expressly vested in him by the Constitution. Dr. Rajendra Prasad, the former President of India raised the question of the constitutional position of the President at the foundation-laying ceremony of the Indian Law Institute and since then, this subject has attracted considerable attention. The death of Dr. Zakir Husain has posed questions in political circles and made the Constitutional experts to think on the role of the President, what qualities he should possess and how he should exercise his judgment and discretion in the event of Constitutional crisis created by a deadlocked Parliament. In the event of multi-group or coalition Government emerging at the Centre in the post election period of 1972, India's next President will be required to preserve and defend the Constitution. Therefore the choice of next President has roused great and considerable interest and it has become topic of vital concern to the people and the Politicians of this country.

2. The legal and constitutional aspects of the powers and functions of the President necessitate a study uninfluenced by consideration of circumstances that have affected or troubled them under political pressures or per-

sonal factors during the last two decades. The resume of the Constituent Assembly debates discloses that the Founding Fathers of the Constitution chose a composite form of Government in which the Parliamentary form of executive and a President with power and authority were to function within the framework of the express provisions of a written Constitution. The President under the Indian Constitution cannot be reduced to the position of sheer impotence like the French President under the pre-de Gaulle Constitution of 1875, but he is invested with status, dignity and residual power, by being elected as the Representative of the whole country. The election has to be held by an elaborate process which allows elected members of the two Houses of Parliament and the State Legislatures to participate in the Election. The scale of representation of the States in such an election is designed to secure a reflection of popular support in the entire country. Article 74 (1) says: "There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions." The words "aid and advise" are not a mere constitutional euphemism as pronounced by some jurists. The President is under no legal obligation to accept unquestioningly every decision of the Cabinet or the Prime Minister. Sir B. N. Rao, the author of "India's Constitution in the making" observes that: "even if in any particular instance the President acts otherwise than on Ministerial advice, the validity of the act cannot be questioned in a Court on that ground." The President is the head of the Union Government and his powers and functions are not only executive, but also legislative, Judicial, Constitutional and prerogative. Article 78 emphasises the independent and responsible position and facilitates the performance of his other duties under the Constitution. Chapter III of Part V refers to the "Legislative Powers of the President." Article 111 embodies the power in the nature of a veto exercisable by the President (i) to withhold assent (ii) to return the Bill for reconsideration. The President's power to consult the Supreme Court under Art. 143 of the Constitution is intended to be used in case of difference of opinion between him and the Cabinet.

3. A view has been expressed by the Law Minister, Sri Govinda Menon that the President's position as the Supreme Commander

of the Armed Forces is symbolic and notional and it does not give him any special powers to govern the country with the help of the Armed Forces. Some eminent Jurists have disagreed with this view and reiterated that to vest the President with the powers of the Supreme Commander is not illusory or their investment is not a matter of form. As Supreme Commander, he is the legal link between the Civil Authority and the Defence Forces of the Union. The power to declare an Emergency is left to the "satisfaction" of the President. The Jurists say that the word "satisfaction" juristically understood to involve the exercise of personal discretion on the part of the dignitary cannot be vicariously exercised. The Constitution provides that "the Prime Minister shall be appointed by the President and the other Ministers shall

be appointed by the President on the advice of the Prime Minister." Constitutionally speaking, the President is bound to invite the leader of the majority party to be the Prime Minister. But, if he is confronted with mosaic of parties and when the Political parties develop inflexible attitudes, the President has wide discretion in the sense that he could restrain their excesses and defend the Constitution. The provision relating to the impeachment of the President indicates that there is a sphere of action in respect of which he is personally responsible. This would negative the contention that the President is a mere Constitutional head, acting solemnly and loyally on the advice of the Prime Minister. In the ultimate analysis, it is the Presidential Writ that keeps the country and the people constitutionally tied together.

"SPEAKING" ORDERS

(By HON'BLE MR. JUSTICE V. S. DESHPANDE, M.A., LL.M. (NAGPUR), LL.M. (STANFORD), High Court of Delhi.)

Is it the law that every quasi-judicial order must state its reasons? "There is no general rule of English law that reasons must be given for administrative (or indeed judicial) decisions," answers an eminent English authority.⁽¹⁾ If the administrative authority is free to give decisions without having to support them with reasons, will it not be tempted to act arbitrarily or on extraneous considerations? Will this not lead to injustice and nepotism? Certainly, the temptation and the scope for an abuse of authority was inevitable in the absence of a rule requiring statement of reasons for administrative decisions. "The prerogative writs of certiorari, prohibition and mandamus inherited a legacy of imperfection, mostly procedural, for which there were valid reasons in the distant past, but which were out of place in the new sphere that these remedies have won for themselves".⁽²⁾ No amount of judicial learning in administering these writs could ensure that an administrative decision must be supported by reasons. A trenchant critic of English Administrative law has said that "either Parliament or the Law Lords should throw the entire set of prerogative writs into the Thames River, heavily weighted with sinker to prevent them from rising again".⁽³⁾ All that the zeal of Lord Denning could do in *R. v. Northumberland Compensation Appel-*

late Tribunal, *ex parte Shaw*⁽⁴⁾ was to make a distinction between the power of judicial review on the ground of lack of jurisdiction and the power of hearing an appeal on the ground that a decision was bad in law. In between the two lay what Lord Denning called the power of "superintendence" which would enable the court to strike down an order which showed an error of law on the face of the record. The decision in *Northumberland* case has been regarded as a landmark in the growth of judicial review not only in England, but also in other common law jurisdictions. But the power of "superintendence" to review an administrative decision showing an error of law on the face of the record could not be exercised if no reasons were given at all for an administrative decision. In that event, the face of the record "spoke" no longer. It was the inscrutable face of the "sphinx" as was piquantly pointed out by Lord Sumner in his famous decision in *R. v. Natt Bell Liquors Ltd.*⁽⁵⁾ The lacuna in the law was recognised in the Report on Administrative Tribunals and Inquiries, 1957. Their recommendation to remedy this defect was carried out by section 12 of the Tribunals and Inquiries Act, 1958, which requires that certain specified Tribunals giving any decisions and a Minister giving a decision after the holding of a statutory inquiry shall furnish the statement of reasons for the decision if requested on or before giving of the decision.

2. Fortunately, the courts in India were

1. S. A. de Smith—*Judicial Review on Administrative Action*, 11 Edn., 1966, p. 133.

2. H. W. R. Wade, *Administrative Law*, p. 81.

3. K. C. Davis "Future of Judge made Public Law in England," *A problem of Practical Jurisprudence*, 61 *Columbia Law Review*, pp. 201 at 204 (1961).

4. (1952) 1 K B 304.

5. (1922) 2 A.C 128.

not handicapped by the technicalities, which limited the operation of the prerogative writs in England. In *Hari Nagar Sugar Mills Ltd. v. Sham Sunder*, (6) the Supreme Court held without hesitation that the order of the Deputy Secretary reversing the decision of the Board of Directors of a company was bad inasmuch as he did not give any reasons for the decision. The court simply based its decision on the ground that it could not exercise its appellate jurisdiction under Art 136 of the Constitution without knowing the reasons for the decision under appeal. The court clarified in another decision that the mere fact that the reasons were not stated in the final order itself, but were available elsewhere on the record would not vitiate the proceedings of the quasi-judicial authority inasmuch as the reasons could be known by the court during the judicial review. It further held that even if reasons were given after the decision but before the case came for judicial review, the proceedings would not be vitiated (*Maharashtra State Transport Co. v. Balwant Regular Motor Service* (7)). In *Sardar Govind Rao v. State of M. P.* (8) the Supreme Court went one step farther by holding that the applicant who had applied for the award of a grant of money or pension to the State Government was himself entitled to know the reasons for the rejection of his application by the State Government. These grounds compelling the quasi-judicial authorities to give reasons for their decisions did not rest specifically on the provisions of the Constitution or of the statute concerned. They must be fairly based on the requirements of justice itself. If the immunity from the requirement of giving reasons could lead to the temptation of giving perverse or corrupt decisions, the Court had the power to do justice by insisting upon a statement of reasons from quasi-judicial authorities. Justice itself is treated here as a source of law. As Viscount Simonds observed in *National Bank of Greece and Athens v. Matissa*, (9) "In the end and in the absence of authority, the question is simple — What does justice demand in such a case as this?"

..... If I have to base my opinion on any principle, I would venture to say it was the principle of rational justice."

3. The innovation made by the Supreme Court in the above-mentioned decisions was soon challenged in *M. P. Industries Ltd. v. Union of India*, (10) The majority of the Court distinguished the decision in *Hari Nagar Sugar Mills* (6) case on the ground that the Central

Government there had reversed the decision of the Directors of the Company without giving any reasons. They said "there is a vital difference between the order of reversal by the appellate authority in that case for no reason whatsoever and the order of affirmance by the revising authority in the present case". The State Government had given reasons for its order and the Central Government dismissed the revision against it by agreeing with the State Government and thereby adopting the reasons given by the State Government. The Court therefore, refused to interfere with the order of the Central Government, though Subba Rao J., was inclined to the view that reasons ought to have been given by the Central Government. Therefore, when the same type of case came up before the Constitution Bench of the Supreme Court in *Bhagat Raja v. Union of India*, (11) the Court addressed itself to the question whether the Central Government was bound to give reasons for its decision in view of the provisions of the Act and the Rules or alunde because the decision was liable to be questioned in appeal to the Supreme Court. The Court reiterated the view that the High Courts and the Supreme Court are placed at a disadvantage if no reasons are given by the quasi-judicial tribunal whose decision is to be considered by them. If the State Government gives sufficient reasons, the Central Government may adopt them and the Court may proceed to examine whether these reasons are good. But, when the reasons given by the State Government are scrappy or nebulous and the Central Government makes no attempt to clarify the same, the Supreme Court may proceed to examine the case *de novo* without anybody being wiser for the review by the Central Government. In such a case even the Central Government must make what is called a "speaking order." Of course, if the reasons for the action of the State Government were notorious as in *Nandram v. Union of India*, (12) then the confirmation of its order by the Central Government without fresh reasons would not be bad. The decision in *Commissioner of Income Tax v. K. V. Pillai*, (13) was confined to its peculiar facts and statutory provisions and did not establish any contrary principle.

4. The legal position having been satisfactorily established after full consideration as above, the following observation by the Supreme Court in their subsequent decision in *Som Datt Datta v. Union of India* (14) is somewhat puzzling: "Apart from any require-

6. AIR 1951 SC 1002.

7. C. A. No. 823 to 851 of 1953, D/- 22-8-1953 - AIR 1953 SC 379.

8. AIR 1955 SC 1222.

9. (1950) AC 203 at 225.

10. AIR 1955 SC 671.

11. AIR 1957 SC 1003.

12. AIR 1958 SC 1922.

13. (1957) 63 ITR 411 (SC).

14. AIR 1962 SC 416.

ment imposed by the Statute or statutory rule expressly or by necessary implication, we are unable to accept the contention of Mr. Datta that there is any principle or any rule of natural justice that a statutory tribunal should always and in every case give reasons in support of its decision." Did their Lordships indicate by this observation that they were not in agreement with the law laid down by them previously in Bhagat Raja's case (11) and the other decisions considered above? Unfortunately, none of their own previous decisions were referred to by their Lordships in *Som Datt's case*.⁽¹⁴⁾ It does not appear, however, that the decision in *Som Datt's case* (14) is really contrary to the decision in *Bhagat Raja's case* (11) and the decision in *Hari Nagar Sugar Mills* (6) and *Sardar Govind Rao's case*.⁽⁸⁾ *Som Datt's case* is distinguishable from the previous decisions of the Supreme Court at least on two grounds viz., (1) a Court martial stands in a class by itself and the Supreme Court and the High Courts are reluctant to interfere with its proceedings and their confirmation by Chief of the Army Staff and the Central Government as shown by Article 227(4), which excludes the High Courts' power of superintendence over it and (2) the Statutory provisions governing the court martial and the confirmation of its proceedings preclude the necessity of giving reasons for the decision. Therefore, the general rule that a quasi-judicial tribunal is required to give reasons for its decision is not applicable to the proceedings of the court martial and their confirmation by the Chief of the Army Staff and the Central Government. The dismissal of the writ petition by the Supreme Court was, therefore, amply justified by these special features of the case. The observation by the Supreme Court in *Som Datt's case* quoted above, though general in its language, must therefore, be understood as being limited to the particular facts of the case and not intended to lay down a general rule contrary to the earlier decisions of the Supreme Court.

5. A learned commentator on the Constitution of India has also addressed himself to the question whether a quasi-judicial authority is under an obligation to give reasons for its order.⁽¹⁵⁾ The learned commentator observes as follows:—

"Does the omission to give reasons prevent the appellate court from effectively hearing the appeal? If from the materials on record the Appellate Court can decide whether an unspeaking order of the court should be set aside or confirmed, it can equally decide from

the materials on record whether the unspeaking order of a quasi-judicial tribunal should be set aside or confirmed, and the mental processes of the persons passing unspeaking orders cannot affect this question. It may be stated that unspeaking decisions are rendered frequently by single judges of the Bombay High Court hearing notices of motion, or dismissing writ petitions summarily. Where there are no materials before the court from which the appellate court can hold that the unspeaking order is correct, the order would have to be set aside whether made by a court or by a quasi-judicial tribunal."

6. The above reasoning would, however, be open to the following comments. Firstly, the fundamental distinction between a true judicial decision and a quasi-judicial decision, which was long ago pointed out in the Report of the Committee on Minister's Powers (1932) (pages 73-74, 81) is that a judicial decision disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found including where required a ruling upon a disputed question of law, while this is not done by a quasi-judicial decision. Its place is taken by administrative action, the character of which is determined by the Minister's free choice. The classification made by the Committee between a judicial, a quasi-judicial and administrative decision has been criticised on the ground that it is too conceptual.⁽¹⁶⁾ This does not, however, cast any doubt on the fundamental nature of the distinction between a judicial and a quasi-judicial decision. For example, Dean Roscoe Pound has asserted: "We know exactly what courts do, on what basis they act in doing it, and at least what they say as to their reasons for doing it. We have no such means of knowing what administrative bodies or agencies have done nor how and why they did it."⁽¹⁷⁾ It is true that Tribunals and Inquiries Act, 1958 and the Administrative Procedure Act, 1946 in the United Kingdom and the United States of America respectively have since then obliged the administrative authorities to give reasons for their findings. Apart from the statutes, however, the distinction between the judicial and the quasi-judicial decisions turns on the application of established law by the former and discretion or policy by the latter. It is unfortunately true that the courts sometimes pass orders without giving reasons, mostly in dismissing petitions in limine. With respect, however, this practice does not square with the essential nature of a judicial decision. Nor is it possible to agree that judicial work cannot be done quickly if

15. H. M. Seervai, Supplement to Constitutional Law of India, 1968, pp. S-78 and S-79.

16. Griffith and Street on Principles of Administrative Law, Ch. IV.

17. Pound-Contemporary Juristic Theory, p. 24.

reasons were to be given for each and every judicial order. Giving of brief reasons does not take long. The reasons ensure that the judicial decisions are not arbitrary or perverse. The reasons show that the justice is not only done in fact, but also in form. It would not be right, therefore, to say that because some of the judges pass orders without giving reasons sometimes, the quasi-judicial authorities cannot be required to give reasons for their orders. Secondly, the Supreme Court and the High Courts in exercise of their powers under Articles 32 and 136 on the one hand, and Articles 226 and 227 of the Constitution, on the other hand, do not always examine the record of a case before them de novo as would be done by a court of first instance or a court of appeal of facts and law both. Their jurisdiction is limited to jurisdictional grounds, errors of law on the face of record, violation of rules of natural justice, etc. It is necessary, therefore, that the reasons for the orders passed by quasi-judicial authorities should show whether any of these limited grounds for interference with their orders exist or not. It is not possible therefore, to agree with the argument that the Supreme Court and the High Courts would be in the same position whether the orders of the quasi-judicial authorities "speak" or not. Thirdly, the learned commentator has discussed the law with reference to *M. P. Industries Limited v. Union of India*,⁽¹⁸⁾ but curiously enough, did not refer to the later and more comprehensive decision of a larger Bench in *Bhagat Raja v. Union of India*⁽¹¹⁾. It is not known, therefore, whether the *Bhagat Raja*'s decision would not have altered the learned commentator's view.

7. In passing, it may be mentioned that the jurisdiction of the High Courts and the Supreme Court over administrative orders has expanded enormously by the recent revolution which has taken place in the concept of quasi-judicial decisions. In *Ridge v. Baldwin*⁽¹⁹⁾, Lord Reid has pointed out how the well known statement of law in *R. v. Electricity Commissioners*⁽²⁰⁾ had been misconstrued to mean that a duty to act judicially had to be imposed on an administrative authority before its order could be said to be quasi-judicial. He has shown that in certain circumstances, an administrative authority may be under an implied duty to act judicially in accordance with the rules of natural justice, although not expressly required to do so or to determine a *lis inter partes*. The Supreme Court in *Associated Cement Company v. P. N. Sharma*⁽²¹⁾

and in *Bhagwan v. Ramchand*⁽²²⁾, promptly followed this view. In fact in *State of Orissa v. Binapani Das*⁽²³⁾, and in *Booldchand v. Kurukshetra University*⁽²⁴⁾, the Supreme Court has gone so far as to hold that any orders involving civil consequences would have to be passed consistently with the rules of natural justice. These decisions have a considerable impact in enlarging the scope of a judicial review over an ever-increasing variety of administrative orders, whenever they have any characteristic of an adjudication. Correspondingly the field in which administrative authorities would be required to give reasons for their orders may also be expected to be enlarged.

8. In the above circumstances, one may conclude that in Indian Law as established by the Supreme Court decisions referred to above, a general principle exists requiring that a quasi-judicial authority must give reasons for its decision. One need not feel shy of this conclusion merely because the English law before the enactment of the Tribunals and Inquiries Act, 1958, failed to establish such a principle. The principle is based on the requirements of justice and is to be found to be established in other legal systems. In the French Administrative law, while a judicial decision must embody its reasons, an administrative one need not do so in the absence of a statutory requirement. But these are cases (which our Courts would regard as quasi-judicial) where the *Council d'Etat* reached the conclusion that administrative decision ought to be a reasoned one. The reason is not, however, that the administrative authority, should be deemed to be acting as a Tribunal. The overriding principle is that any conduct of the administrative authorities rendering judicial review more difficult must ipso facto be improper.⁽²⁵⁾ In Italy also there is no rule that every administrative order must embody its reasons. 'One must look at the nature of the act in question. If the act is done in exercise of an absolute discretion there is no such obligation as that of giving reasons, but wherever a decision deals with requests or applications of any kind and decides them in the negative or dissolves a contractual relationship or, in any way, imposes burdens or liabilities on the subject, in all these cases an absence or insufficiency of reasons becomes a ground of invalidity by itself.'⁽²⁶⁾

22. AIR 1965 SC 1767

23. AIR 1967 SC 1252.

24. AIR 1963 SC 232.

25. C. J. Harnon *Executive Discretion and Judicial Control*, pp. 180-181.

26. Galvani—*The Judicial Control of Public Authorities in England and Italy*, pp. 153-159

18. AIR 1966 SC 611.

19. (1964) A C 40

20. (1924) 1 KB 171.

21. AIR 1963 SC 1595

Speech of Hon'ble the Chief Justice, Delhi High Court delivered on the occasion of separation of Judiciary from the Executive on 3rd of October, 1969 at Tis Hazari Courts, Delhi.

It is a great day for the administration of justice. Ever since the beginning of this century our national leaders were clamouring for the separation of the judiciary from the executive. This used to be one of the subjects of resolutions which were passed in successive sessions of the Indian National Congress. Article 50 of our Constitution in the Chapter of Directive Principles specifically provides that the State shall take steps to separate judiciary from the executive in the public services of the State.

The separation came into being in other States earlier and now it has been introduced in the capital of the country. The success of this experiment primarily hinges upon you. It has been said that the quality of the administration of justice in the final analysis depends upon the personality of its judges and presiding officers of the Courts. It is in this context that I thought of meeting you all and addressing of few words to you.

You are now entering upon a new era. Previously you were under the control of the executive head of the district. This impaired confidence of the accused in the fair administration of justice. Now you will be free of that control. It is now for you to see that this new freedom does not degenerate into a licence to do something capricious or arbitrary. You have to keep a judicial poise and balance and see that justice is administered without fear or favour. You have to keep the scales even. If undeserved convictions are bad and undesirable, undeserved acquittals equally shake the confidence of the people in the administration of justice. There is sometimes a tendency to acquit to earn cheap popularity. You have to shun it in the same way as you

have to resist pressure for the conviction of the accused.

There are some basic things which we have to keep in mind. As executive magistrates you had to make contacts with large number of persons. Administration of justice requires a certain amount of detachment and aloofness. You have to avoid contacts which may embarrass your position as judicial officer. For this purpose you may have to refrain from accepting hospitality and attending social parties.

You have also to see to it that you attend the Court and start work at 10 A. M. and otherwise too observe correct Court timings. You have also to be properly attired when working in Court. The normal dress for a judicial officer is black coat and necktie.

A number of old criminal cases are pending in Courts. I hope they will be disposed of before long. The Chief Judicial Magistrate and the Additional Chief Judicial Magistrates would see to it that there is equitable distribution of work and that we get the optimum out of each one of you. So far as High Court is concerned, it would be your merit and the quality of your work which would weigh and create impression. We shall see that your scales of pay are attractive but you will be strengthening our hands if you discharge your duties in such a way that people all round have confidence in the administration of criminal justice and appreciate the new set-up. For errors of judgment you need not worry but the High Court would insist upon a very high standard of integrity. I have every hope that there would be fullest co-operation between you and the members of the Bar. You have my best wishes and I am sure you will acquit yourselves well.

"EXTENT OF UNLAWFULNESS OF WAGERING CONTRACTS IN ENGLAND"

(By M. V. APPALA NAIDU, B.A., M.L., U. G. C. JUNIOR RESEARCH FELLOW, DEPARTMENT OF LAW, ANDHRA UNIVERSITY, WALT AIR.)

A wagering contract may be well defined as one by which two persons, professing to hold opposite views concerning an uncertain event, mutually agree that on the happening of that event, one shall pay or hand over a sum of money or something of money value, to the other in consideration of his paying or promising to pay to him a sum of money or something of money value on the non-happening of that event.⁽¹⁾ Whether a contract is a wagering one or not, depends upon its subst-

ence, not upon its outward form; to arrive at the substance the court will receive evidence without confining its attention to the mere words in which it is expressed.⁽²⁾ So the object of wagering contract has been ascertained to be unlawful because of the fact that to constitute a wager there must be three elements present, namely, (a) the parties must profess the determination of an uncertain event as the sole condition of their contract, (b) one party should stand to win and the other to lose upon the ascertainment of that event,

1. See per Hawkins, J., *Carlill v. Carbolic Smoke Ball Co.*, (1892) 2 Q B 484 at pp. 490-492.

2. See *Ironmonger v. Dyne*, (1928) 44 T L R 497.

and (c) the sum or the stake he will so win or lose must be the only interest which the parties have in the contract. Neither the judiciary nor the legislature have, however, been ever able to make up their minds definitely to what extent, if any, wagering contracts are unlawful in England.

The judiciary could not prevent men from gambling or from regarding gambling debts as 'debts of honour'. Until the later part of 18th century, wagering contracts were not as such illegal or void or even unenforceable, but only discouraged by some trifling difficulties of pleading envisaged by the courts. Strange and even ludicrous results often followed. For example a bet upon the duration of the life of Napoleon was held to be unenforceable as tending, on one side, to weaken the patriotism of an Englishman, on the other to encourage the idea of assassination of a foreign ruler, and the result of this decision is to provoke retaliation upon the Englishman (8).

The struggle of the legislature with the gambler began in 1664 that is as early as the Restoration. As Sir Frederick Pollock pointed out (4) ".... it is tale of some permanent value as an example of blundering good intentions and a warning to hasty, piecemeal reformers". The first step was taken by the legislature during the reign of Charles II, when an Act of 1664 was passed by which any sum exceeding £ 100 lost in playing at games or pastimes or in betting on the players, should be irrecoverable, and that all forms of security given for money so lost should be void (5). Further control was made by an Act of 1710, by which all securities whether given for money lost in playing at games or pastimes or in betting on the players or knowingly advanced for such purposes were rendered wholly void (6). As this was felt to be harsh, the Gaming Act of 1833 was passed providing that all securities caught by the Act of 1710 were to be deemed to have been made or accepted on an illegal consideration. It can be observed that this Act covered only wagers on 'games and pastimes' (which include horse racing) and the wagers of other kinds, such as a wager on the result of a contested election remained unaffected. To bring the latter also into line, the Gaming Act of 1845 was passed, rendering all contracts or agreements by way of gaming or wagering null and void. But by a curious omission this Act did not affect the distinction maintained by the earlier Act of 1833 between wagers on games and pastimes and other wagers, so far as securities given in respect of

each class of wagers were concerned, as it did not repeal the latter. There was, yet, another drawback about the Act of 1845. Since wagers were only void, no taint of illegality would attach to a transaction whereby a person employed another to lay wagers for him. However, the Act of 1892 was passed declaring void any promise to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the Act of 1845, or to pay any sum of money by way of commission, fee, reward or otherwise in respect of any services relating to such contract.

This survey into the history of wagering legislations in England inevitably leads to a question whether their effect is to make wagering contracts as such illegal in the strict sense of the word or merely void. This question, indeed, has not yet been answered explicitly and clearly. However, the whole Common Law and Statute Law have recently been reviewed by Subbarao, J., in *Gherulal Parakh v. Mahadeodas* (7). He has not said anywhere specifically that wagers in England are illegal after the Gaming Act of 1892. He simply says that under the Act, in view of its wide and comprehensive phraseology, even collateral contracts, including partnership agreements are not enforceable. This suggests at first sight that wagers are illegal after 1892. But actually a contrary result may be noticed by a close examination of the language of the Act of 1892. The Act makes only certain collateral transactions other than securities null and void (b). The securities given in respect of wagers on games and pastimes are by reason of the Act of 1885 deemed to be given on an illegal consideration, whereas securities given in respect of other wagers are treated as given for no consideration at all by reason of the Act of 1845. There is no rule either at Common Law or in Statute Law which taints the latter with illegality. Its only defect is want of consideration, and this is cured by its subsequent transfer for value, though generally the value is presumed to have been given (9). Thus the securities given for wagers other than those on games and pastimes, are still enforceable by subsequent transferees. Moreover the Court of Appeal has held that money knowingly lent to pay bets is not money paid in respect of a contract rendered null and void by the Gaming Act of 1845, and accordingly it does not fall under the Act of 1892 and may be still recovered (10). Nevertheless, if it is a term in the contract

7. (1953) S.C.J. 878 at p. 891: AIR 1953 S.C. 751 at pp. 791-792.

8. See Anson, 'Law of Contract' 22nd Ed. pp. 309-310.

9. *Lilley v. Rankin*, (1895) 25 L.J.Q.B. 248.

10. *Re O'Shea*, (1911) 2 K.B. 931.

3. *Gilbert v. Sykes*, (1812) 16 East 120.

4. *Law of Contracts*, 13th Ed. p. 792.

5. 25 Car. II c. 7.

6. 9 Anne c. 14.

that money lent should be used for the payment of a bet, it cannot be recovered.(11) It may be asked whether the Act of 1835 makes such a loan irrecoverable. Since that Act deals only with securities, where no security is given the loan seems to be recoverable; but if a security is given, then the security is deemed to be given on an illegal consideration. It is doubtful whether this result by implication makes the loan also irrecoverable.

Again, it is questionable, why if a wagering contract is not illegal, restitution of the money paid by the loser has not been allowed in practice by the Courts? Restitution is not allowed not by reason of the taint of illegality, but because of the fact that the Act of 1845 is apparently treated as conferring a privilege which the loser may waive, if he pleases. Payment made voluntarily in discharge of an obligation known not to be binding, constitutes such waiver. In the words of Bowen, L. J., the loser merely "waives a benefit which the statute has given to him and confers a good title to the money upon the person to whom

he pays it".(12) Moreover it is clear that one who is employed to make bets on behalf of another and who receives the winnings cannot keep them, since he receives them on behalf of another under a contract of agency; and they are not money paid in respect of a contract made void by the Act of 1845.(13) Consequently they do not fall under the Act of 1892, and may still be recovered.

Thus the two essential features, characteristic of illegal contracts, namely, (1) that collateral transactions will be also affected, and (2) that apart from certain exceptional cases restitution will not be allowed, are not totally fulfilled in the case of wagers. This shows that the wagering contracts in England are not illegal in the strict sense of the word, but only void leaving them to be treated as 'debts of honour.' Because of this apparent contradiction, the position remains still doubtful, and requires to be clarified in any future review of the law on this matter.

11. Macdonald v. Green, (1950) 2 All. E. R. 1240.

12. Bridger v. Savage, (1885) 15 Q. B. D. 363 at p. 367.

13. De Mattes v. Benjamin, (1894) 63 L. J. (Q. B.) 248.

A NOTE ON SECTION 130 (1), THE MOTOR VEHICLES ACT, 1939, (Act No. 4 of 1939)

(By DR. B. N. ACHARYA, M.A., PH. D., Godhra, Distt. Panchamahals, Gujarat.)

The Motor Vehicles Act, 1939, was amended by the Motor Vehicles (Amendment) Act (Act 100 of 1956). Some dynamic changes were made in the text of the original Act by this amendment and these provisions were brought into force with effect from 16.2.1957 under Notification No. SR 491 D/- 7.2.57 issued by the Government of India in Ministry of Transport. Section 130 (1) of the Motor Vehicles Act runs as under :—

"130. (1) A Court taking cognizance of an offence under this Act shall, unless the offence is an offence specified in Part A of the Fifth Schedule, state upon the summons to be served on the accused person that he (a) may appear by pleader and not in person, or (b) may by a specified date prior to the hearing of the charge plead guilty to the charge by registered letter and remit to the Court such sum not exceeding twenty five rupees as the Court may specify."

In the above S. 130 (1) of the Act, the original word 'may' in the Act No. 4 of 1954 is substituted by the word "shall" by S. 95 of the Motor Vehicles (Amendment) Act, 1956. The effect of this amendment is that now, it is obligatory for the Court taking cognizance of an offence not falling within the mischief of Part A of the Fifth Schedule to issue a summons directing that the accused person may

appear by pleader and not in person and that he may send his plea of guilty by registered letter and remit the amount not exceeding Rupees twentyfive if he pleads guilty to the charge. This amendment has created a position that whatever the amount of fine might have been prescribed for the offence for which summons can be issued under S. 130 (1), Motor Vehicles Act, the accused can be fined Rs. 25 only. If we take the case of an offence under S. 112, Motor Vehicles Act, that offence was originally punishable with fine which may extend to Rupees Twenty for the first offence and with fine which may extend to Rupees one hundred for any subsequent offence. By S. 88 of the Act 100 of 1956, the words "One hundred Rupees" have been substituted for the words "Twenty Rupees" for the first offence and words "three hundred Rupees" have been substituted for the words "One hundred Rupees" for the subsequent offence. Thus the legislature found that the fine of Rupees twenty for first offence and that of Rupees one hundred for the subsequent offence was inadequate and it, therefore, raised the quantum of the fine by the amendment. The object of this amendment and raising the quantum of fine was overlooked and no parallel amendment was made in S. 130 (1). Thus under S. 130 whatever the nature of the offence may be and

whether the offence under S 112 is first or subsequent one and even if it is of a serious nature the accused cannot be fined more than Rupees twenty-five only. Thus the object and purpose of amending S. 112 by the Act 100 of

1956 is practically frustrated by S. 180 (1). Thus, there is some discrepancy in S 180 (1), Motor Vehicles Act and it ought to have been set right when S 112, Motor Vehicles Act was amended in the year 1956

INTERPRETATION AND ANOMALIES U. P. (TEMPORARY) CONTROL OF RENT AND EVICTION ACT (III of 1947)

(By CHARAN SINGH CHAUDHRY, M.A., LL.B. *Advocate, Meerut*)

Needless is it to say that India is a Sovereign Democratic Republic and under our Constitution a number of Fundamental Rights have been guaranteed to its constituent individuals. One of the rights so guaranteed is that of equality before law. As such in putting every enactment on the statute book, this consideration is held supreme. But all the same some anomalies do come to show their face, cutting at the very root of the principle, of course, for no deliberate fault of our law makers but because there is another independent constitutional organ, called judiciary, that can also be said to be no less a law giving body than the Legislature in so far as the judiciary forces through their interpretation of the laws the Legislature into amending them. The result is that in the course of such interpretation of the language and meaning of the statutes some precedents come to exist, again for no fault of the judiciary either, that may, in their application and practice have the effect of discriminating between, if not individuals, classes of people. So a remedy provided in law to one may be virtually denied to another by the same law.

This has, in view of the law laid down in *Bashi Ram v. Mantri Lal*, 1965 All L J 58 AIR 1965 All 493 (FB) happened in the cases of tenants and landlords in respect of provisions of sub-s. (8) and (4) of S. 8 of U. P. (Temporary) Control of Rent and Eviction Act, and S. 7 of the same Act so far as it relates to revisions to the State Government against refusing, or granting permission for the filing of a civil suit for eviction referred to in S 8 of the Act.

Relevant provisions of S. 8 of the U. P. (Temporary) Control of Rent and Eviction Act run as under

"S. 8 (1) Subject to any order passed under sub-s. (8) no suit shall without the permission of the District Magistrate be filed in any civil Court against a tenant for his eviction from any accommodation, except on one or more of the following grounds.

(2) Where an application has been made to the District Magistrate for permission to sue a tenant for eviction from any accommodation and the District Magistrate grants or refuses to grant the permission, the party

aggrieved by his order may within 80 days from the date on which the order is communicated to him apply to the Commissioner to revise the order

(8) The Commissioner shall hear the application made under sub-s. (2) as far as may be within six weeks from the date of making it and he may, if he is not satisfied as to the correctness, legality or propriety of the order passed by the District Magistrate or as to the regularity of proceedings held before him, alter or revise his order, or make such other order as may be just and proper

(4) The order of the Commissioner under sub-s. (8) shall subject to any order passed by the State Government under S 7-F be final."

Material portion of S 7-F of the Act reads as follows:

"The State Government may call for the record of any case granting or refusing to grant permission for the filing of a suit for eviction referred to in S. 8 and may make such order as appears to it necessary for the ends of justice."

Dealing with Ss 8 (1) and 7-F of the U. P. (Temporary) Control of Rent and Eviction Act, 1947, it has been held by a Full Bench of the Hon'ble High Court of Allahabad in 1965 All L J 58 AIR 1935 All 493 (FB) that in case a suit is instituted by a landlord for ejectment of his tenant with the permission of the District Magistrate obtained under S 8 (1) of the U. P. (Temporary) Control of Rent and Eviction Act, the State Government on being moved by the tenant to pass an appropriate order under S. 7-F on the record of the case granting permission passes an order suspending the operation of the permission, the order has no effect on further proceedings in the suit pending in Court.

It has further been laid down therein that if a suit instituted by a landlord for ejectment of his tenant with the permission of the District Magistrate is decreed in the landlord's favour and the tenant files an appeal and during its pendency the State Government passes an order purporting to be one in exercise of the power conferred by S. 7-F directing that the permission granted by the District Magistrate would have effect after a

certain date, which date is subsequent to the date of the decree under appeal, there is no effect on the decree passed in the suit."

It will thus be seen that the operation of the above rule of law so far as the remedies provided for by way of revision to the Commissioner under sub-ss. (2) and (3) of S. 3 and to the State Government under S. 7-F as it relates to revisions against refusing or granting permission referred to in S. 3 has absolutely no effect on the right of landlord and his remedies remain intact. This is so because if the permission to file a suit for the eviction of a tenant is refused to the landlord the way is open to the latter to go up in revision to the Commissioner under sub-ss. (2) and (3) of the Act and if his revision is allowed and permission is granted thereby he can file a suit for eviction of the tenant with that permission. If, however, his revision petition is rejected by the Commissioner he can move the State Government under S. 7-F to pass an appropriate order. So if the State Government pleases to pass an order in favour of the landlord and grants him permission refused by the District Magistrate and the Commissioner he can file a suit for eviction of the tenant with such permission as efficaciously as with one granted by the District Magistrate. In this way, if the initial authority refuses him permission he can approach the higher authorities and can seek his remedy.

But this is not so in the case of a tenant in view of the Full Bench ruling referred to above. If permission is granted by the District Magistrate to the landlord to file a suit for eviction of the tenant, the landlord would have no ground uncovered in hurrying to file the suit and the moment the suit is filed, the tenant's remedy provided under sub-ss. (2) and (3) of S. 3 to go in revision to the Commissioner would be barred and if by some act of Providence the tenant succeeds even in filing

the revision to the Commissioner before the institution of civil suit by the landlord, that too would be of no help to the tenant and the revision would be rendered infructuous, if and when the landlord chooses to file the civil suit for eviction. This is so because, even if an order in revision by the Commissioner is passed in favour of the tenant, it will have no effect on the further proceedings of the suit instituted. In this way the remedy of the tenant exhausts with the filing by the landlord of the civil suit for eviction with the District Magistrate's permission. The very same chain of facts will occur in case the permission refused by the District Magistrate is granted by the Commissioner in revision by the landlord. In that case on institution of the civil suit with the permission of the Commissioner, the tenant's way to approach the State Government for seeking his remedy under S. 7-F would be blocked and this remedy shall as well be denied to him.

As such with all regards and respects to all concerned, it is submitted that by virtue of the above referred rule the remedy provided to the landlord by way of revisions before the Commissioner and then before the State Government if the Commissioner decides against him, is virtually denied to the tenant in so far as his remedy exhausts with the institution of the eviction suit which is most natural and bound to be filed in all hurry, as no landlord would ever choose, in filing the same, to wait for the decisions in revisions by the higher authorities which might be against his interest, and allow himself to be called negligent luxurious litigant and by some a fool.

With the foregoing in view, the attention of the State Government may be drawn to remove this anomaly of the provisions concerned and to put the tenants and the landlords at par in so far as the remedy before law in this respect is concerned.

CANCEROUS GROWTH OF CORRUPTION IN JUDICIARY

— A Study

(By SHRI S. N. JOHRI, B.SC., LL.M., Deputy Registrar, High Court, Jabalpur.)

In the panorama of the development of human society, ages have by and by carved out, with the chisels of tried thinkers an ideal image of a judge specially in the context of free world. The conventional pen-picture, demanding particular qualitative requirements, which was lying hidden in parts in the debris of precedents and dictums, was collected, assembled and summarised in Article 34 of the Canons of Judicial Ethics by the American Bar Association, which requires a judge to be conscientious, studious, thorough, courteous, patient, punctual, just, impartial, fearless of

public clamour, regardless of public praise, indifferent to private, political or partisan influences, administering justice according to law, dealing with the appointment as a public trust not ill-using it for promoting personal interests and gains and free from the ambition to increase popularity. The paper further demands that a judge should be polite, temperate and tolerant yet firm and attentive and his personal behaviour, not only upon the bench and in performance of his duties, but also in his every day private life, should be beyond reproach. Judge ought to be more learned

than witty, more revered than plausible and more advised than confident. Above all things integrity is their proper virtue. An over-speaking judge is no well-tuned cymbal. Restraint in interference of proceedings streamlined by intelligent and lawful avoidance of wasteful, confusing and irrelevant material, short of preventing pertinent information to come on the record, is a difficult thin rope for a judge to ride undisparaged.

2 Of all other essential virtues greatest emphasis has been laid upon the unflinching integrity and impartiality of a judge from the times immemorial. Some of the dicta may be recalled as follows

'Thou shalt not wrest judgment, thou shalt not respect persons, neither take a gift, for a gift doth blind the eyes of wise and pervert the words of the righteous'

(Deuteronomy)

'Thieves for their robbery have authority when the judges steal themselves.'

(William Shakespeare)

'He hath put off the person of a judge that puts on the person of a friend'

(Thomas Adams)

'The greatest scourge an angry heaven ever inflicted upon an ungrateful and sinning people was an ignorant, a corrupt or a dependent judiciary.'

(John Marshall)

'There is one absolute standard, one impleacable test which society applies to a judge, this is unswerving honesty. For a judge to deviate from the most rigid honesty and impartiality is to betray the integrity of all law'. A bribed judge not only sacrifices his own morality but poisons the well of justice itself and thus corrupts the essential feature of the Government. According to William Seagle, 'a judicial scandal has always been regarded as far more deplorable than a scandal involving either the executive or the legislature. Slightest hint of irregularity or impropriety in courts is a cause of great anxiety and alarm. A legislator or an administrator may be found guilty of corruption without apparently endangering the foundation of the State, but a judge must keep himself absolutely above suspicion'

3 This presumptively exalted position of a poor judge stands before him like an unsurmountable peak of a steep slippery mountain, in the present context of society when nauseant and choking atmosphere heavily prevails around the man standing knee-deep in the debris of the fallen moral standards of the society. The wild clamour for glamour, money, luxury, exhibition and attainment of fictitious standards of living deafen his ears, glittering gold dazzles his eyes and baffles his conscience. He is not an ascetic who has renounced the

world, very much a worldly man with crushing responsibilities on his feeble shoulders and yet the corrupt society is out to weaken his determinations, compromise his principles and allure him to a fall at every step he takes in his journey

4. The majestic peaks of Himalayas do not rest on thin air. They have massive support of the solid earth. Great generals are produced only in the period of strife, the period where the whole nation is putting forth untiring efforts to succeed in the war. For any achievement of some significance the presence of appropriate environment is necessary. The high standard which the Judiciary is expected to reach and maintain is only possible in a society having a firm moral basis, a society which implicitly believes in the 'rule of law' and acts up to it. In this unfortunate country afflicted with corruption to the roots it appears to be an idle dream to expect the Judiciary to reach and maintain the high standard expected of it.

5 After all a judge is to be drawn and recruited from the same rotten stock of the society where immorals thrive and honesty has often to suffer a crushing defeat at the hands of some sinister plan. Moral standard of a man is no criterion for recruitment and enquiry on this plane at that early stage of formative years of life, can hardly make a reliable digging. What training is given to him for acquiring that self-restraint and tolerance when he is selected to hear the proverbial non sense, for the whole day with tight lips?

6. It is difficult to swallow the opinion of William Seagle that the scandal against a judge is 'more alarming' than against other organs of a democratic Government because it endangers the foundations of the State. Without minimising the responsibilities of the judges, I would like to say that in a Welfare State a judge is as much an organ of the State as any other, an humble bolt in the whole machinery, not very different from others. It is true that if others falter the remedy lies in the Courts, but it is not correct to say that if a judge falters the nation is left to dogs. In the hierarchy of judges every action is watched and examined vigilantly and intently by the superiors. Moreover strong public opinion is a sufficiently sharp knife for operating upon the malignant part.

7-8. Amidst all round corruption, the Judiciary has somehow managed to maintain its standard and is generally regarded as uncorrupt. With the high cost of living, the low scale of pay and the all round disrespect shown to it by the Executive, it is not known how long the Judiciary may fight the process of

corruption and may not succumb. There are already signs of wavering. In such a state of affairs a few determined persons may still save the situation. If democracy is to survive in this country and the rule of law is to be maintained, the judiciary should come a step forward to play the role of the determined few. Even though it may be forced to suffer all the privations it has to stand as a rock, not yielding to the powerful forces of corruption. Majority of the judicial personnel are alive to the situation and have risen to the occasion for rendering service to the motherland. This can, however, be achieved and maintained only if its own house is kept as clean as possible. The adage "A single spoilt mango damages the basketful" should not be lost sight of. The efforts of the majority of the judicial officers are likely to be set at naught by a few corrupt ones. The problem is how to save the Judiciary from itself.

9. The general belief that suffers corruption, is that the prosecution of a judge would be a shock to the society's confidence in the judiciary. It appears to be a baseless proposition inasmuch as the society knows a corrupt judge and is always itching to see him disgracefully expelled out of the sacred temple of judicial service. If such a person is prosecuted and punished, it will only help in restoring confidence in the judiciary. No such confidence was even shaken when the Judges were impeached or prosecuted in England and U. S. A.

10. There is historical and traditional opposition to an attack on a judge for any reason. It is significant that in the reign of Edward I (1272 to 1307) English Law provided for the punishment of defamatory rumours affecting the reputation of Magistrates. This was the statute of Scandalum Magnatum the offence of which was not abolished in England till 1838. This ancient statute was probably the foundation for common law doctrine that criticism of a judicial officer, even though made after the determination of a cause, may constitute contempt of Court. In U. S. A. this rule was effective in Federal Courts till 2nd March, 1831 when an Act for its repeal was voted. The legislation resulted after the imprisonment of an attorney for criticising one of the decisions of a Judge sitting in Missouri. The Act of 1831 was drawn by Republican James Buchanan, later to be the President of U. S. A. A part of the preamble of the Act may be reproduced as follows :

"Such criticism is the right of the citizen and essential not only for the proper administration of justice but also for the public tranquillity and contentment. Withdrawing power from the Courts to summarily interfere with

such exercise of right of the press and freedom of speech deprive them of no useful power. . ." In India a similar process is on the anvil of the Legislature in the shape of Contempt of Courts Bill. Judicial Officers Protection Act also perpetrates an age old notion of protecting a judge even against his malicious acts if done not without jurisdiction. The precedents lay down that even in appeals or transfer petitions an aggrieved party should not make personal allegations against a judge relating to his integrity, etc. All this is too much of a protection in the present era and amounts to an unreasonable curb on the freedom to speak the truth boldly and fearlessly. It introduces a fear element in the complainants and many times prevents the corrupt judges from being exposed.

11. Fear has thus certainly and historically been an important element in the reluctance of many members of legal profession to institute official inquiries into the conduct of judges. Suppose the inquiries are inconclusive or lead to nothing, what will the judge do to the complaining lawyer, to his partners and associates and worst of all to the interest of the client if he still dares to retain him. To overcome this fear element in such complainants the High Court may be invested with powers to withdraw, by an order passed after due notice, such protections in the case of a judge who is repeatedly suspected of corruption.

12. However, the other side of the picture is that by the very nature of his work, a judge has to displease several persons every day and the experience indicates that numerous false complaints start pouring in against innocent judges just for humiliating them and many times for coercing them to leave the virtuous track. The poor judge suffers many times, because he stands all alone surrounded by a group of scoundrels and conspirators, because the officer making the enquiry is more close to the complainant and has an easy faith in the honesty of his complaint, little knowing of the exploited confidence and conspiracy; and many times because a foolish order, passed by a judge either due to negligence, zeal to dispose of the case expeditiously, immaturity of understanding, rashness or due to an unbalanced state of mind, exposes him to various speculative charges based on suspicion fortified by the imputed motives in the complaint. Proper safeguards and anchors will have to be provided against this aspect of a judge exposed to the mischievous elements of the society, for not being washed away or blurred by these waves surging around him. Hence normally no enquiry should be initiated on any anonymous complaint i.e. unless the complainant is willing to come forward with

an affidavit in support of his allegations. The name and identity of the complainant may however be kept a closed secret till a very plausible and prima facie case is made out against a judge and he is transferred from the place so that the fear element in the complainant is averted and his interests are properly secured. At the same time in order to keep the waters clean nothing short of removal from service should meet the fate of a judge who is reliably confirmed to be corrupt even if the evidence is scanty. The rigidity of the standards of proof may be relaxed in such cases.

13. At the same time the corruptor must go with the corrupted Accomplice in the crime, the one who is instrumental in corrupting a judge, should not be allowed to escape unhurt. Bar Council should strive hard to raise the moral standards of the Advocates who are the most easy-go betweens in the matter of corrupting an innocent judge.

14. Corrupt society is no justification for a corrupt judge. The silent heart searching would definitely reveal, that these lofty ideals and high expectations of the society are simply one sided, there is no reciprocity. While rights are always associated with corresponding duties and responsibilities or counter obligations, may I humbly ask, as to what responsibility or obligation is felt or discharged by the society towards a judge, except to keep him half-fed and impoverished making him a laughing stock, a have-not in the society of plenties and power drunk? What are the strongholds and protective devices made available to him, which may help him not only in withstanding the nauseating and suffocating atmosphere around him but may also provide him with footholds for successfully ascending the steep slippery Himalyan peak?

15. It is thus the duty of the society and the State to ameliorate the economic condition of the judges. History records that in the infancy of Vikram Era i. e. in Gupta period in India, every High Court Judge was paid tax free 5,000 silver coins when the cost of living and price index were almost negligible. As against that in the context of present day

floating and soaring prices and ever-rising living standards, a judge of a High Court to-day can hardly count 1800' coins of amalgamated metal or paper currency after all deductions on account of taxes etc. This will clearly indicate still worse grossly miserable and very difficult financial lot of the subordinate judicial officers. The economic hardship is many times responsible for undermining the integrity. Today an honest judge living in the neighbourhood of a corrupt judicial officer, has to live like a street beggar by the side of a princely personage and is often contemptuously looked down upon because being almost in the same scale of pay, he and his children stand no comparison and have to suffer the pinch every minute.

16. Being officially required to be in public contact an executive officer with large sums of money in hand and tremendous opportunities to oblige others, has unlimited resources, and even without being corrupt in the sense of accepting bribe in cash or committing embezzlement, he stands in a much more comfortable position by channelising the resources and influences for exacting personal comforts and better worldly life. On the other hand the whole lot of Judges are expected to develop into a confused self-contradiction of a worldly ascetic like King Janak of pre-historic era. Yet whenever the question of revising the pay-scales is raised by the suffering judges, the problem of parity with the executive officers stands in the way as a stumbling block and they are left to dig into the void. According to William Seagle the responsibilities of judges are greater, the society and Government demands much better ethical standards and aloofness demands more expensive living, minimum qualifications for recruitment necessitate late arrival in service, yet in the matter of pay and allotment of residential accommodation parity with others is their poor lot, effigy of which stands erect to baffle all their economy, peace and integrity. Drastic and bold revision of their pay-scales appears to be absolutely necessary before the cancerous growth of corruption does spread its tentacles in deeper tissues of the judicial services in India.

REVIEWS

EVIDENCE IN EAST AFRICA. By H. F. Morris M.A., LL.B., Ph. D., Reader in African law, School of Oriental and African Studies, University of London. Published by Sweet & Maxwell Ltd 11 New Fetter Lane, London and the African Universities Press Limited, Lagos. Sole Agents in India, N.M. Tripathi, Private Ltd.,

Princess Street, Bombay 2. Pages 283. Price in India Rs 58 50.

Kenya, Tanzania and Uganda have codified body of evidence law, the various Evidence Acts being closely based on the Indian Evidence Act of 1872. The Indian Act, in fact was in force until very recently in several of the East African countries. The English common law has been, in general, reproduced

in the Indian Act, though there are a number of differences, as do its offsprings the four East African Evidence Acts. The common law of England, no doubt is available in many standard works, but due to these differences, it would be hardly appropriate to approach them. Unlike common law, where the law is codified, the code should itself, as far as the content of the law is concerned, should speak for itself. Accordingly the book under review which is published as Number 24, in "law in Africa" series, is primarily a commentary upon the provisions of the Codes rather than an exposition of the law of evidence as such.

The book opens with an introductory chapter on the historical development of the law of evidence in East Africa. Then are taken up the Evidence Acts section by section, following in general the order in which they appear in the Acts. The commentary has been presented in the light of the decisions of the East African Courts. Important divergencies of the East African law from that of England have been noted. Reference to East African decisions have not always been practicable, since local case law, though full in respect of some aspects of evidence law, for example, those containing the admissibility of confessions and the need for corroboration, is virtually non-existent in respect of considerable portions of the Evidence Acts. In such cases the Indian case law and also the English, have been referred to.

The various provisions of the East African Evidence Acts and the Indian Act are not identically worded. These do not also appear with the same numbering. A comparative table of corresponding provisions of the various Acts (including the parent Indian Act) has been given in the beginning. Similarly ample footnotes showing the correspondence in section numbering are given. The comparative table and the footnotes have greatly overcome any difficulty which the reader and the student are apt to encounter. In general, the Kenya Act has been taken as the basis; it is its sections that have been referred to in the books.

Sequence of the chapters follows the sequence of the chapters of the Acts. After the historical introduction, the topic of admissibility and relevancy followed by the topic of hearsay evidence are taken up. Then follows "admissions and confessions"; subjects dealing with the evidence of opinion and character are dealt

with next. The subject of judicial notice is taken up in Chapter 7. Chapters 8 and 9 deal with burden of proof and estoppel. The last two chapters are devoted to witnesses, their competence, compellability and the weight of their evidence and their examination.

The entire commentary is lucid, succinct and not voluminous like a big work. This will be welcomed by the students for whom the book is mainly written. No text book on the East African law of Evidence has, as yet, existed. This book will surely fill this need of both the student and the legal practitioner. But this does not mean that the student has not to assist himself with works on the English and Indian law. These works will have to be consulted with the differences between the English and the East African law clearly in mind. There are a couple of works recently published on the law of Evidence in Nigeria, which are of relevance to East Africa, the present work may also be of relevance to Nigeria, for Nigeria shares with East Africa the characteristic of possessing not only a codified law of evidence but also one which derives from the same authorship, that of Fitzjames Stephen, the drafter both of the Indian Evidence Act and of the Digest of Evidence upon which Nigerian Act is based.

The Appendices contain the text of the Kenya Evidence Act and the Primary Courts (Evidence) Regulations. The law dealt with in the text is, in general that which existed on January 1, 1967. Since this date, however, the Evidence Act of Tanzania, has been enacted in April 1967, replacing in mainland portion of Tanzania, the Indian Evidence Act previously operating in what used to be the Territory of Tanganyika. The manuscript had to be recast so as to take into account this new enactment.

To Indian students, the book will be found interesting not only from the point of view of comparative study, but also to know how their Act has travelled much beyond the borders of India without having changed in any particular aspect. This is in a way a compliment to that great drafter of the Indian Act, Fitzjames Stephen.

R.G.D.



The Hon'ble Mr. Justice SALIL K. DATTA
Judge, Calcutta High Court



The Hon'ble Mr. Justice
M. POCKIARATH UNNIKRIISHNA KURUP
Judge, Kerala High Court

The respondent was not entitled to the protection of Art. 311 of the Constitution of India.

Under Article 16 of the Constitution it is not one of the fundamental rights that a person who is an employee of the State shall be entitled to continue in service and that his employment shall not be terminated so long as persons junior to him remain in service. Appeal allowed.

AIR 1969 N. S. C. 156 (V 56)

SIKRI, J. (MITTER AND JAGANMOHAN REDDY, JJ. concurring).

K. Ranganatha Reddiar v. State of Kerala.

Criminal Appeal No. 141 of 67 D/- 14-8-1969.

The Prevention of Food Adulteration Act, 1954 — Rule 12A.

Warranty regarding the quality and substance etc. — Whether should be in the label or in the cash memo—Warranty stated in the invoice and not in the cash memo — Held, no violation of Rule 12A.

The appellant was charged for selling adulterated stuff on the ground that the warranty as required by Rule 12A was not forthcoming. The invoice received from the whole-seller contained a remark "the quality is upto the mark".

Held, "the quality is upto the mark" means the quality is upto the standards required by the Act and the vendee, the quality in the context would include nature and substance of the article. There was sufficient compliance with the requirement of Rule 12 (A) although the warranty did not exist in the label or cash memo. This reasonable interpretation of Rule 12A would achieve the object underlying without causing harm to the right of carrying on trade. Appeal was allowed.

AIR 1969 N. S. C. 157 (V 56)

SHAH, AG. C. J. (RAMASWAMI, AND GROVER, JJ. concurring)

K. C. Nambiar v. Rent Controller, Madras and others.

Civil Appeal No. 2225 of 1966, D/- 18-8-1969.

The Madras Buildings (Lease and Rent Control) Act, 1960 — Section (3) (b) and Section 4 (2) — The Madras Buildings (Lease and Rent Control) Rules, 1960— Rules 11, 12, 13 and 14.

"Fair Rent" — Material date for calculating "cost of production".

"Cost of production"—Whether market value for reproducing the building on

the date when the Act came into force—Held, "Cost of construction" means the cost on the date of the construction of the building.

In the application by the landlord for the fixation of the standard rent it was contended that the cost of construction means cost of reproducing similar building on the date on which the Act was brought into force. It was contended that the "fair rent" under Section 4 (3) (b) (i) means the market value of reproducing a similar building and the deduction of the depreciation as provided by the Act. According to the tenant the "fair rent" should be fixed on the basis of the cost of construction when the building was constructed added to by such additions which are subsequently made.

Held, the intention of the Legislature in using the expression "Cost of construction" in Section 4 (3) (b) (i) and the expression "market value" in Sub-section (3) (b) (ii) is not to equate two. Market value would include factors such as amenities, architectural features, situation, etc. A separate provision for these factors is made in the Act and Rules for the additional rent. It cannot be the intention of the Legislature that in fixing the fair rent the amenities as stated above should be taken into consideration twice. Fixation of standard rent on the basis of market value reverses the normal method followed in most of the rent control Acts in other States. Further, market value of real property may go on changing from year to year. Rejecting the High Court's view it was held that the cost of construction for the purposes of fixing the fair rent is not the cost of the reproduced building on the date of the commencement of the Act reduced by depreciation at the prescribed rates.

AIR 1969 N. S. C. 158 (V 56)

SHAH, AG. C. J. (RAMASWAMI AND GROVER, JJ. concurring).

Keshava Narayan v. Mandal Co-operative Marketing Society and others.

C. A. No. 1224 of 1966, D/- 18-8-1969.

The Madhya Pradesh Co-operative Societies Act, 1960 — Section 82.

"Dispute touching the business of a society" — The claim for the recovery of the price of goods purchased by a co-operative Society. Held, the claim touches the business of the society — Complaint directed to be presented to the Registrar of Co-operative Societies.

The appellant had preferred a claim against a co-operative Society for the supply of foodgrains. Another Co-opera-

tive Society stood surety for the respondent Society. The High Court dismissed the suit filed by the appellant for the recovery of the price of grant supplied, holding that Civil Court was incompetent by virtue of Section 82 (1) (c) to try the suit.

Held, the respondent Society carries on the business of purchase and sale of foodgrains and other goods. The by-laws contain the object of purchasing and supplying the food-stuffs. The expression "touching the business of a Society" means any reference or in relation to, respecting, regarding, or concerning the business of the society. The dispute thus touches the business of the respondent society.

The complaint was returned for presentation to the Registrar of Co-operative Societies.

AIR 1969 N. S. C. 159 (V 56)

SIKRI, J. (MITTER AND JAGAN-MOHAN REDDY, JJ. concurring)

Municipal Council, Raipur and another v. State of Madhya Pradesh.

Criminal Appeal No 163 of 1967, D/- 18-8-1969.

The Motor Transport Workers Act, 1961 (Madhya Pradesh) — Section 2 (g).

"Motor Transport Undertaking" — Whether Municipal Council engaged in transport workers is a "Motor Transport Undertaking" and requires registration under Section 3 (1) of the Act. Held, Municipal Council is "Motor Transport Undertaking" for the purposes of registration.

Section 38 — Exemption on the ground of public Order — Municipal Council's function of carrying night soil and for distributing water does not fall under "public order" — No exemption.

The Municipal Council, Raipur and the Presiding Officer were prosecuted for failure to register under Section 3 (1) of the Motor Transport Workers Act, 1961. The Council employs about 50 transport workers. The appellant Council claimed that the Council was not a Motor Transport undertaking and was exempted under Section 38 (1) from registration under the Act.

The definitions of "private carrier", "Transport vehicle" and "Goods" in the Motor Vehicles Act, 1939 make it clear that the appellant Council falls within the definition of "private carrier" as the Council owns transport vehicles and uses them solely for the carriage of goods which are its properties.

By use of word 'includes' the Legislature has intended to enlarge the meaning of expression "Motor Transport undertaking" and does not intend to restrict it to undertakings of commercial nature. The Act provides for the welfare of the Transport workers and regulates the conditions of their work. Such beneficial Acts are not to be construed strictly.

"Public Order" means "public peace and tranquillity" and does not mean "public health" as alleged. Carrying on night soil and distribution of water by the Council for which vehicles are used does not fall under 'public order' and the vehicles engaged for the said purpose are not entitled to exemption from registration under Section 38 (1) (u).

AIR 1969 N S C 160 (V 56)

SHAH, AG C J. (RAMASWAMI, AND GROVER, JJ. concurring).

Pratap Singh v. Preetam Singh and another.

C A. No 2321 of 1968, D/- 19-8-1969.

The Arbitration Act — Sections 2(c), 28, 31 (4), 34.

Whether an application for the appointment of a receiver should be made to a Court which is ceased of the arbitration matter by granting extension of time to make the Award or can it be made to any other Court — Application for extension of time made to Delhi Court — Application for the appointment of receiver made to a Court in Madhya Pradesh.

Held, since the jurisdiction of the Delhi High Court was itself challenged the application in Madhya Pradesh Court was maintainable.

The appellant and the respondent were carrying on business in partnership in Madhya Pradesh and at two places in Maharashtra namely, Bombay and Nagpur. In a dispute regarding the partnership business, the Arbitrator appointed by both the parties, applied for extension of time for making the award under Section 28 to Subordinate Judge Delhi, which was granted. The jurisdiction of the Delhi Court was challenged in an appeal in Delhi High Court. Pending this appeal the appellant applied for the appointment of a receiver to property to a Court in Madhya Pradesh. The respondent moved for the stay of the proceedings. The Madhya Pradesh Court appointed the receiver and the same was confirmed by Madhya Pradesh High Court. The question for decision was whether the Madhya Pradesh Court had

jurisdiction to appoint a receiver in view of the fact that Delhi Court was seized of the matter, under Section 31 (4) of the Act.

Held, that the Civil Court in Madhya Pradesh was competent to appoint receiver of the property until the question about jurisdiction of the Delhi Court in Section 31 (4) was finally determined. After the High Court of Delhi determined the question, the receiver appointed might be made subject to jurisdiction of Delhi High Court if it was held that Delhi High Court had a jurisdiction to entertain the application for extension of time.

The application for appointment of receiver could be granted notwithstanding the order of stay of suit under Section 34 of the Arbitration Act.

AIR 1969 N. S. C. 161 (V 56)

MITTER J. (SIKRI AND JAGANMOHAN REDDY JJ. concurring).

Hari Rao and another v. State of Bihar.

Cr. App. No. 240 (N) of 1966, D/- 15-10-1969.

Indian Penal Code — Secs. 415 & 420, 34 — Cheating—Causing damage or harm to property — False representation to Railway in a forwarding note — Under Railway rules no liability in such case — No cheating.

Indian Railways Act: Sec. 73.

Goods Tarrif Rules: Rule 15 Part I.

No admission on the party of Railway as to weight or description of goods mentioned in the forwarding note.

The appellant was convicted under Section 420 read with Sec. 120-B, I. P. C., for dishonestly inducing the booking officer, to make a railway receipt showing 251 dry chilly bags in place of 197 bags of chaff, actually loaded. The Railway booking officer had made the entry on the receipt to show that he had acted only according to the instructions by the appellant regarding weight and description of the goods.

Held, the Railways did not run any additional risk or liability, apart from Sec. 73 of the Railways Act, in spite of the misrepresentation on the forwarding note. Rule 15 of Part I of Goods Tarrif Rules provides that acceptance of forwarding note does not imply any admission regarding weight or description of goods on the part of Railways.

Dominion of India v. Firm Muserar Kishunprasad, AIR 1950 Nag 85 and

Union of India v. S. P. L. Lakhu Reddiar, AIR 1956 Mad 176 wherein Rule 15 of the Goods Tarrif Rules, was relied upon to absolve the Railway administration of liability, were cited with approval.

Held, the appellant was not guilty as no loss or damage was likely to be ensued to the Railways by the alleged misrepresentation.

AIR 1969 N. S. C. 162 (V 56)

SIKRI J. (HIDAYATULLAH C. J., MITTER, RAY, JAGANMOHAN REDDY, JJ. concurring).

Rabindra Nath Bose and others, Appellants v. The Union of India and others, Respondents.

Writ Petn. No. 146 of 1967, D/- 9-10-1969.

Constitution of India, Arts. 14 & 16: Pre-constitution laws & actions under — Cannot be challenged as violative of Fundamental Rights if valid when passed—Pre-Constitution Rules regarding appointment and seniority of I. T. O's. Class I Grade II — Not void.

Constitution of India, Art. 32.

Delay in filing petition — Delay of more than six years — Fatal.

Constitution of India, Art. 309.

Income-tax Officers (Class I, Grade II) Service Rules 1945: Seniority Rules (Class I, Grade II), 1949, 1950, 1952.

The petitioners are direct recruits and the Respondents 6 to 39 are promotees in Income-tax Officers Class I, Grade II service. Various appointments and promotions made between 1945 to 50 were challenged by the petitioners. The Rules under which the said actions were taken viz. Income-tax Officers (Class I, Grade II) Service Rules 1945 and Seniority Rules, 1949, 1950 were alleged to be discriminatory and violative of Arts. 14 and 16 of the Constitution. Seniority Rule of 1952 along with the Seniority list were challenged on similar grounds. The Court upheld the preliminary objections raised by the Attorney General and held that the writ petition was not maintainable.

Held, the impugned Rules, orders and actions are pre-constitutional and were valid at their inception. They cannot be challenged for the alleged violation of Arts. 14 & 16 as Constitution has no retrospective operation.

Pannalal Binraj v. Union of India, 1957 SCR 233=AIR 1957 SC 397, relied upon.

The observation in Shanti Sarup v. Union of India, AIR 1955 SC 624 to the

effect that the pre-constitutional orders continued after the Constitution can be challenged for the deprivation of Fundamental Rights from day to day, was not approved. Cases followed —

(i) *Shri Jagadguru Kari Basava v. Commissioner of Hindu Religious Charitable Endowments Hyderabad*, (1964) 8 SCR 252=AIR 1965 SC 502.

(u) *Guru Datta Sharma v. State of Bihar*, (1962) 2 SCR 292=AIR 1961 SC 1684.

The challenge to Seniority Rule 1952, was negatived by the Court on the ground of delay. There was a delay of 15 years. Even after the alleged knowledge of the Government decision in 1961 there was inordinate delay in filing the petition. The explanation for delay that Jaishinghani's case (1967) 2 SCR 703=AIR 1967 SC 1427 was pending in the High Court and then in Supreme Court did not find favour with the Court. Cases followed (i) *M/s. Tilokchand Moti Chand case*, (1969) 1 SCC 110, (ii) *Laxmanappa v. Union of India*, (1955) 1 SCR 769=AIR 1955 SC 3.

Following Jaishinghani's case (1967) 2 SCR 703=AIR 1967 SC 1427 held, that it would be unjust to deprive the respondents of the rights accrued to them as permanent Assistant Commissioners.

AIR 1969 N. S. C. 163 (V 56)

HEGDE J. (SHAH J. concurring)

The Patna Electric Supply Co. Ltd., Appellant v. The Patna Municipal Corporation and others, Respondents.

Civil Appeal No. 418 of 1969, D/- 9-10-1969.

Constitution of India, Art. 226 — Writ of mandamus — Alternate remedy — Whether Arbitration under Sec. 15 of the Telegraph Act, 1885, a proper remedy in a dispute over rental payable for erection of electric poles — Held, Sec. 15 inapplicable.

Indian Electricity Act, 1910, S. 51. Conferment of some powers under Indian Telegraph Act, 1885 on the licensee under the Electricity Act, does not mean that the rights & liabilities of a licensee are governed by the Telegraph Act.

Indian Telegraph Act, 1885. Sec. 15; Sec. 3(6) Arbitration to resolve certain disputes between telegraph authority and local authority — Licensee under the Electricity Act, is not a "telegraph authority" within the meaning of Sec. 3(6) of the Telegraph Act.

Mandamus sought against the Respondent Corporation by the Appellant, res-

training the Respondent from taking any coercive action for the alleged recovery of the arrears of rent for the land utilised for the erection of electric poles. High Court rejected the petition on preliminary ground that proper remedy was arbitration under Sec. 15 of the Telegraph Act, 1885.

Held, although Sec. 51 of the Electricity Act, empowers the State Government to confer certain powers on the licensee under that Act, enjoyed by a "telegraph authority" under the Telegraph Act, it does not follow that all the rights and liabilities of such a licensee are governed by the Telegraph Act. A licensee under Electricity Act is not a "telegraph authority" within the meaning of Sec. 3(6) of the Telegraph Act. The remedy of Arbitration under Sec. 15 of the Telegraph Act is available only in case of certain disputes. Remedy under Sec. 15 of the Telegraph Act was not open to the Appellant.

Case remanded to High Court.

AIR 1969 N. S. C. 164 (V 56)

DUA J. (SHELAT, VAIDIALINGAM, JJ. concurring).

The Works Manager, Central Railway Workshop, Jhansi, Appellant v. Vishwanath and others, Respondents.

Civil Appeal No. 1644 of 1966, D/- 9-10-1969.

Factories Act 1948: Sec. 2(1).

"Worker" — Time-keepers — Whether workers — Considering the nature of duties they can be treated workers.

Payment of Wages Act 1936. Secs. 15 & 17. Time-keepers are workers and are entitled to overtime wages.

Interpretation of Statutes

Welfare legislation — Liberal interpretation.

Words and Phrases "Incidental" "whatsoever".

The time-keepers prepare the paysheets of the workshop staff, maintain leave accounts, dispose settlement cases and maintain record for statistical purposes of the staff engaged in the production of Railway spare parts and repairs.

Held, Factories Act was a welfare legislation and should be liberally interpreted. Keeping in view the duties and functions of the respondents they must be treated workers. The definition of "worker" in the Factories Act does not exclude employees entrusted with clerical duties.

The use of word "whatsoever" after the words "any other kind of work" in the definition of "worker" under S. 2(h) of the Factories Act 1934, was redundant. Its deletion in the amending Act has not narrowed down the definition of "worker".

Cases referred to—

(1) Indian Oxygen Ltd. v. Shri Ram Adhar, Civil Appeal No. 1444 of 1966, D/-24-9-1968 (SC).

(2) Nagpur Electric Light and Power Co. Ltd. v. Regional Director Employees State Insurance Corporation, (1967) 3 SCR 92=AIR 1967 SC 1364.

AIR 1969 N. S. C. 165 (V 56)

P. JAGANMOHAN REDDY J. (SIKRI J. concurring).

Kantilal Chandulal Mehta, Appellant v. The State of Maharashtra and others, Respondents.

Criminal Appeal No. 260 of 1968, D/-10-10-1969.

Criminal Procedure Code, 1898 — Sec. 423.

Powers of the Appellate Court in disposing of appeal—Amendment of charge with an opportunity to the accused to meet the same what was ordered by the High Court was not a "new trial".

Criminal Procedure Code: Sec. 535:

Failure of justice — no failure since the opportunity to meet the amended charge was given — no prejudice.

In an appeal against the conviction for misappropriation of money (Sec. 406 I. P. C.), the High Court sent back the case to the trial Court to amend the charge so as to include misappropriation of property also and directed that the accused should be given full opportunity to meet his case. The appeal was kept pending. In the said order the High Court used the word "retrial". The High Court's order was challenged on the ground that the retrial ordered without satisfaction of the prima facie case of entrustment of goods was against the provisions of the Criminal Procedure Code and was grossly prejudicial to the accused.

Held, the order in question was not an order of "retrial". The amended charge arose out of the same transaction and allegations and no further evidence was to be recorded by the prosecution. Such order was within the competence of the High Court under Sec. 423 Cr. P. C.

There was no failure of justice nor any prejudice caused to the accused in spite of the fact that the question of prima facie case on the charge of misappropriation of goods was not decided by the High Court. The accused was afforded opportunity to lead evidence and to meet the amended charge.

Case relied upon —

Thakar Sahab v. Emperor, AIR 1943 PC 192.

AIR 1969 N. S. C. 166 (V 56)

JAGANMOHAN REDDY J. (SIKRI & RAY, JJ. majority)

HEGDE J. AND MITTER J. dissenting

Lennart Schussler and another, Appellants v. The Director of Enforcement and another, Respondents.

Cr. Apps. Nos. 113 & 163 of 1969, D/-14-10-1969.

(A) Indian Penal Code, Sec. 120-B — Conspiracy — Accumulation of foreign exchange in violation of rules regarding repatriation.

Per Majority — Agreement to evade repatriation of foreign exchange and helping the accumulation in a foreign country amounts to conspiracy.

Per Mitter J. — The offence falls under Sec. 21(1) Foreign Exchange Regulation Act & not under Sec. 120-B, I. P. C.

Per Hegde J.:— The charge-sheet does not disclose any conspiracy.

(B) Foreign Exchange Regulation Act, 1949, Sections 4(3), 5(1)(e) & 9, 21(1) — Agreement for evasion of the provisions of the Act.

(C) Mala fides — Complaint not bona fide — Per Hegde J.

A complaint was filed against Appellant No. 1, a Swedish National and Appellant No. 2 Managing Director of M/s. Rayala Corporation, India, under S. 120-B, I. P. C. and Sections 4(3), 5(1)(e) and 9 of the Foreign Exchange Regulation Act, 1949, for conspiring to (illicitly) acquiring & retaining foreign exchange in Sweden. There were two agreements between Appellants Nos. 1 & 2, entered into in 1963 & 1965, whereby, Appellant No. 1 was to help appellant No. 2 to keep the foreign exchange in a Swedish bank & to look after the proper accounting. In pursuance of the conspiracy, Appellant No. 1 after the accumulation of foreign exchange abroad, visited India several times to acquaint appellant No. 2 of the position of his account. Appellant

No. 1 was arrested and detained when the plane touched Indian Airport and stopped due to engine trouble. The Supreme Court held the detention illegal and released him. In *M/s Rayala Corporation (P) Ltd. v. The Director of Enforcement, Cr. Apps Nos 17 & 19 of 1969, D/- 23-7-69 = AIR 1969 NSC 135* in which the proceeding started was against appellant No 2 and Rayala Corporation, for the same offences, the Supreme Court set aside the proceedings as being against the provisions of the Foreign Exchange Regulation Act.

(A) Held, per majority —

Entering into 1965 agreement for the illegal acquisition of foreign exchange in violation of the Foreign Exchange Regulation Act, 1885, and acting in furtherance of it by crediting the exchange in the Swedish bank, visits to India for furnishing statements of account by Appellant No 1, amount to conspiracy within the meaning of Sec. 120-B I. P. C.

Per Mitter J. :— The offence is one relating to an agreement regarding illicit acquisition and withholding repatriation to India of the foreign exchange. It falls under Sec. 21(1) of the Foreign Exchange Regulation Act and not under Sec 120-B, I P. C.

Per Hegde J. :— The allegations show that appellant No 1 was an accessory after the fact and not a co-conspirator.

(B) Per Mitter J. :— A complaint for prosecution under Sec. 23(1)(b) of the Foreign Exchange Regulation Act for violation of S 21(1), cannot be launched unless the adjudicatory proceedings are completed under Sec. 23(1)(A) and the authorities were satisfied that the administrative penalties were not adequate to meet the gravity of the offence. *M/s. Rayala Corporation (P) Ltd. v. The Director of Enforcement, New Delhi, Cr. App Nos, 17 & 19 of 1969, D/- 23-7-69 = AIR 1969 NSC 135.*

(C) Per Hegde J. :— The complaint was not bona fide but was colourable so as to detain Appellant No 1, in India.

Appeal against the order of Madras High Court (holding the complaint valid) was dismissed.

AIR 1969 N. S. C. 167 (V 56)
HIDAYATULLAH C. J (SHELAT,
VAIDIALINGAM, GROVER, RAY JJ.
concurring)

State of Assam & another, Appellants
v. Kuscswar Salkia & others, Respondents.

Civil Appeal No. 358 (NCE) of 1969,
D/- 17-10-1969.

Constitution of India, Arts. 233 & 235 — Promotion of a District Judge — Promotion to the post of an Additional District Judge can be ordered by the Governor, in consultation with the High Court under Art. 233 — Not within the power of the High Court under Art. 235.

High Court of Assam, on a writ of quo warranto, declared that one Rajkhowa the District Judge, Tezpur, Assam was not entitled to hold the office. The High Court held that the promotion of Shri Rajkhowa as Additional District Judge (and then as District Judge) should have been made by the High Court in exercise of its power under Art. 235. The order of promotion issued by the Governor was illegal.

Held, Additional District Judge is also a District Judge for the purpose of Arts. 233 & 235. Promotion to the post of an Additional District Judge as also the promotion of a District Judge is made by Governor under Art. 233. The promotion of a person from junior service to the post of an Additional District Judge, is not a promotion of a person holding post inferior to the post of District Judge, within the meaning of Art. 235. Therefore High Court is not the promoting authority.

AIR 1969 N. S. C. 168 (V 56)
GROVER J. (SHAH, RAMASWAMI, JJ.
concurring.)

Jagad Bandhu Chatterjee, Appellant v. Smt. Nilima Ram and others, Respondents

Civil Appeal No. 2170 of 1967, D/- 17-10-1969.

(A) Indian Contract Act: Sec. 63 — "Waiver" — 'Neither agreement' nor 'consideration' necessary.

(B) Bengal Tenancy Act, 1885. Sec. 26F — Pre-emption — Waiver.

The Appellant who had purchased two pieces of land objected to the respondent's purchase of the adjoining piece of land on the ground of his right of pre-emption under Sec. 26F of the Bengal Tenancy Act. It was held by the trial Court and confirmed by the High Court, that the Appellant had waived his right by acting as a broker in the respondents' transaction.

Held, the contention, that in absence of consideration, there was no waiver, was incorrect. Under Indian law (Sec. 63, Indian Contract Act) neither consideration nor an agreement would be necessary to constitute waiver.

Waman Shrinivas Kini v. Ratilal Bhagwandas, (1959) Supp 2 SCR 217 = AIR 1959 SC 689.

Acquiescence in the sale by any positive act amounting to relinquishment of a pre-emptive right has the effect of such a right.

AIR 1969 N. S. C. 169 (V 56)

SHELAT J. (BHARGAVA, VAIDIALINGAM AND DUA, JJ. concurring)
State of Punjab v. Khemiram.

C. A. No. 1217 of 1966, D/- 6-10-1969.

Punjab Civil Service Rules—R. 3.26(d).

Extension of date of retirement where the disciplinary proceeding is pending.

Suspension — Order of suspension becomes effective from the date of its issuance (communication) and not from the date of actual receipt.

Words and Phrases: "Communication". The order is said to be communicated when the telegrams were despatched to the address of the respondent.

The respondent who was an employee of State of Punjab was on deputation with the Himachal Pradesh Government. His due date of retirement was August 4, 1958. The State of Punjab passed an order of suspension on July 31, 1958 which was communicated to the respondent by a telegram to his home address where he was enjoying leave preparatory to retirement sanctioned by the Himachal Pradesh Government. The Himachal Pradesh Government then cancelled the leave granted. The order of suspension was received by the respondent after his date of retirement i. e. August 4, 1958. The respondent challenged the disciplinary proceedings as bad in law as the order of suspension was received by him after the date of retirement. The question for the decision was whether an order of suspension takes effect when it is made or when it is actually served on and received by the Government servant.

Held, the telegrams transmitted or imparted information to the respondent that he was suspended from a particular date. Once the order is issued and is sent out to the concerned Government servant it must be held to have been communicated to him, no matter when he actually received it.

The State Government has a right to extend the date of retirement if a disciplinary action is contemplated under R. 3.26(d) of the Punjab Civil Service Rules.

Held, suspension was valid.

Cases referred to: (1) Dr. Pratap Singh v. State of Punjab, ILR (1962) Punj 642 = AIR 1962 Punj 298, (2) Raja Harish Chandra v. Dy. Land Acquisition Officer, 1962 (1) SCR 676 = AIR 1961 SC 1500, (3)

Bachhittar Singh v. State of Punjab, (1962) 3 Suppl. SCR 713 = AIR 1963 SC 395, (4) S. Pratap Singh v. State of Punjab, (1964) 4 SCR 733 = AIR 1964 SC 72, (5) State of Punjab v. Sodhi Sukdev Singh, (1962) 2 SCR 371 = AIR 1961 SC 1657, (6) State of Punjab v. Amar Singh, Harika, AIR 1966 SC 1313.

AIR 1969 N. S. C. 170 (V 56)

HEGDE, J. (BHARGAVA J. concurring)

Raghuvir Singh v. Raghu Bir Singh Kushwaha.

C. A. No. 1597 (NCE) of 1968, D/- 7-10-1969.

Representation of the People Act, 1951: Sec. 123(1)(A) — Bribery — Promise of funds for School Building.

Representation of the People Act, 1951: Section 123(4).

Publication of false statement of facts by the election agent.

Oral statements in the meeting against the respondent No. 2's personal character and conduct.

The allegation was that the Maharaja of Gwalior promised certain sums of money for the school building if none of the voters voted for respondent No. 2. The Court found the allegation unbelievable as it was not possible to find out whether anybody has voted for the respondent No. 2 or not. The witnesses on behalf of respondent No. 2 were found to be interested witnesses. They were not believed.

The Court found that the alleged publication of false statements in the newspaper made by the election agent were published before he was appointed as election agent. The allegation that respondent No. 1 had distributed thousands of copies of the said newspaper in the town of Bhind on the date of polling and a day before it was fantastic. The court agreed with the High Court that the witnesses on behalf of respondent No. 2 were either the candidates along with respondent No. 1 or were interested in respondent No. 2. Held, the allegation was not established by satisfactory evidence. The alleged corrupt practice of respondent 1 accusing respondent No. 2 in the public meeting of securing withdrawal of a candidate belonging to Republican Party on payment of bribe of Rs. 2,000 was found to be not proved. The witnesses were not believed for the reasons stated above.

The Court confirmed the findings of the High Court and dismissed the appeal.

AIR 1969 N. S. C. 171 (V 56)

DUA J (SHELAT AND VAIDIALINGAM, JJ. concurring)

Tribhuvan Parkash Nair v. Union of India.

C. A. No. 1568 of 1966, D/- 10-10-1969.
Civil Procedure Code: Sec. 115, Order 47, Rule 1(c).

Displaced Persons (Claims) Act, 1950.

Displaced Persons (Claims) Supplementary Act, 1954: Sec. 5(1)(b).

Displaced Persons (Verification of Claim) Supplementary Rules, 1954: Rule 18.

Revisionary powers of the Chief Settlement Commissioner of the "verified claims"

A claim verified at Rs. 10 lacs as the value of the property left in West Pakistan by the Appellant, was revised to Rs. 15,000 by the Settlement Commissioner, exercising the power of the Chief Settlement Commissioner under Section 5(1)(b) of the Supplementary Act of 1954. It was contended that the Chief Settlement Commissioner had no jurisdiction to revise the order made by the Claims Commissioner exercising the revisionary powers under the 1950 Act.

Held, on plain reading of Sec. 5(1)(b) & in the light of the definition of the expression 'verified claim' the Chief Settlement Commissioner, has suo motu power to revise a claim on which a final order has been passed by the Chief Claims Commissioner under the 1950 Act. The words "revise any verified claims" show that the Parliament intended to entrust the Chief Settlement Commissioner a wide power of scrutiny. The statutory scheme of the Act also supports this view.

Since the best evidence regarding the title and value of property was in Pakistan, the legislature found it necessary in the larger public interest to grant a power to revise and re-assess the verified claims, even though they were confirmed in the revision under the principal Act.

The revisionary powers of the Chief Settlement Commissioner under Section 5(1)(b) read with Rule 18 were wider and more general than the similar power in Section 115 and Order 47, Rule 1(c) of the Civil Procedure Code. The exercise of the revisionary powers in the instant case fell under clause (ii) of Rule 18.

On merits it was held that the revision of the claim by the Chief Settlement Commissioner was not based on any evidence but on conjectures. Case sent back to Chief Settlement Commissioner for a fresh decision according to law.

Case referred to: — M. M. B. Catholics v. The Most. Rev. Mar Poulouse, (1955) 1 SCR 520—AIR 1954 SC 526.

AIR 1969 N. S. C. 172 (V 56)

HIDAYATULLAH C. J. (GROVER, J. concurring)

Lachman Dass v. State of Punjab
Criminal Appeal No. 118 of 1968, D/- 10-10-1969.

Constitution of India — Art. 136 Re-appreciation of evidence — Defence evidence totally ignored by the High Court — Supreme Court can reconsider the evidence in spite of concurrent findings of facts.

Prevention of Corruption Act, S. 5(1)(d) and S. 5(2); Indian Penal Code: S. 161 — Illegal gratification by a public servant.

The appellant who was an accountant with the Municipal Committee Budhleda was convicted for accepting bribe of Rs. 10 from a contractor working for the Municipality. The appellant's contention was that he had recovered Rs. 812 which was an excess payment made to the contractor in the earlier bill and had returned Rs. 1.88 to the contractor and also had passed the receipt. The Executive Officer of the Municipality deposed that there was an excess payment of Rs. 8-12 and that he had ordered the recovery from the contractor. There were two independent witnesses including a Municipal Commissioner who had seen the appellant passing the receipt to the contractor. The account book showed that there was a shortage of Rs. 1.88. All this evidence was brushed aside as false by the High Court and it confirmed the findings of the Special Judge.

Held, this was a fit case to reappreciate the evidence in spite of the concurrent findings of facts of the two Courts. On considering the defence evidence the conviction was set aside.

AIR 1969 N. S. C. 173 (V 56)

VAIDIALINGAM J. (SHELAT AND DUA, JJ. concurring).

City Municipal Council, Mangalore v. Frederic Pals and others.
(C. A. Nos. 1302-1306 of 1968, D/- 13-10-1969).

Mysore Municipalities Act, 1964: Section 382 — Continuation application of the Madras District Municipalities Act, 1920 for certain purposes — Tax assessed on the basis of Madras Act and higher rate of tax prescribed by the Madras Act availed of by the Mysore Municipality. Held, house tax levied not valid.

The Madras District Municipalities Act, 1920 which was applicable to the City of Mangalore before the formation of the new Mysore State was repealed by the

Mysore Municipality Act, 1964 which was further amended in 1966. Section 382(1) and its provisos Nos. 2 and 3 continued the assessment of tax and fees under the Madras Act and also continued the higher rate of tax and fees so long as the new rates were not prescribed by the Mysore Act. The respondent was served with a demand notice for the payment of property tax for the year 1966-67 at Madras rate which was higher than the one prescribed by the Mysore Act. The High Court quashed the assessment as being illegal.

On appeal by special leave the Supreme Court held that provisos 2 and 3 to Section 382(1) of the Mysore Act were not applicable in the instant case as the property tax was not imposed (initially) by the Madras Act.

Held, the assessment lists are meant for one official year as Municipal tax is an annual tax. *Municipal Corporation v. Hira Lal*, (1968) 2 SCR 125 = AIR 1968 SC 642 relied upon. The Solicitor General's contention that the assessment books which were prepared under the Madras Act and which held good for five years, entitled the levy of house tax on the basis of Madras Act, was rejected.

AIR 1969 N. S. C. 174 (V 56)

MITTER, J. (SIKRI, JAGANMOHAN REDDY, JJ. concurring)

State of U. P. v. Siya Ram etc.

Cr. A. Nos. 72, 73, 74 of 1968, D/- 13-10-1969.

Indian Penal Code: Sec. 302, 325 read with S. 34—'Sentence'—Reduction of sentence on the ground of imprisonment already undergone.

The three accused were convicted under Section 302 I. P. C. and sentenced to death for the murder of 'X'. They were also convicted and sentenced under Sections 324 and 325 read with S. 34 I. P. C. for causing hurt to other person. The High Court set aside the conviction of all the three accused on the ground (i) that the medical evidence did not fit in the prosecution case of the use of spear for causing death, (ii) that the time of lodging the First Information Report by one Shiv Singh who was also hurt was incorrect and (iii) there was a delay in medical examination of one Jog Raj who had received injuries at the hands of the accused.

The Supreme Court sent for the spear-head that was recovered from the accused so as to ascertain whether the medical evidence of the Civil Surgeon regarding the injuries was correct or not. The

Supreme Court came to the conclusion that the injuries mentioned in the post-mortem report could have been caused by the said spear-head.

The Supreme Court believed the eye-witnesses and held that the inaccuracy in the mention of the exact time of lodging the F. I. R. as also the delay in the medical examination of Jog Raj had no material bearing so as to come to the contrary conclusion regarding the guilt.

In view of the long interval of time between the Session's trial and hearing before the Supreme Court, the sentence under Section 302 I. P. C. was altered to one of imprisonment for life.

AIR 1969 N. S. C. 175 (V 56)

SIKRI J. (RAY AND JAGANMOHAN REDDY, JJ. concurring)

(HIDAYATULLAH C. J. AND MITTER, J. dissenting)

Smt. Kanta Kathuria v. Manak Chand Surana.

C. A. No. 1869 (NCE) of 1968, D/- 16-10-1969.

Constitution of India: Art. 191 — Office of Profit under Govt. Advocate appointed as a special Govt. Pleader for some arbitration cases — (Per majority) does not hold office of profit.

Representation of the People Act, 1951: Sec. 80.

Representation of the People Act, 1951: Sec. 82 — Parties to the petition. For making person a party he must be a candidate of the same election.

Words & Phrases — "Office"—Appearance of a pleader for Govt. in certain number of cases does not amount to creation of new office (per majority) — Governor's order appointing the appellant as a special Govt. Pleader was the creation of an office (per minority).

Legislative competence—Whether State Legislature can pass a law with retrospective effect for removal of the disqualification — State Legislature competent. (unanimous).

The appellant was appointed as a Special Government Pleader by the Governor of Rajasthan for assisting in the conduct of certain arbitration matters. The fees were also prescribed. She appeared for the State before and after her election on February, 22, 1967. The election was set aside by the High Court on the ground of incurring disqualification under Article 191 of the Constitution as she was holding office of profit under the State Government at the time of her election.

When the appeal against the High Court's order was pending in Supreme Court, Rajasthan Legislative Assembly Members (Prevention of Disqualification) Act 1969 was passed to remove the disqualification of the appellant with retrospective effect. The questions for the decision were (i) whether the appellant was holding office of profit under the State Government and (ii) whether the State Legislature was competent to pass a law removing the disqualification with retrospective effect and (iii) whether the petition was bad for not impleading one Shri Mathur as a respondent.

(i) Held, (Per majority) (SIKRI, RAY, JAGANMOHAN REDDY, JJ) Article 191 (1)(a) of the Constitution creates disqualification for an office and not for a particular person holding the office. Office must be subsisting permanent, substantive position with independent existence and a person who filled it.

(Justice Rawlatt in Great Western Rly. Co v. Bater, (1922) 8 Tax Cas 231. There is no difference between the said definition of Justice Rawlatt and the definitions of "office" followed by Lord Wright and Lord Atkin in *McMillan v. Guests*, 24 Tax Cas 190).

In *Mahadeo v. Shantibhai*, C. A. No. 1832 (NCE) of 1967, D/- 15-10-1968 (SC) the definitions of office, the definition of Lord Wright was followed.

Mahadeo's case, C. A. No. 1832 (NCE) of 1967, D/- 15-10-1968 (SC) distinguished on the ground that it was a case of a panel lawyer with more permanent and abiding relation with the State Government.

The Notification under Order 27, Rule 8(b) appointing a person as a Special Government Pleader as in the instant case does not create an "office" within the mischief of Article 191.

Held, on the above grounds that the petitioner was not disqualified under Article 191 (per minority) (Hidayatullah C. J. and Mitter J): Mrs. Kathuria was not briefed as a lawyer and entrusted with the Government litigation, simpliciter but a special office of a Special Government Pleader under Order 27, Rule 8(b) C P C. was created as there were 26 arbitration cases and more cases were likely to add. Therefore, even according to Rawlatt J.'s definition the appellant was holding an "office". "Office of profit" is a position or place to which certain duties are attached, especially one of a more or less public character. Lord Wright in *McMillan v. Guests*; 1942 AC 561.

II. (Per unanimous Court) — The State Legislature was competent to pass an enactment removing the disqualifica-

tions with retrospective effect. Art. 191 does not take away the competence. Assuming that the appellant had incurred a disqualification the same was cleared by the enactment of the Rajasthan Assembly.

III. It was not necessary to implead Mr. Mathur as a party as he was not a candidate at the same election, in which the appellants and respondents were the contestants.

In terms of the majority opinion the appeal was allowed.

AIR 1969 N. S. C. 176 (V 56)

DUA, J. (RAMASWAMI, J concurring)

Ram Chander Rai and others v. State of Bihar.

Cr Appeals Nos. 22 and 23 of 1969, D/- 16-10-1969

Constitution of India, Art. 136 — Special Leave — Only ground of punishment—Should be granted in exceptional cases — Sentence — Judicial discretion.

Two appellants were convicted under Section 326 I. P. C. and sentenced to rigorous imprisonment for life. Other six appellants were convicted under Section 326 read with Secs 34 and 149 I. P. C. Appellants Nos. 1 and 2 were responsible for cutting the nose and fingers of one Shiv Pujan and other appellants had given blows with lathies.

Held, special leave only on the ground of punishment should be granted only in the exceptional cases where the sentences were unduly harsh and do not advance the ends of justice.

Kapur Chand Pokh Raj v. State of Bombay, AIR 1958 SC 993—1958 Cri LJ 1558

Sentence is a matter of discretion guided by variety of circumstances.

Adamji Umer Dalal v. State of Bombay, (1952) 2 SCR 172—AIR 1952 SC 14—1953 Cri LJ 542.

The sentence of life imprisonment was found to be too harsh and was reduced in 8 years' imprisonment. Sentences of other accused were reduced to four years' imprisonment.

Cases referred to: (1) 17 Bom LR 68—AIR 1915 Bom 120—16 Cri LJ 168

(2) 40 Bom LR 832—AIR 1933 Bom 430—39 Cri LJ 928

(3) ILR 16 Bom 580.

(4) AIR 1915 Lah 395.

AIR 1969 N. S. C. 177 (V 56)

SIKRI J. (P. JAGANMOHAN REDDY J. concurring)

Sheo Nath v. State of Uttar Pradesh.

Cr. App. No. 49 of 1969, D/- 15-10-1969.

Indian Penal Code — Secs. 396, 411 & 412 — Recovery of stolen property from the appellant — By itself not sufficient to convict the accused either for murder or dacoity — The only evidence against the appellant was three cotton lengths recovered — Held, no conviction under Sec. 396 or 412 but only under Sec. 411.

Evidence Act — Sec. 114 (illustration (a)): — Presumption where a person is found to be in possession of stolen property.

The appellant was not named by any eye-witnesses, no witness had claimed to identify him as taking part in the dacoity and the dying declaration did not mention him. High Court relying on illustration (a) to Sec. 114 of the Evidence Act, convicted the appellant under Sec. 396 I. P. C. as he was found to be in possession of three cotton lengths (forming part of the looted property).

The Supreme Court followed the decision in Sanwat Khan v. State of Rajasthan AIR 1956 SC 54 = 1956 Cri LJ 150 which has laid down that it was not safe to draw inference that a person in possession of stolen property was a murderer.

Wasim Khan v. State of Uttar Pradesh, 1956 SCR 191 = AIR 1956 SC 400 = 1956 Cri LJ 790 was distinguished as in that case there was other evidence, apart from stolen property, establishing the connection of the accused to murder.

Held, the accused can be presumed to know that the goods were stolen, but not that they were stolen in the dacoity. Conviction converted to one under Sec. 411.

Bhurgiri v. State, ILR (1954) 4 Raj 476 cited with approval.

AIR 1969 N. S. C. 178 (V 57)

SHAH J. (HEGDE J. concurring)

The Official Receiver, Kanpur, Appellant v. Smt. Laxmi Devi and others, Respondents.

C. A. 2211 of 1966, D/-30-9-1969.

(A) Provincial Insolvency Act 1920, S. 20 — Interim Receiver — Auction of Property (Receiver) — Rule 86, Order 21, Civil P. C. not applicable to such auction sale.

(B) Indian Contract Act — Section 74 — A sum payable for the breach of the auc-

tion sale should not be in the nature of penalty — Liability to extent of actual loss.

An interim receiver appointed under Section 20 of the Provincial Insolvency Act put to auction a house belonging to the insolvent, under Court orders. The respondent was the highest bidder and paid 25 per cent of the amount of the bid under the condition of the auction at the time of the auction. She did not pay the balance within the stipulated period. The amount deposited was forfeited.

Held, the auction was made by the receiver under the Provincial Insolvency Act and not under Order 21 of the Civil Procedure Code. Rule 86 of Order 21 had therefore, no application to the auction sale held by the receiver. The rights and obligations of the Receiver and the respondents were governed strictly by the provisions of the Indian Contract Act.

Forfeiture of 25 per cent of the amount of the auction bid was in the nature of penalty within the meaning of Section 74 of the Indian Contract Act. Since no actual loss was suffered by the receiver the respondent had no obligation to make any payment for the breach. Held, forfeiture was not justified.

AIR 1969 N. S. C. 179 (V 56)

RAY J. (SIKRI, MITTER, HEGDE, JAGANMOHAN REDDY, JJ., concurring)

Kunwar Shri Vir Rajendra Singh, Petitioner v. The Union of India and others, Respondents.

Writ Petn. No. 190 of 1966.

AND

Kunwar Shri Vir Rajendra Singh, Appellant v. The Union of India and others, Respondents.

C. A. No. 1949 of 1966, D/-30-9-1969.

(A) Constitution of India, Art. 366 (22) — Ruler — Right of recognition of the President.

(B) Constitution of India, Art. 19 (1) (f) & Art. 31 — Recognition as a Ruler does not entitle the Ruler to inherit the private property of the ex-ruler — Recognition does not violate Arts. 19(1)(f), 31.

(C) Constitution of India, Art. 14 — Power to recognise the ruler is not arbitrary and unguided.

The petitioner claimed the private property worth Rs. 3 crores belonging to the deceased Maharaja of the former Dholpur State, on the principle of lineal male primogeniture. As there was a dispute, the President appointed a committee for recommending as to who should be recognised as the ruler. His Highness the

Maharaja Shri Rana Hemant Singh was declared as the ruler of Dholpur by the President of India. In challenging the recommendations of the Committee, and the President's Order, the petitioner raised the following contentions—

1. Recognition as a ruler also invests the said ruler with the private property of the ex-ruler. The President's Order violates the property right of the petitioner under Articles 19 and 31.
2. Recognition as a ruler by the President is not permissible under Article 366 (22) which is merely a definition article. Recognition is not the exercise of a political power by the President, and the same is justiciable.
3. Power of recognition is arbitrary and unguided.

Held, recognition does not invest the ruler with the private property of the ex-ruler, it gives him only right to privy purse and other privileges of the office. Petitioner had not established that he was entitled to the private property of the ex-ruler. There was no violation of Arts. 19 (1) (f) and 31.

The words "for the time being is recognised by the President" create the power to recognise a successor to the existing ruler. The words "is recognised by the President" indicate that the power of recognition is embedded and inherent in the clause itself. The words "for the time being" indicate that the President has power not only to recognise but also to withdraw recognition.

The power of recognition is a political power of the President and is not justiciable similar to the matters falling under Art. 363 of the Constitution.

The President had exercised the power by appointing a committee to examine the rival claims. The power of recognition is the exclusive privilege of the President and cannot be challenged as arbitrary.

AIR 1969 N. S. C. 180 (V 56)

HEGDE, J. (SIKRI, MITTER,
RAY, JAGANMOHAN
REDDY, JJ., concurring)

Chandra Bhavan Boarding & Lodging,
Bangalore, Appellant v. The State of
Mysore and another, Respondents.

C. A. No. 1617 of 1967, D/-29-9-1969.

AND

The All Mysore Hotels Association,
Petitioner v. The State of Mysore, Res-
pondent.

Writ Petn. No. 207 of 1967, D/-29-9-1969.

(A) Constitution of India, Art. 14 — Choice of Procedure under S. 5(1)(a) and S. 5 (1) (b) of the Minimum Wages Act, does not give unguided discretion in matters of fixation of minimum wages — No violation of Art. 14

(B) Constitution of India, Art. 19 (1) (g) — Freedom of trade — Prescribed minimum wages do not interfere with the freedom of trade — A trade has no right to continue if it cannot pay minimum wages.

(C) Minimum Wages Act, S. 51 (a) — Government may not appoint a committee under the Section if it is in possession of the adequate data.

(D) Natural Justice—Whether fixing of minimum wages a quasi-judicial function? — No failure of natural justice principle as adequate opportunity was given.

The Government of Mysore by its Notification dated 1st June 1967 fixed minimum wages for different classes of employees in residential hotels and eating houses in the State of Mysore. The Order was challenged on the following grounds—

1. Section 5 (1) of the Act is violative if Art. 14 inasmuch as it leaves unguided discretion with the Government to follow either of the alternative procedures prescribed in Cls. (a) and (b) of that sub-section. It was incumbent on the State Government to appoint a committee for the recommendation of minimum wages. Government's failure has resulted in fixing minimum wages arbitrarily.
2. Minimum wages fixed under the Act interfere with the freedom of trade guaranteed under Art. 19 (1) (g).
3. Failure to observe natural justice principles in the fixation of minimum wages, which is a quasi-judicial function, vitiates the said Order.
4. It was illegal to fix different wages in different industries and to carve out different zones for that purpose. Division into zones was done on irrational basis.
5. The valuation of the food where provided by the employer, was unreasonably low thereby giving undue benefit to the employees.

The power to choose the procedure under Section 5 (1) was not unguided and unregulated. Which procedure should be followed in a particular employment depends on the nature of employment and the information the Government has in its possession minimum wages change according to the standard of living and differ from place to place and industry to industry. It also depends on the collection of considerable data. The Government had consulted the Advisory Committee constituted under Section 7 of the Act. The choice of procedures does not violate Art. 14. The advice of the Com-

mittee appointed under Section 5 (1) (a) is not binding on the Government. If the Government has a sufficient data in its possession to formulate proposals under Section 5 (1) (b) there is no need of appointing a committee.

The observations regarding the validity of Section 5 (1) in the *Edward Mills Co. Ltd. v. State of Ajmer*, (1955) 1 SCR 735 = AIR 1955 SC 35 and *Bijay Cotton Mills Ltd. v. State of Ajmer*, (1955) 1 SCR 752 = AIR 1955 SC 93, Rel. on.

It is not correct to say that the small units in hotel industry would be adversely affected and driven out of trade if the minimum wages are to be paid. The industry or units which cannot pay minimum wages have no right to exist. Freedom of trade does not mean freedom to exploit. Article 19 is not violated.

Natural justice principles relevant for each occasion should be followed even in administrative proceedings. *A. K. Kraipak v. Union of India*, (1969) 2 SCC 262 = AIR 1969 NSC 108. The reasonable opportunity was given to the Appellants in fixing the minimum wages. After the report of the Advisory Committee, the Government may reduce the proposed rates or enhance them in the final order.

Under Section 3 (3), Government has a power to divide the State into several zones and fix different minimum wages for different industries and localities. Fixing of zones was not done on collateral considerations. *M/s. Bhikusa Yamasa Kahatriya v. Sangamner Akola Taluka Bidi Kamgar Union*, (1963) Supp 1 SCR 524 = AIR 1963 SC 1591.

The plea regarding the valuation of food contradicted the principal contention of minimum wages at a higher rate. If the value of food is increased, the minimum wages should also increase. Supply of food is an amenity under S. 22 (2) (v).

AIR 1969 N. S. C. 181 (V 56)

RAMASWAMI J. (SHAH, GROVER, JJ. concurring)

State of Rajasthan v. Pundarik Pushkardutta.

Civil Appeal No. 1622 of 1966, D/-29-9-1969.

(A) Constitution of India, Art. 295:

Liability of a successor State.

(B) Civil Procedure Code, Ss. 36 and 87

(B) — Sanction for action against an ex-ruler.

The respondent Pundarik had filed a suit for the recovery of a sum of Rupees

32,938 against the Government of Rajasthan and the ex-ruler of Shanpura State alleging that the moveable property (gold and silver) belonging to his adoptive father was not returned to him. The property was with the Court of Wards of the Shahpura State. After the merger of State, the property passed to the State of Rajasthan. The High Court of Rajasthan partially allowed the claim against the State of Rajasthan. The claim against ex-ruler of Shahpura was rejected on the ground that the sanction of the Central Government as required by Section 86 read with Section 87 (B) of the Code of Civil Procedure was not obtained by the respondent. The trial Court rejected the claim on the ground that the same was barred under Art. 363 of the Constitution.

The Supreme Court agreed with the High Court and held the evidence was trustworthy. It was an evidence that the State property was intermingled with the personal property of the ruler. It was in evidence that all such property including the gold and silver belonging to the respondent's father passed to the State of Rajasthan as a successor State. The High Court's findings were upheld.

AIR 1969 N. S. C. 182 (V 56)

BHARGAVA J. (HEGDE, J. concurring)

Nazul Ali Molla, etc., Petitioners v. State of West Bengal, Respondent.

Writ Petns. 227 and 228 of 1969, D/-16-9-1969.

(A) Constitution of India, Art. 25 — Preventive Detention Act — Delay of two months in considering the representation of the detenus — Illegal.

(B) Constitution of India, Art. 226 and Art. 32 — Res judicata — Habeas Corpus — Habeas Corpus petition to High Court does not bar a similar petition to the Supreme Court — Respondent not entitled to invoke the principle of res judicata as complete record regarding the petition before the High Court was not produced.

In the Habeas Corpus petition under Art. 32, the petitioners had challenged their detention under Section 3 (2) of the Preventive Detention Act on the ground of unjustifiable delaying the consideration of their representations by the State Government. The State challenged the maintainability of the said petitions on the principle of res judicata as the petitioners had earlier moved the High Court for the same relief.

Held, a petition under Art. 32 of the Constitution for the issue of a writ of

Habeas Corpus is not barred on the principle of *res judicata* if the petition for a similar writ under Art. 226 of the Constitution before a High Court has been decided and no appeal is brought up to the Supreme Court against that decision. Decision of the Supreme Court in *Daryao v State of U P*, (1962) 1 SCR 574 = (AIR 1961 SC 1457) clearly indicates that the principle of *res judicata* does not apply to the petition for Habeas Corpus. The grounds urged before the High Court and the High Court's decision on them was not placed before the Supreme Court. In the circumstances, the Supreme Court held that the State cannot invoke the principle of *res judicata*.

There was no satisfactory explanation for the delay of two months in the consideration of the representation by the State Government. Detention held illegal.

AIR 1969 N. S. C. 183 (V 56)

DUA, J (RAMASWAMI, J. concurring)
Management of M/s. Pradeep Lamps Works v Pradeep Lamp Workers, Karma-chari Sangh and another.

C A. No 482 of 1967, D/-16-10-1969.

The Industrial Disputes Act, 1947: Section 11 — Procedure to be followed by the Tribunal — Shutting management's evidence — Award suffers from infirmity.

Strike and lock-out both illegal — Apportionment of blame — Wages — Half month's wages.

On a reference of an Industrial Dispute the Tribunal held that the strike was unjustified and lock-out after the first day was illegal. During the course of the enquiry the Tribunal granted time to the workers to produce their evidence but refused the adjournment to the management and declared the evidence closed. Without properly apportioning the blame for strike and lock-out the Tribunal awarded one month's wages for the period for which the illegal lock-out continued.

Held, refusal of opportunity to the management to lead its evidence creates infirmities in the Award. But since the evidence which management wanted to adduce related to the apportionment of blame, the Supreme Court came to the conclusion that the blame should be apportioned half to half.

The award was modified to grant the half month's wages on the basis of following cases:—

India General Navigation and Railway Company Ltd. v. Their Workmen, (1960)

2 SCR 1 = AIR 1960 SC 219: India Marine Service Pvt Ltd. v. Their Workmen, (1963) 3 SCR 575 = AIR 1963 SC 522.

AIR 1969 N. S. C. 184 (V 56)

DUA, J. (RAMASWAMI, J. concurring)

State of Gujarat v. Ram Prakash P. Puri and others

Criminal Appeals Nos. 60 & 63 of 1965, D/-16-10-1969.

Criminal Procedure Code, S. 419, Sections 258, 410, 417 & 423 — Joint Appeal in the High Court by the State where several accused persons were jointly tried and acquitted by the Trial Court — Appeal valid.

Bombay High Court Appellate Side Rules 1960, R. 6 — Joint Appeal — Rule not inconsistent with the provisions of Criminal Procedure.

One joint appeal filed by the State against the acquittal of the several accused persons jointly tried was rejected by the Division Bench of the High Court without going into merits. The Full Bench of the said High Court had held in *Lalu Jela v. State of Gujarat*, AIR 1962 Guj 125 = 1962 (1) Cri LJ 714 (FB) that such a joint appeal was maintainable. The Division Bench did not agree with the decision of the Full Bench. According to the Division Bench Section 419, Cr. P. C. along with Sections 258, 410, 417 and 423 put a bar to such a joint appeal.

Held, Rule 6 of the Bombay High Court Appellate Side Rules, 1960 permits a joint appeal. The rule is valid since it is supported by Section 554 (2) (c) Criminal Procedure Code empowering the High Court to frame the Rules. Rules of Procedure are meant to further the cause of justice and therefore, Rule 6 must be construed accordingly. As it is possible for the accused to prefer a joint appeal so should it be possible for the State Government to prefer one appeal. *Rabari Ghela Jadhav v. State of Bombay*, AIR 1960 SC 748 = 1960 Cri LJ 1156 distinguished as the case has nothing to do with the question of joint appeal.

There is nothing in Sections 419, 258, 410 and 423 of the Cr. P. C. to bar the joint appeal.

The Full Bench decision of the Gujarat High Court in *Lalu Jela* case, AIR 1962 Guj 125 = 1962 (1) Cri LJ 714 (FB) was approved.

AIR 1969 N. S. C. 185 (V 56)

HIDAYATULLAH C. J. (GROVER J.
concurring)

The All India Film Corporation Ltd.,
Appellants v. Shri Raja Gyan Nath and
others, Respondents.

Civil Appeals Nos. 2416-2417 of 1966,
D/-26-9-1969.

(A) Transfer of Property Act: S. 76 (a)
— Mortgagee in possession — Duty to act
with ordinary prudence — Granting a
building lease for a long duration no ex-
ercise of prudence — Does not bind the
purchaser on redemption.

(B) Transfer of Property Act — S. 111-C
— Determination of a lease where the in-
terest of the lessor determines — Mort-
gagee-Lessor's interest is determined with
the mortgage — Relationship of landlord
and tenant comes to an end.

(C) Evacuee Interest (Separation) Act,
1951, S. 10 (b) — Mortgagor's property
declared evacuee property—Mortgage can
be satisfied by sale of property under the
Act.

(D) East Punjab Rent Restriction Act,
1949 — Landlord and Tenant — Definition
depends upon a right to receive rent and
duty to pay rent — No application where
lease is determined by the redemption of
mortgage where mortgagee was a lessor.

The mortgagee in possession created a
lease of the mortgage property—a cinema
house in favour of the Appellant No. 1.
The Rent fixed was Rs. 250 per month
and the duration was 5 years, with an
option to the lessee to get it renewed for
a further period of 10 years, on the same
terms. Lessee granted a sub-lease. The
mortgage was redeemed by the sale of the
property under Sec. 10 (b) of the Evacuee
Interest (Separation) Act, 1951, as the
property had been declared evacuee prop-
erty with the mortgagor leaving to
Pakistan. The purchaser's suit for posses-
sion and mesne profit was decreed; and
the High Court confirmed it subject to
reduction of mesne profits.

Held, by virtue of Section 111-C Trans-
fer of Property Act, the relationship of
landlord and tenant came to end with the
determination of mortgage by sale under
Section 10 (b) of the Evacuee Interest
(Separation) Act 1951.

The principle that the acts done bona
fide and prudently by a mortgagee in pos-
session bind his transferee is ordinarily
made applicable to agricultural lands and
has been seldom extended to urban prop-
erty. The exception to this proposition is
that the lease will continue to bind the
mortgagor or persons deriving interest
from him if the mortgagor had concurred
to grant it. The lease in question of long
duration with such a small rent, was not
an act of prudence on the part of mort-
gagee. The purchaser was not bound by
it.

Mere right to receive the rent will not
make the purchaser the landlord and ten-
ant will not be able to invoke the protec-
tion of the East Punjab Urban Rent Res-
triction Act, 1949. The relationship of
landlord and tenant had come to end with
the purchase of the mortgage property and
paying of the debt. Cases relied upon—

1. Mahabir Gope v. Harbans Narain,
1952 SCR 775 = AIR 1952 SC 205.

2. Asaram v. Mst. Ram Kali, 1958 SCR
986 = AIR 1958 SC 183.

AIR 1969 N. S. C. 186 (V 56)

SHAH, J. (RAMASWAMI, GROVER JJ.
concurring)

Smt. Kamla Soni, Appellant v. Rup Lal
Mehra, Respondent.

Civil Appeal No. 2150 of 1956, D/-26-9-
1969.

Delhi Rent Control Act, 1958 — S. 14
(1) (e) — Landlord claiming possession for
bona fide use and occupation—The reason
that the landlord is not used to living in
a place where somebody else is living —
Whether bona fide — Held, the require-
ment is not bona fide.

Appellant's family consists of herself,
her husband and daughter. They live in
a very comodus accommodation of four
bed rooms, drawing room, dining room,
study, verandas converted into rooms & a
garage. The landlord claimed the posses-
sion from tenant as she enjoys high social
status and does not like to stay in the
house in which strangers live.

Held, the claim put forth by landlord
was not a claim of a reasonable man. It
was not bona fide. It is for the Court to
decide whether the claim is bona fide. The
High Court had not excluded the jurisdic-
tion under S. 39 (2) of the Act, in reject-
ing concurrent finding of fact of bona fide
requirement. The question whether "bona
fide" requirements as alleged by the land-
lord falls within the meaning of Sec. 14
(1) (c) is a mixed question of law and fact.

AIR 1969 N. S. C. 187 (V 56)

SHAH J. (RAMASWAMI,
GROVER JJ. concurring)

State of U. P. v. Ramkishan Burman and
others.

Civil Appeal No. 444 of 1966, D/-26-9-
1969.

U. P. Court-fee Act, Schedule II, Cl. 17
(iii) — Section 7 (IV-A).

Suit for a declaration of title to property is not a suit for money or property — Falls under Sch. II, CL. 17 (iii) and not under S. 7 (IV-A)

The Respondent filed a suit against one Radhey Lal for declaration that Radhey Lal had obtained an ex parte decree regarding the ownership of certain properties, by suppressing from the Court that he had admitted Respondent's claim in the properties and had actually entered into compromise with him. The relief sought was a declaration that the respondent and not Radhey Lal was the owner of the said properties. The Civil Judge ordered the Respondent to amend the plaint and to pay the Court-fee of Rs. 3528 instead of Rs. 18/12. According to the Civil Judge (and the Inspector of stamps, the suit was one "for money or property" and not for a mere declaration. Held, the suit was one for a declaration and would fall under

Sch. II, CL. 17 (iii) of the Act and not under Section 7 (IV-A) and no additional stamp duty was payable.

A decree 'for' money or property means a decree for obtaining a decree ordering payment of money or property. The word 'for' means 'for the recovery' (of money or property). It does not mean concerning or relating to. The word "for" in Section 7 (at various places) is not used to mean 'concerning or relating to'.

A decree in invitum is not an "instrument" securing money or other property. Such a decree is a record of the formal adjudication of the Court relating to a claim in the suit. The suit was not for adjudging void or voidable an "instrument" securing money or property.

E N D

them from holding, controlling, managing and regulating cattle fairs at any place in the State of Punjab extends only to cattle fairs strictly so-called, and not to cattle markets. The monopoly declared by the Act does not invest the State with the monopoly to conduct cattle markets, i.e., places where the business of sale or purchase is regularly conducted by private parties and not as a fair. Any attempt made by the Officers of the State claiming to exercise authority under the Act to prohibit cattle markets is without authority of law.

11. The Act also does not invest the State with authority to declare private property of an individual or of a local authority, a fair area. Section 4 (2) enables the Fair Officer to define a fair area, to reserve sites or places for certain facilities, to make temporary allotment for commercial and other purposes and to arrange for watch and ward and for construction of temporary offices. The Cattle Fair Officer is not thereby authorised to hold fairs on lands not belonging to the State. In defining a "fair area" and in making reservation, allotment, construction and arrangements of the nature mentioned in clauses (i) to (v) of sub-sec. (2) of Section 4 the Cattle Fair Officer cannot trespass upon private property. It is implicit in the provisions of the Act that the State will hold cattle fairs on its own lands and not on private lands. The words used in Section 4 are wide and may be capable of the interpretation that the right to hold, control, manage and regulate a cattle fair at any place in the State of Punjab under Section 3 (1) authorises the State to hold, control, manage and regulate fairs in all places including private lands. But it would be reasonable to interpret the Act, so as not to authorise violation of the fundamental rights guaranteed by Articles 19 and 31 of the Constitution. It is implicit in the provisions of Sections 3 and 4 of the Act that the monopoly acquired by the State to hold and manage cattle fairs may be held on property belonging to the State and does not extend to the property of local authorities or private owners.

12. The contention that the provisions of the Act, and especially the definition of "cattle fair" in Section 2 (bb), impose unreasonable restrictions upon the fundamental rights guaranteed under Article 19 (1) (b) and (d) has, in our judgment, no substance. The definition of Cattle Fair in Section 2(bb) does not infringe the

right of citizens under Article 19 (1) (b) to assemble peaceably and without arms, and the right under Article 19 (1) (d) to move freely throughout the territory of India. By the definition clause concourse of twenty-five persons is not prohibited: the Act does not place restrictions upon the freedom of assembly or of free movement either under clause (b) or clause (d) of Article 19 (1). The Act only prohibits an individual or local authority from arranging a gathering of more than twenty-five persons for the purpose specified in the definition of "cattle fair". The restriction for the purpose of making the monopoly effective must be regarded as reasonable within the meaning of clauses (3) and (5) of Article 19.

13. By imposing restrictions upon the right to hold a fair, the citizens are not deprived of their property, and the freedom guaranteed by Article 19 (1) (f) is not infringed. The primary object of the Act is to give a monopoly to the State to hold cattle fairs. As a necessary concomitant of that monopoly, holding of cattle fairs by local authorities and individuals is prohibited. The prohibition flows directly from the assumption of monopoly by the State and falls within the terms of Article 19 (6) of the Constitution. It is a provision of the law creating monopoly "basically and essentially necessary" for creating the State monopoly to prevent other persons from conducting the same business.

14. Our attention was invited to the decision of this Court in State of Bihar v. Rameshwar Pratap Narain Singh, (1962) 2 SCR 382=(AIR 1961 SC 1649) and to a decision of the Madras High Court in Kandiyil Vapia Pudukudi Ramunni Kurup v. Panchayat Board, Badagara, AIR 1954 Mad 754 in support of the plea that a right to hold a fair is property. But those cases have no bearing on the question arising in these petitions. A law which creates a monopoly to carry on a business in the State and thereby deprives the citizens of the right to carry on that business by virtue of Article 19 (6) is not open to challenge on the ground that it infringes the fundamental right guaranteed by Art. 19 (1) (g). The law will not also be exposed to attack on the ground that the right to carry on business is property, for the validity of restrictions on the right to carry on occupation, trade or business or to practise any profession must be adjudged only in the light of Article 19 (6). In any event the presumption of reasonable-

ness of a statute creating a monopoly in the State may come to aid not only in respect of the claim to enforce the right under Article 19 (1) (g) but under Article 19 (1) (f) as well.

15. Section 15 which authorises the State to call upon a Panchayat Samiti or a Municipal Committee, within whose jurisdiction the fair is to be held to deposit in the Cattle Fair Fund the prescribed amount, not exceeding one thousand rupees to cover the initial expenses of the fair and compelling the local authority to abide by the directions, is invalid. It is clearly a provision for deprivation of property. Reasonableness of such a provision was not set up either in the affidavit or in the arguments before us. It is true that under Section 17 (d) out of the Cattle Fair Fund the amount which has been recovered from a local authority may be reimbursed, but the provision authorising the State to call upon a local authority to pay a sum of money towards the Cattle Fair Fund is in our judgment, unreasonable and must be declared invalid. The learned Attorney-General appearing on behalf of the State of Punjab did not seek to support the provision.

16. To sum up, the power which the State Government may exercise to declare a fair area and to make provision for reservation of sites, allotment of sites temporarily for commercial or other purposes, and to arrange for watch and ward and to construct temporary offices may be exercised only on lands belonging to the State. No such power may be exercised in respect of lands owned by local authorities or individuals. The monopoly which is acquired by the State by S. 3 is a monopoly to hold, control, manage and regulate a fair and not a cattle market business. An attempt to prevent persons from conducting the business of cattle markets and from holding, controlling, managing and regulating cattle markets is unauthorised, for by Section 3 only private individuals, local authorities and associations incorporated or not are prohibited from holding cattle fairs and not cattle markets.

17. In the light of these principles we proceed to examine the claims made in the five petitions.

18. The Fair Officers have not made any declaration of fair areas which include the lands of the petitioners in Writ Petitions Nos. 362, 443 and 444 of 1963. In respect of the lands of the petitioners in

Writ Petitions Nos. 295 and 365 of 1963 a notification defining a fair area has been made.

Writ Petition No. 295 of 1963

19. This petition is filed by the Municipal Committee, Amritsar. By letter D/- August 26, 1968, the Deputy Commissioner, Amritsar, informed the Municipal Committee that a cattle fair was intended to be held as scheduled on the "Cattle Fair Ground (Mal Mandi)" under the management of the District Fair Officer, and the Municipal Committee was required to arrange to supply water and electricity, to make suitable sanitary arrangements, to deposit the income from Baisakhi Cattle Fair in Government Treasury in Cattle Fair Fund and to deliver the record in that behalf to the Fair Officer. The Section Officer, District Amritsar, also served an order, purported to be made under S. 4 (2) (i) read with S. 2 (d) of the Punjab Cattle Fairs (Regulation) Act, 1967, specifying the fair area, for the purpose of controlling, managing, regulating and holding the Cattle Fair from October 16, 1968 to October 27, 1968, at Ram Talui Ki Mandi described as "2 Kilometres from the main building situated in Cattle Fair Ground at Ramtabi (Mal Mandi) Amritsar".

20. A Municipal Committee is not, according to the decisions of this Court, a "citizen" within the meaning of Article 19. The Municipal Committee is, therefore, not entitled to claim protection of any of the fundamental rights under Article 19. But the State is incompetent to declare land belonging to the Municipal Committee as falling within the fair area, and to take possession of that land in exercise of the power conferred by the Act, without providing for payment of compensation guaranteed by Article 31 (2). The Municipal Committee is by order of the Fair Officer deprived of its property for the duration of the fair. The Act does not authorise the holding of cattle fairs on the land of local authorities, individuals or associations. A direction to make Municipal property available for holding a cattle fair by the State is a threat to requisition municipal property without authority of law and without payment of compensation, and must be deemed unauthorised. Section 23 of the Act which gives the provisions of the Act a paramount operation, notwithstanding anything inconsistent therewith contained in any other law for the time being in force will not supersede a constitutional guarantee.

21. It was argued on behalf of the State that by the order only directions to control, manage and regulate the fair held on behalf of the Municipal Committee were intended to be given. But that is not the effect of the order passed by the Deputy Commissioner. The Deputy Commissioner informed the Municipal Committee that possession of its land should be handed over so that the State may be able to hold the fair under the provisions of the Punjab Cattle Fairs (Regulation) Act, 1967. Section 3 (1) is intended only to provide for a monopoly in the State to hold cattle fairs and to control, manage and regulate such fairs. The demand made by the Fair Officer asking the Municipal Committee to supply water, electricity and to make sanitary arrangements and make the staff, articles and offices of the Municipal Committee available to the Fair Officer is not warranted by any provision of the Act. The notification issued by the Fair Officer defining the fair area inclusive of the land of Mal Mandi is, therefore, unauthorised. The demand made by the Fair Officer for assistance of the "staff, articles and offices of the Municipality" for holding the fair and the demand for supply of water and electricity and making suitable sanitary arrangements is also uncalled for and unauthorised. The directions must, therefore, be declared invalid.

Writ Petition No. 362 of 1968

22. The petitioner is Sardara Singh. He claims that he is in lawful possession of a piece of land situated in village Hussainpur, Tahsil and Dist. Rupar (Punjab) and that for the last ten years he holds a cattle market on that piece of land from the first to the fourth of every month. He also asserted that he had been holding cattle markets on the lands in his lawful possession at Kurali, Anandpur, Saheb, Marunda (District Rupar) within the State of Punjab. According to the petitioner, for the purpose of holding cattle markets on the lands in his occupation at Hussainpur, the petitioner had constructed a well for providing water to the cattle, with sheds, and mangers. He further claimed that he provides chaff-cutters, tents, charpais and all other amenities which are essential for the cattle and the merchants. It appears from the averments made by the petitioner that he is holding cattle fairs. No declaration was made defining any fair area which included the lands of the petitioner. The State, for reasons already set out, is not entitled to hold a cattle fair on the land in the occupation of the petitioner without providing for

compensation as guaranteed under Art. 31 (2). But on that account the petitioner is not entitled to hold a cattle fair even on his own lands.

Writ Petition No. 365 of 1968

23. The petitioner is Jagtar Singh. He claims that he has obtained for the period April 1, 1968 to March 31, 1969, from the Municipal Committee, Amritsar, a piece of land on lease called the Ahata near the "Butcher-Khana" known as "Adda Bakar Mandi." The land is used for an enclosure for sheep and goats brought for sale. The petitioner states that he has constructed near the Butcher-Khana ten kothas around a vacant piece of land for enclosure of goats and sheep brought by prospective sellers and has also constructed some rooms where he provides board and lodging to the merchants who come to the Adda Bakar Mandi in connection with their business. He has set out in his petition the manner in which the business is carried on and the charges made by him. It may be sufficient to mention that the petitioner claims that he conducts a cattle market and not a cattle fair.

24. The Fair Officer issued a declaration under Section 4 (2) (i) read with Section 2 (d) of the Punjab Cattle Fairs (Regulation) Act, 1967, specifying "2 Kilometres from the main building situated in the Cattle Fair Ground at Bakar Mandi outside Lahori Gate" as a fair area for the purpose of controlling, managing, regulating and holding the Cattle Fair, Amritsar, at Bakar Mandi outside Lahori Gate. The Fair Officer also addressed a letter to the petitioner dated October 25, 1968, informing him that the Punjab Government had exclusively undertaken the work of holding, managing, controlling and supervising the Cattle Fairs under Section 3 of the Punjab Cattle Fairs (Regulation) Act, 1967, and that the petitioner who was carrying on the business of holding a cattle fair should stop running the Bakar Mandi. The Fair Officer informed the petitioner that the ground of the Bakar Mandi had already been specified as fair area by him and on that account the petitioner was prohibited to work as commission agent, unless he got a broker's licence under the Act.

25. The land in respect of which the declaration has been made as fair area is the land of the Municipal Committee, of which under a licence or a lease the petitioner is in possession. For reasons which we have already set out, the Government of Punjab is not competent to declare the

land of the Bakar Mandi a fair area. The notification declaring the Bakar Mandi as fair area is, therefore, invalid.

26. By Section 3 of the Act the cattle fairs can be held in the State of Punjab only by the State and by no other person. But prima facie the business carried on by the petitioner is in the nature of a market for sale of sheep and goats brought by intending sellers for slaughter. Such a place cannot be called a fair

27. It was urged on behalf of the State that since the petitioner was collecting brokerage and carrying on the business of a broker, he was bound to take out a licence under Section 9 of the Act. But a person carrying on his business within the fair area lawfully declared is required to obtain a licence, but not in respect of his business in a cattle market.

28. The petition filed by Jagtar Singh must, therefore, be allowed and the order declaring the petitioner's land as fair area and the intimation calling upon him to stop his business of cattle market is unauthorised.

Writ Petitions Nos 443 & 444 of 1968

29. The petitioners in these petitions are Naran Singh and another. They claim that they are in "legal possession" of different pieces of land taken on lease within the State of Punjab at Khanna, Doraha (District Ludhiana), Sunam (District Sangrur) and also in other Districts where they have been holding cattle markets for the last many years. They claimed that they provide the prospective sellers and purchasers facilities like cots for resting, drinking water, sheds, mangers, chaff-cutters, tents, light, chowkidars, dry fodder and all other essential amenities. They further claimed that the intending vendors come to their lands with cattle and sell the cattle, bargains being struck through brokers in the market arranged by the petitioners on those pieces of land.

30. It is not clear from the averments made in the petitions whether the so-called market is of the nature of a fair. The petitioners are prohibited from holding or conducting a cattle fair, since the enactment of Punjab Act 6 of 1963. The lands belonging to the petitioners have not been included in a cattle fair area under the notification issued by the Fair Officer. Without deciding the question whether the business carried on by the petitioners is in the nature of a fair or a market, we declare that the petitioners are not entit-

ed to carry on the business of a cattle fair and the relief claimed by them in Paragraph 21 (b) cannot be granted. We deem it necessary to add that the petitioners are not prohibited from carrying on the business of cattle market on their own lands.

31. There will be no order as to costs in these petitions.

SSG/D.V.C.

Order accordingly.

AIR 1969 SUPREME COURT 1108
(V 56 C 201)

(From Punjab)*

S. M. SIKRI, R S BACHAWAT AND
K. S. HEGDE, JJ.

Delhi Administration and others, Appellants v. Chanan Shah, Respondent.

Civil Appeal No. 277 of 1966, D/- 12-2-1969.

Civil Services — Punjab Police Rules (1934), Chapter XVI, Rules 38 and 28 — Complaint against Assistant Sub-Inspector of Police for receiving illegal gratification — Superintendent of Police (City) making summary inquiry and passing an order of censure — Deputy Inspector-General, under Rule 28, setting aside the order and ordering to deal the matter departmentally — Superintendent of Police (Central District), to whom inquiry was entrusted, asking for the sanction of District Magistrate to proceed departmentally — District Magistrate not informed of the previous order of Superintendent of Police (City) and its setting aside by Deputy Inspector General — District Magistrate sanctioning to proceed departmentally without recording any reasons — Departmental action taken against the Assistant Sub-Inspector is invalid as there has been no substantial compliance with the provisions of rule 38 — The District Magistrate gave his sanction without recording any reasons and without applying his mind to the requirements of Rule 38 — It is for the District Magistrate to decide who should investigate the case — No investigation of any kind was made under his direction — The inquiry held by the Superintendent of Police (City) was not authorised by the District Magistrate nor did it receive his approval. AIR 1961 SC 751 and AIR 1962 Punj 38, Ref. (Para 9)

* (L. P. A. No. 68-D of 1961, D/- 23-1-1963—Punj at Delhi.)

IM/IM/AS95/69/D

Cases Referred: Chronological Para
(1962) AIR 1962 Punj 38 (V 49) =
63 Pun LR 860, Jagannath v. Sr.
Supdt. of Police, Ferozepure 8
(1961) AIR 1961 SC 751 (V 48) =
(1961) 2 SCR 679, State of Uttar
Pradesh v. Babu Ram Upadhya 8

Dr. V. A. Seyid Muhammad, Senior Advocate (M/s. R. N. Sachthey and B. D. Sharma, Advocates with him), for Appellants; M/s. Frank Anthony and Harbans Singh, Advocates, for Respondents.

The following Judgment of the Court was delivered by

BACHAWAT, J.: The respondent was recruited as a constable in the police service in the undivided Punjab on April 3, 1934. By April 1946 he was promoted to the rank of Assistant Sub-Inspector. In 1950, he was posted at Delhi. On August 26, 1955 he was confirmed in this rank by the Senior Superintendent of Police, Delhi.

2. In the beginning of 1957 an accusation was made against him that while investigating a case registered by him against one Mohammad Jamil under First Information Report No. 1322 dated November 25, 1956 he had taken one Rame Shah to the Lahori Gate police post without formally arresting him and received from him by way of illegal gratification Rs. 100/- which was paid on his behalf by one Roshan Lal. On coming to know of this complaint Sri A. C. Chaturvedi, Superintendent of Police (City), Delhi, made some kind of summary inquiry into the matter and on 28-2-1957 passed the following order:—

"Reference. complaint received from S. P.'s Office Vide No. 1212/GB, dated the 12th of January 1957.

Integrity of S. I. Chanan Shah No. 112/D was found to be doubtful in connection with case F.I.R. 1322 dated 25-11-1956 under Section 20.11.78 of P. B. Kotwali against one Mohd. Jamil a Pakistani National. He is hereby censured." On a review of this order under rule 16.28 of the Punjab Police Rules, 1934, Sri N. S. Saxena, the Deputy Inspector General of Police passed the following order on June 12, 1957:—

"I have gone through the inquiries made by the city police as well as by the Crime Branch and feel that the S. I. should have been dealt with departmentally for his misconduct and by which course the S. I. could have a chance to prove his innocence. I therefore order under P. S. 16-28 that the censure awarded to offi-

ciating Chanan Shah be cancelled and he should be dealt with departmentally. The departmental file will be prepared by Sri B. L. Gulati, I. P. S., Superintendent of Police (Traffic). The relevant papers may be sent to him."

The conduct of the departmental inquiry was entrusted to Sri D. C. Sharma, Superintendent of Police, Central District, Delhi. On August 20, 1957 Sri Sharma wrote the following D. O. letter No. 2165-C to Sri C. B. Dube, District Magistrate, Delhi:—

"1: On 25-11-56, S.I. Chanan Shah No. 112/D while posted as I/c P. P. Lahori Gate recovered a revolver with 6 rounds from the possession of one Mohd. Jamil alias Mohan Lal of Lahore while the latter was staying at Regal Hotel. A case FIR No. 1322 dated 25-11-56 u/s. 20.11.78 Arms Act was accordingly registered at P. S. Kotwali. The investigation of this case was carried out by S. I. Chanan Shah.

2. During the course of investigation, the S. I. raided the house of one Rame Shah owner of shop No. 1387 Lajpat Rai Market. Although nothing incriminating was found, yet he took Rame Shah to the P. P. where it is alleged, he (Rame Shah) was threatened with arrest and later on let off at midnight after he had paid a sum of Rs. 100 through one Roshan Lal by way of illegal gratification.

3. In the course of inquiry it is felt that there is no sufficient evidence to prosecute the S. I. in a court of law under the Prevention of Corruption Act, though he can be successfully dealt with departmentally.

4. In view of the above it is proposed that he may be dealt with departmentally instead of filing judicial proceedings against him. Necessary approval under P. P. Rule 16.38 may kindly be accorded."

A copy of the letter was produced in this Court. On August 21, 1957 Sri C. B. Dube, District Magistrate, Delhi, sent the following letter to Sri D. C. Sharma:—

"Please refer to your D. O. letter No. 2165-C dated the 20th August, 1967.

Sanction is hereby accorded to the taking of departmental action against S. I. Chanan Shah as required under Punjab Police Rule 16.38."

3. On November 15, 1957 Sri Sharma drew up a formal charge-sheet. On the basis of the charge-sheet he held an inquiry and found that the allegations against the respondent were substantially true. On March 18, 1958 Sri Sharma

served a notice on the respondent to show cause why he should not be dismissed. After considering his reply and hearing him personally Sri Sharma passed an order on April 12, 1958 dismissing him from service. An appeal filed by him against the order was rejected by the Deputy Inspector General on February 14, 1959, and a revision petition filed by him was rejected by the Inspector General on June 5, 1959.

4. On August 18, 1959 the respondent filed a writ petition in the Punjab High Court for quashing the dismissal order. One of the grounds taken by him was that the departmental inquiry was made in contravention of Chapter 16 rule 38 of the Punjab Police Rules, 1934. Gosain, J. dismissed the petition. The respondent filed a Letters Patent Appeal against this order. A Divisional Bench of the High Court allowed the appeal and set aside the order dismissing the respondent from service. The Divisional Bench held that the dismissal order could not be sustained in view of the fact that the inquiry was made in contravention of Chapter XVI, Rule 38. The present appeal has been filed by the Delhi Administration after obtaining special leave.

5. Chapter XVI of the Punjab Police Rules deals with punishments. Rule 1 prescribes the punishments and provides that "no police officer shall be departmentally punished otherwise than as provided in these rules." Rule 23 provides for prompt record of complaints against a police officer made by a member of the general public and the transmission of the record to the Superintendent of Police or other gazetted officer under whose immediate control the officer who has recorded the complaint is serving. If such officer is of opinion that the allegations in the record constitute a prima facie case for inquiry, a departmental inquiry as in Rule 24 must be held. Rule 38 specially deals with certain types of complaints against a police officer. Sub-rules (1) and (2) of Rule 38 are as follows—

"(1) Immediate information shall be given to the District Magistrate of any complaint received by the Superintendent of Police, which indicates the commission by a police officer of a criminal offence in connection with his official relations with the public. The District Magistrate will decide whether the investigation of the complaint shall be conducted by a police officer, or made over to a selected Magistrate having 1st class powers.

(2) When investigation of such a complaint establishes a prima facie case, a judicial prosecution shall normally follow, the matter shall be disposed of departmentally only if the District Magistrate so orders for reasons to be recorded. When it is decided to proceed departmentally the procedure prescribed in rule 16.24 shall be followed. An officer found guilty on a charge of the nature referred to in this rule shall ordinarily be dismissed."

6. The provisions of sub-rules (1) and (2) of Rule 38 are attracted in cases of complaint received by the Superintendent of Police, indicating the commission by a police officer of a criminal offence in connection with his official relations with the public. In such a case, the Superintendent of Police is required to bring the complaint to the notice of the District Magistrate who is to decide whether the investigation of the complaint should be made by a selected Magistrate having first class powers or should be left to a police officer. If the investigation discloses a prima facie case, a judicial prosecution should normally follow unless for reasons to be recorded in writing the District Magistrate directs that the matter should be disposed of departmentally.

7. In the present case, the complaint received by the Superintendent of Police (City) Delhi indicated the commission by the appellant of a criminal offence in connection with his official relations with the public. The complaint fell within R. 38(1) and should have been dealt with accordingly. Nevertheless there was no investigation of the kind prescribed by rule 38(1). The District Magistrate did not direct any preliminary investigation nor was any prima facie case against the appellant as a result of such an investigation established.

8. In *State of Uttar Pradesh v. Babu Ram Upadhyaya* (1961) 2 SCR 679 at pp 711, 727-728 = (AIR 1961 SC 751 at pp 765, 772) the Court by majority held that the provisions of paragraph 486 rule I of the U. P. Police Regulations were mandatory and that a departmental action against the police officer in disregard thereof was invalid. The minority held that the paragraph was directory and as there was substantial compliance with its provisions the departmental proceedings were not invalid. In *Jagan Nath v. Sr. Supdt. of Police, Ferozepur* AIR 1962 Punj 38 the Punjab High Court held that the provisions of rule 16.33 (1) and (2) were mandatory and that a departmental inquiry held without following its provisions was illegal.

9. It is not necessary to decide in this case whether the provisions of Rule 16.38 of the Punjab Police Rules are mandatory or directory. Even assuming that the rule is directory we find that there has been no substantial compliance with its provisions. The complaint fell within rule 16.38, and it was for the District Magistrate to decide who should investigate the case. No investigation of any kind was made under his directions. Without obtaining his directions, the Superintendent of Police held an inquiry and passed an order of censure. The order was set aside by the Deputy Inspector-General. Thereafter by D. O. letter No. 2165-C, the Superintendent of Police asked for the sanction of the District Magistrate to proceed departmentally. Even at this stage, the District Magistrate was not informed that the Superintendent of Police held an inquiry and passed an order of censure and that, his order was set aside by the Deputy Inspector-General. The inquiry held by the Superintendent of Police was not authorised by the District Magistrate nor did it receive his approval. The District Magistrate gave his sanction without recording any reasons and without applying his mind to the requirement of Rule 16.38. In the circumstances, we are constrained to hold that the departmental action taken against the respondent is invalid.

10. In the result, the appeal is dismissed with costs.

CWM/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 1111 (V 56 C 202)

(From Jammu and Kashmir:

AIR 1969 J. & K. 16)

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Sheikh Abdul Rehman, Appellant v.
Jagat Ram Aryan, Respondent.

Civil Appeal No. 1527 of 1968, D/- 11-2-1969.

Constitution of Jammu and Kashmir (1956), S. 51 (a) — J. & K. Representation of the People Act (4 of 1957), S. 47 (2) (a) — Filing of nomination paper — Failure to subscribe oath or affirmation before authorized officer — Nomination paper is liable to be rejected — (Representation of the People Act (1951), S. 36 (2) (a)).

IM/IM/A884/69/D

The failure of a person prior to filing the nomination paper to make or subscribe oath or affirmation before the authorised officer as required under S. 51 (a) disqualifies him to be chosen to fill the seat in the Legislature under S. 51 (a). The nomination paper of such person is liable to be rejected under S. 47 (2) (a) of the J. & K. Representation of the People Act and the mere fact that signed oath forms are filed along with the nomination paper makes no difference. AIR 1969 J. & K. 16, Affirmed; AIR 1968 SC 1064, Rel. on. (Para 14)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1064 (V 55)=
(1968) 2 SCJ 629, Pashupati Nath
v. Harihar Prasad Singh 24

M/s. R. N. Bhalgotra and S. S. Khanda, Advocates, for Appellant; M/s. R. K. Garg, S. C. Agarwal and D. P. Singh, Advocates of M/s. Ramamurthi and Co., and Miss S. Chakravarti Advocate, for Respondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: This appeal is directed against a judgment of a Single Judge of the High Court of Jammu and Kashmir dismissing an election petition for setting aside the election of the respondent Jagat Ram Aryan to the legislative assembly of the State of Jammu & Kashmir from the Bhaderwah scheduled caste assembly constituency.

2. The last date for filing the nomination papers was January 20, 1967. The date of scrutiny of nomination papers was January 23, 1967. The date of poll was February 21, 1967. The date of counting and declaration of result was March 1, 1967. Several candidates filed their nomination papers from this constituency. The candidates were: (1) Jagat Ram Aryan, (2) Faquir Chand, (3) Narain Dass, (4) Nikka Ram, (5) Bhagat Ram, (6) Om Prakash and (7) Swami Raj. The first five filed their nomination papers on January 23, 1967 before the Assistant Returning Officer, Kahan Singh, a Tehsildar of Bhaderwah. On scrutiny of the nomination papers, the Returning Officer Abdul Gani accepted as valid the nomination papers of Jagat Ram and Faquir Chand and rejected the nomination papers of the remaining candidates for various reasons. At the poll the contest was between Jagat Ram, the Congress candidate and Faquir Chand, the National Conference candidate. Respondent Jagat Ram having secured larger number of votes was declared elected.

3. The appellant, a voter in the constituency, filed the election petition for setting aside the respondent's election on the ground that the nomination papers of Narain Dass, Nikka Ram and Bhagat Ram were improperly rejected. The High Court found that the nomination paper of Bhagat Ram was properly rejected and this finding is no longer challenged.

4. The nomination paper of Nikka Ram was rejected on three grounds (1) he did not make and subscribe the oath or affirmation as required by Section 51 (a) of the Jammu and Kashmir Constitution, (2) he was not a member of a scheduled caste and (3) his father's name was not correctly shown in the electoral rolls. The nomination paper of Narain Dass was rejected on two grounds (1) he did not make and subscribe the oath or affirmation as required by Section 51 (a) and (2) he was not a member of a scheduled caste. The High Court found that both Narain Dass and Nikka Ram were members of the scheduled caste "Megh". It also held that the error in the electoral roll with regard to the name of Nikka Ram's father was not a ground for rejecting his nomination paper having regard to Section 44 (4) of the J & K Representation of the People Act, 1957. The High Court also rejected the additional contention that Narain Dass had not made a deposit of Rs. 125/- in conformity with Section 45 (2) of the Act. All these findings are no longer challenged.

5. The only point now in issue is whether Narain Dass and Nikka Ram made and subscribed the oath or affirmation as required by Section 51 (a) of the J. & K. Constitution. Section 51 (a) provides,

"A person shall not be qualified to be chosen to fill a seat in the legislature unless he—

(a) is a permanent resident of the State, and makes and subscribes before some person authorised in that behalf by the Election Commission of India an oath or affirmation according to the form set out for the purpose in the fifth Schedule"

6. The Returning Officer and the Assistant Returning Officer were authorised in this behalf by the Election Commission of India by notification No. 3/4 J & K/65 as the persons before whom the oath or affirmation could be made and subscribed. The prescribed form of oath or affirmation to be made by a candidate of the State legislature is—

"I, A. B., having been nominated as a candidate to fill a seat in the Legislative

Assembly, (or Legislative Council) do swear in the name of God/solemnly affirm that I will bear true faith and allegiance to the Constitution of the State as by law established and that I will uphold the sovereignty and integrity of India."

7. Section 44 of the J. & K. Representation of the People Act, 1957 provides for presentation of nomination papers and prescribes certain requirements for a valid nomination. Section 45 provides for deposits. Section 46 deals with notice of nominations and the time and place for their scrutiny. Section 47 (2) (a) reads—

"The returning officer shall then examine the nomination papers and shall decide all objections which may be made to any nomination, and may, either on such objection or on his own motion, after such summary enquiry, if any, as he thinks necessary, reject any nomination on any of the following grounds—

(a) that on the date fixed for the scrutiny of nominations the candidate either is not qualified or is disqualified for being chosen to fill the seat under any of the provisions of Sections 51 and 69 of the Constitution and Part VI of this Act, ..."

8. Form 2A of the J. & K. Representation of the People (Conduct of Election and Election Petition) Rules, 1957 prescribes the form of nomination paper for election to the legislative assembly.

9. It is common case that along with their nomination papers both Narain Dass and Nikka Ram filed oath forms signed by them. The appellant's case is that at the time of the presentation of their nomination papers both Narain Dass and Nikka Ram made oaths and signed the oath forms in the presence of the Assistant Returning Officer. In support of this case, the appellant examined Narain Dass, Nikka Ram, Abdul Qayum and Abdul Rehman. The respondent's case is that Narain Dass and Nikka Ram did not make or subscribe any oath or affirmation before the Assistant Returning Officer, that the oath forms had been filled up and signed before they were presented to him and were not signed in his presence. In support of his case the respondent examined Kahan Singh, the Assistant Returning Officer, and Abdul Gani, the Returning Officer. The High Court accepted the respondent's case.

10. It should be remembered that the requirement of making and subscribing an oath or affirmation was inserted in Section 51 (a) of the J & K. Constitution by the Constitution Sixth Amendment Act

1965. There is ground for believing that Narain Dass and Nikka Ram were not aware of this provision and for this reason they omitted to make or subscribe any oath or affirmation before the Assistant Returning Officer.

11. Our attention was drawn to Instruction No. 7 (7) in Chapter II at p. 19 of the Handbook for Returning Officers, issued by the Election Commission, India, for General Elections, 1967. The aforesaid instruction was as follows:—

“The oath or affirmation has first to be made and then signed by the candidate before the authorised officer. It should be borne in mind that mere signing on the paper on which the form of oath is written out is not sufficient. The candidate must make the oath before the authorised officer. Accordingly he will ask the candidate to read aloud the oath or affirmation in English or the regional language and then to sign and date the paper on which the oath or affirmation is written. In the case of illiterate persons who want to contest elections, and who cannot properly make and subscribe the oath or affirmation the authorised officer, should read out the prescribed oath and ask the candidate to repeat the same and thereafter take his thumb impression on the form on which the oath is printed or cyclostyled in token of his having subscribed the oath. The authorised officer should endorse on this paper that the oath or affirmation has been made and subscribed before the candidate (sic) on that day. He will immediately furnish to the candidate a certified copy thereof keeping a copy for year (sic) record. The candidate will produce this copy as evidence before you at the time of scrutiny of nomination papers. This copy will be given to the candidate forthwith without his applying for it, nor any fee be charged for it.”

Kahan Singh the Assistant Returning Officer was not conversant with these instructions. He did not ask either Narain Dass or Nikka Ram to read the oath or to sign the oath form in his presence. But the breach of these instructions does not entitle them to say that they had made and subscribed the oath before the Assistant Returning Officer when in fact they did not make or subscribe the oath before him.

12. It is admitted by the appellant that the oath forms filed by Narain Dass and Nikka Ram did not bear any endorsement of the Assistant Returning Officer stating that the oath or affirmation had

been made and subscribed before him nor was any certificate of such endorsement furnished to them. The absence of the endorsement on the oath forms tend to suggest that no oath or affirmation was made and subscribed by them before the Assistant Returning Officer. Neither Narain Dass nor Nikka Ram could produce before the Returning Officer, Abdul Gani any evidence of their making and subscribing the oath or affirmation. Abdul Gani gave them an opportunity to produce affidavits in proof of this fact but they did not file any affidavit or any other evidence before him. The appellant examined witnesses to prove that attempts were made to file such affidavits, but the High Court rightly rejected the testimony of these witnesses. The materials on the record corroborate the testimony of Kahan Singh, the Assistant Returning Officer that Narain Dass and Nikka Ram did not sign the oath forms in his presence and did not make the oath or affirmation before him. Narain Dass and Nikka Ram were Jan Sangh candidates. Abdul Qayum and Abdul Rehman were their party men. All of them were interested witnesses. Having regard to all the materials on the record it is impossible to prefer their testimony to that of Kahan Singh. In agreement with the High Court we hold that neither Narain Dass and Nikka Ram signed the oath forms before the Assistant Returning Officer nor did they make the oath or affirmation before him.

13. On January 23, 1967 both Narain Dass and Nikka Ram filed with the Assistant Returning Officer signed and filled up oath forms along with their nomination papers. In our opinion, this was not sufficient compliance with the requirement of Section 51 (a).

14. In Pashupati Nath v. Harihar Prasad, AIR 1968 SC 1064 this Court held that the nomination paper was liable to be rejected under Section 36 (2) (a) of the Representation of the People Act, 1951 corresponding to Section 47 (2) (a) of the J. & K. Representation of the People Act, 1957 if the qualification required by Article 173 (a) of the Constitution corresponding to Section 51 (a) of the J. & K. Constitution did not exist on the date of scrutiny of nominations. In that case no signed oath form was attached to the nomination paper or filed before the date fixed for scrutiny. In the present case signed oath forms along with nomination papers were filed with the Assistant Returning Officer on January 23, 1967 before the date fixed for scrutiny. But this fact makes no dif-

ference. They neither made nor subscribed the oath or affirmation before the Assistant Returning Officer as required by Section 51 (a). On the date fixed for the scrutiny of nominations they were not qualified to be chosen to fill the seat in the legislature under Sec 51 (a) of the J & K Constitution and their nomination papers were liable to be rejected under Section 47 (2) (a) of the J & K Representation of the People Act, 1957.

15. In the result, the appeal is dismissed. There will be no order as to costs BNP/D V C. Appeal dismissed.

AIR 1969 SUPREME COURT 1114
(V 56 C 203)

(From U P Lucknow)*

M. HIDAYATULLAH, C J AND
G. K. MITTER, J.

Sukhram Singh and another, Appellants
v Smt Harbheji, Respondent

Civil Appeal No. 666 of 1966, D/- 19-2-1969

(A) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951), Secs. 157 and 21 (as amended by U. P. Land Reforms (Amendment) Act (20 of 1954), Ss 5 and 27) — S 157 as amended has retrospective operation — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Retrospective operation).

Section 157 (1) (a) as amended by U. P. Land Reforms (Amendment) Act 20 of 1954 has retrospective application.

(Para 14)

A law is undoubtedly retrospective if the law says so expressly but it is not always necessary to say so expressly to make the law retrospective. There are occasions when a law may be held to be retrospective in operation. Retrospection is not to be presumed for the presumption is the other way but many statutes have been regarded as retrospective without a declaration. Thus it is that remedial statutes are always regarded as prospective but declaratory statutes are considered retrospective. Similarly sometimes statutes have a retrospective effect when the declared intention is clearly and unequivocally manifest from the language employed in the particular law or in the con-

text of connected provisions. It is always a question whether the legislature has sufficiently expressed itself. To find this one must look at the general scope and purview of the Act and the remedy the legislature intends to apply in the former state of the law and then determine what the legislature intended to do. This line of investigation is, of course, only open if it is necessary. In other words it can be said that there might be something in the context of an Act or be collected from its language, which might give to words *prima facie* prospective a larger operation. More retrospectivity is not to be given than what can be gathered from expressed or clearly implied intention of the legislature. (1890) 15 AC 384, Foll. (Para 13)

It is clear that Section 21 (h) mentioned only one of the clauses viz, clause (e) as furnishing a ground for declaration. After the amendment of clause (h) one or more of the clauses of Section 157 (1) are to be taken into account. Now there would be no point in making the amendment of Section 21 (h) retrospective if the other clauses were to apply prospectively for then the force of the retrospectivity of clause (h) of Section 21 is made neutral. Therefore, if the new Section 21 (h) is to be read retrospectively from the commencement of Land Reforms Act, the amendment of Section 157 (1) which was made simultaneously must also be clearly intended to operate with retrospectiveness. The legislature intended that at any given moment of time from the commencement of the Land Reforms Act all the clauses or one or more of them and not clause (e) alone were to be taken note of. (Para 14)

(B) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1950), (1 of 1951), S. 240-II — Compensation officer himself Assistant Collector — Compensation officer not referring to himself case after framing issue — Order should be held to have been passed in the capacity of Compensation Officer and not in the capacity of Assistant Collector. (Para 15)

Cases Referred: Chronological Para
(1890) 15 AC 334=59 LJPC 63, Main
v. Stark 15

M/s. J. P. Goyal and R. S. Gupta, Advocates, for Appellants, Mr S. P. Sinha, Senior Advocate (Mr. M. I. Khawaja, Advocate with him), for Respondent.

*(Rev. No. 91 of 1963, D/- 20-9-1963 — U. P. Luck)

IM/IM/B119/69/D

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: The parties in this appeal are the same as in Civil Appeal No. 286 of 1966 which we declared to have become infructuous because of the operation of Section 5 of the Uttar Pradesh Consolidation Act. The judgment in that appeal was delivered by us on February 7, 1969. For the narration of facts in this appeal we have, however, referred to certain orders which were passed by the High Court from the sister appeal. The parties to this appeal as in the other appeal are Sukhram Singh and Laiq Singh of the one part and Smt. Harbheji of the second part. These two parties have been fighting a long drawn litigation over khata No. 271 of village Shahgarh. Two separate proceedings took place before the Revenue Courts and reached this Court by way of special leave, one of which has been disposed of and the other is now before us. The points involved in this appeal are short but in view of the length of litigation a long narration is necessary.

2. On March 10, 1954 Smt. Harbheji as bhumidar filed a suit (No. 38 of 1954) under Section 202 of the U. P. Zamindari Abolition and Land Reforms Act, 1955 against the other party in the Court of the Assistant Collector, 1st Class, Aligarh. The allegation in the suit was that Sukhram Singh and Laiq Singh were Asamis who were leased the khata in 1947 from year to year. Smt. Harbheji asked for their ejectment from the khata. The defence of the other side was that the occupants were Adhivasis. The Land Reforms Act was passed in 1951. Under the Act the intermediaries were abolished and their rights and title vested in the State from July 1, 1952. The Act was later amended from time to time and we are concerned with one such amendment made by the U. P. Land Reforms Act XX of 1954 which came into force on October 10, 1954.

3. Reverting to the facts, the suit No. 38 of 1954 was dismissed by the Assistant Collector, 1st Class, Aligarh on April 20, 1956 and it was held that Sukhram Singh and Laiq Singh were not Asamis and therefore not liable to ejectment. On appeal the Civil Judge of Aligarh allowed it on February 1, 1957 and declared Sukhram and Laiq Singh to be Asamis. A second appeal in the High Court before a Single Judge succeeded on February 19, 1958. Sukhram Singh and Laiq Singh were again declared to be Adhivasis.

A Letters Patent Appeal was filed in the High Court. Meanwhile the Consolidation of Holdings Act was brought into force in this area and a notification under Section 4 of the Consolidation of Holdings Act declaring village Shahgarh area to be under consolidation was published on November 11, 1961. The appeal in the High Court was decided on February 8, 1962. It appears that the arguments were already heard and the case was reserved for judgment when the notification came into force. The learned Judges did not apply Section 5 of the Consolidation of Holdings Act which provides that on notification issuing any suit, proceeding or appeal must be taken to have abated. The Division Bench gave its decision reversing the judgment of the Single Judge. As a result Sukhram Singh and Laiq Singh were again declared to be Asamis. An appeal was then brought to this Court by special leave and it is that appeal which we declared had become infructuous by reason of the abatement of the suit. This was the end of the proceedings under Section 202 of the Land Reforms Act.

4. Meanwhile Smt. Harbheji as bhumidar was entitled to compensation for the extinguishment of her rights. The Compensation Officer prepared a preliminary statement under Section 240-F and showed Sukhram Singh and Laiq Singh as Adhivasis. Smt. Harbheji filed an objection under Section 240-G but on the date of hearing (October 25, 1956) she did not appear before the Compensation Officer who dismissed her objection holding that Laiq Singh and Sukhram Singh had Adhivasi rights and the objector had no interest in the land. The statement of compensation was also confirmed on the same date. In the consolidation proceedings Smt. Harbheji applied for correction of the records under Section 10 (1) of the Consolidation of Holdings Act. This matter was decided by the Consolidation Officer III Khera Narainsingh on March 7, 1963. The objection filed by Smt. Harbheji was dismissed. On appeal the Settlement Officer (Consolidation) reversed the above decision on June 14, 1963 holding that Sukhram Singh and Laiq Singh were Asamis. The Deputy Director of Consolidation, exercising the powers of the Director of Consolidation Uttar Pradesh dismissed the revision petition on September 20, 1963 filed by Sukhram Singh and Laiq Singh. The present appeal is from the last decision by special leave.

5. Two points were argued before us, namely, that Smt. Harbheji was not enti-

tled to the benefit of Section 21 as amended by Act XX of 1954 and secondly that the order of the Compensation Officer made on October 25, 1956 had finally decided the status of Sukhrām Singh and Laq Singh as *Adhivasis* and not having been appealed against, the question cannot now be reopened. We shall take these points one by one

6. The U P Zamindari Abolition and Land Reforms Act was amended in 1954 by the above amending Act in several respects. We are only concerned with the amendment of Sections 21 and 157 and the addition of Chapter IX-A. Section 21 leaving out portions not necessary for our purposes provides after the amendment as follows—

"Section 21. Non-occupancy tenants, sub-tenants of grove-lands and tenant's mortgagees to be *asamis*.

(1) Notwithstanding anything contained in this Act, every person who, on the date immediately preceding the date of vesting, occupied or held land as—

(h) A tenant of *sir* land referred to in sub-clause (a) of clause (i) of the Explanation under Section 16, a sub-tenant referred to in sub-clause (u) of clause (a) of Section 20 or an occupant referred to in sub-clause (i) of clause (b) of the said section where the land-holder or if there are more than one land-holder, all of them were person or persons belonging—

(b) if the land was let out or occupied on or after the ninth day of April, 1948, on the date of letting or occupation,

to any one or more of the classes mentioned in sub-section (1) of Section 157 shall be deemed to be an *asami* thereof." Before the amendment the corresponding part of the section read as follows—

"Section 21 (1) — Notwithstanding anything contained in this Act, every person, who, on the date immediately preceding the date of vesting, occupied or held land as—

(h) a tenant of *sir* or land referred to in sub-clause (a) of clause (i) of the explanation under Section 16, a sub-tenant or an occupant referred to in Section 20, where the land-holder or if there are more than one land-holder all of them were person or persons belonging, both on the date of letting and on the date immediately preceding the date of vesting, to any one or more of the classes mentioned

in sub-section (2) of Section 10 or clause (e) of sub-section (1) of Section 157 shall be deemed to be an *asami* thereof."

7. The difference between the two sections material for our purposes lies in the mention of all clauses of Section 157, sub-section (1) after the amendment whereas before the amendment only cl (e) of sub-section (1) of Section 157 was mentioned. Section 157 also was amended. Again for the purposes of this case it is not necessary to reproduce the whole of the section. It read before the amendment as follows—

"Section 157 (1) — A *bhumidar* or a *sirdar* or an *asami* holding the land in lieu of maintenance allowance under Section 11, who is—

(a) an unmarried woman, or if married, divorced or separated from her husband, or a widow,

(b) a *minor* whose father has died,

(c) a lunatic or an idiot,

(d) a person incapable of cultivating by reason of blindness or other physical infirmity,

(e) prosecuting studies in a recognised institution and does not exceed 25 years in age,

(f) in the Military, Naval or Air Service of the Indian Dominion, or

(g) under detention or imprisonment" may let the whole or any part of his holding."

8. After the amendment it reads as follows—

"Section 157 — Lease by a disabled person. — (1) A *bhumidar* or a *sirdar* or an *asami* holding the land in lieu of maintenance allowance under Section 11 who is—

(a) an unmarried woman, or if married, divorced or separated from her husband or whose husband suffers, from any of the disqualifications mentioned in clause (e) or (d) or a widow,

(b) a *minor* whose father suffers from any of the disqualifications mentioned in clause (c) or (d) or has died, and

(c) a lunatic or an idiot,

(d) a person incapable of cultivating by reason of blindness, or other physical infirmity;

(e) prosecuting studies in a recognised institution and does not exceed 25 years in age and whose father suffers from any of the disqualifications mentioned in cl. (e) or (d) or has died;

(f) in the Military, Naval, or Air Service of the Indian Dominion; or

(g) under detention or imprisonment; "

may let the whole or any part of his holding."

9. The difference here is that a lease by a woman although married was possible if her husband was suffering from insanity or idiocy or was a person incapable of cultivating by reason of blindness or other physical infirmity. Smt. Harbheji in her applications wished to take advantage of the amendments of Sections 21 and 157 on the ground that her husband was suffering from sinus and hence from physical infirmity and was incapable of cultivating the land. The difficulty arises because the Legislature while making the amendment made the amendment in cl. (h) of Section 21 retrospective from the date of the passing of the Abolition Act but in Section 157 it did not expressly state that the amendments were retrospective. The short question that arises is whether Section 157 when read with Section 27 (21P) also becomes retrospective notwithstanding that there are no express words of retrospectivity.

10. The second point is concerned with the addition of Chapter IX-A which is headed 'Conferment of Sirdari Rights on Adhivasis'. The grounds on which the ejectment of an Adhivasi could be made were contained in Section 234 of the Land Reforms Act but none of the grounds applies here. Thus if Sukhram Singh and Laiq Singh were Adhivasis they could not be ejected by Smt. Harbheji but if they were only asamis then the ejectment could take place because they were only tenants from year to year. Chapter IX-A added Sections 240-A to 240-N. It provides that the Government may by a notification declare that the rights, title and interest of the land-holders in the land held by Adhivasis shall cease and vest in the State and also provides for payment of compensation to the landlord whose rights, title or interest in the land are acquired. The compensation statement is required to be published under Section 240-F and Section 240-G gives a right to any person interested to file objections. Section 240-H deals with the procedure for disposal of the objections under Section 240-G. It provides that the Compensation Officer shall frame an issue regarding it and refer it for disposal to the Court which has jurisdiction to decide a suit under Section 229-B read with Section 234-A and that thereupon all the provisions relating to the hearing and disposal of such suit shall apply to his reference as if it were a suit. Section 229-B provides that any person claiming to be an Asami of the

whole or a part of it may sue the landlord for a declaration of his rights as Asami. Sub-section (3) of the same section provided that the provisions are to apply mutatis mutandis to a suit by a person claiming to be sirdar (Adhivasi). Section 234-A then provides that the provisions of Section 229-B mentioned above shall apply to an Adhivasi as if he were an Asami. Schedule II to the Land Reforms Act in Item 34 appoints the Assistant Collector, 1st Class, as competent Court for the trial of suits for declaration of rights under Section 229-B. The Schedule also provides for an appeal to the Commissioner from the order and to the Board of Revenue by a second appeal.

11. In the present case the Compensation Officer who passed the order on October 25, 1956 was also Assistant Collector, 1st Class, but he did not refer the case to himself after framing an issue and hence his order has been treated to have been passed by him in his capacity as a Compensation Officer.

12. We will now come to the question whether Section 157 also operates retrospectively with Section 21. The latter was made retrospective expressly. The High Court in the Division Bench decision held that Section 157 was also retrospective by implication. The contention of the appellants is that Smt. Harbheji was not entitled to take the benefit of the amendment and to plead that she could let out her sir land because her husband was suffering from an infirmity and was not able to look after the cultivation. If Smt. Harbheji is entitled to plead the amended section then under Section 21 Sukhram Singh and Laiq Singh must be treated as Asamis because that is what Section 21 enacts. If the unamended section is to be read with Section 21 then the contrary result is reached.

13. Now a law is undoubtedly retrospective if the law says so expressly but it is not always necessary to say so expressly to make the law retrospective. There are occasions when a law may be held to be retrospective in operation. Retrospection is not to be presumed for the presumption is the other way but many statutes have been regarded as retrospective without a declaration. Thus it is that remedial statutes are always regarded as prospective but declaratory statutes are considered retrospective. Similarly sometimes statutes have a retrospective effect when the declared intention is clearly and unequivocally manifest from the language employed in the particular law or in the

context of connected provisions. It is always a question whether the legislature has sufficiently expressed itself. To find this one must look at the general scope and purview of the Act and the remedy the legislature intends to apply in the former state of the law and then determine what the legislature intended to do. This line of investigation is, of course, only open if it is necessary. In the words of Lord Selborne in *Man v. Stark*, (1890) 15 AC 384 at p 388 there might be something in the context of an Act or be collected from its language, which might give to words *prima facie* prospective a larger operation. More retrospectivity is not to be given than what can be gathered from expressed or clearly implied intention of the legislature.

14. Applying these tests to the statute we have in hand, we are clear that Section 157 (1) (a) must be read to apply retrospectively. It is clear that Section 21 (h) mentioned only one of the clauses viz., clause (e) as furnishing a ground for declaration. After the amendment of cl (h) one or more of the clauses of Section 157 (1) are to be taken into account. Now there would be no point in making the amendment of Section 21 (h) retrospective if the other clauses were to apply prospectively for then the force of the retrospectivity of clause (h) of Section 21 is made neutral. Therefore, if the new Section 21 (h) is to be read retrospectively from the commencement of Land Reforms Act, the amendment of Section 157 (1) which was made simultaneously must also be clearly intended to operate with retrospectivity. The legislature intended that at any given moment of time from the commencement of the Land Reforms Act all the clauses or one or more of them and not clause (e) alone were to be taken note of. The amendment of clause (h) speaks of one or more clauses and when we read the clauses of Section 157 (1) we find them altered also. Therefore the new clauses must be read and not the old clauses. The High Court was thus right in its conclusion that the clauses of Section 157 (1) as amended also operate retrospectively. This disposes of the first point.

15. The next point is about the finality of the order of October 25, 1958 passed by the Compensation Officer. We cannot refer that order to his capacity as the Assistant Collector. An act would, no doubt be referable to a capacity which would give it validity. But the law required the compensation officer to frame

an issue and refer it to the competent Court. He could not decide the matter without doing so. One of the parties was before it and he ought to have asked that party to prove its case. He did nothing. It is, therefore, not wrong for the Settlement Officer and the Deputy Director to treat the order as proceeding from the Compensation Officer. Further since proceedings under Section 202 of the Land Reforms Act were already pending for the decision of the identical question the Compensation Officer ought to have stayed his hands. In our opinion, the order of the Compensation Officer did not have that finality which is claimed for it. That finality attaches only to the order of the Assistant Collector on a reference of an issue from the Compensation Officer. There was thus no finality.

16. The order of the Deputy Director cannot, therefore, be assailed. The appeal must fail and is dismissed but in view of the fact that an amendment of the law deprives the present appellants of a valid plea we make no order about costs.
MVJ/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 1118
(V 56 C 204)

(From. Madhya Pradesh)*
J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ

Smt. Rani Bai, Appellant v. Yadunandan Ram and another, Respondents.

Civil Appeal No 532 of 1966, D/- 19-2-1969 (In forma pauperis).

Civil P. C. (1908), O. 23, Rr. 1 and 3 — C, a trespasser, dispossessing A in possession of land in lieu of maintenance — Suit for declaration of right and possession by A joining B as co-plaintiff — B compromising with C applying for withdrawal of suit — Court cannot dismiss the suit of A on the basis of the application. Misc. Appeal No. 22 of 1962, D/- 17-9-1962 (MP), Reversed.

One J who possessed landed properties inherited by him from his father died leaving A the widow of his predeceased son and B his own widow, C, who claimed the properties under an alleged gift deed by J, illegally occupied the lands, which were in the possession of A, for some time and obtained possession of the

* (Misc. Appeal No. 22 of 1962, D/- 17-9-1962 — M P.)

IM/TM/B123/69/D

land through process taken under S. 145, Criminal P. C. A thereupon filed a suit for declaration of her rights along with B appearing as co-plaintiff. Later on B filed an application under O. 23, R. 1 withdrawing from the suit. An application under O. 23, R. 3 also was filed signed by both B and C praying that the suit by B be dismissed.

Held that the suit of A could not be dismissed on the basis of those applications: Misc. Appeal No. 22 of 1962, D/-17-9-1962 (MP), Reversed. (Para 4)

A who was the widow of the predeceased son of J was entitled to receive maintenance out of the estate of J so long as she did not remarry and she was presumably in possession of those properties in lieu of her maintenance. She could not be deprived of them even by B without securing proper maintenance for her out of those properties. That being so C who was only a trespasser could not deprive her of possession of the properties: (1894) ILR 18 Bom 679 & (1894) ILR 18 Bom 452, Rel. on. (Para 4)

B could not effect a transfer of all her rights to C who was a mere trespasser by merely filing a petition that she did not wish to prosecute the suit as a co-plaintiff. A who had a possessory title was entitled to restoration of possession as against C if he had no right, title or interest and was a mere trespasser and she was further entitled to remain in possession by virtue of her claim or right to maintenance until C who claimed the estate of J made some proper arrangement for her maintenance. (1893) ILR 20 Cal 834 (PC), Rel. on. (Para 6)

Cases Referred: Chronological Paras
(1945) AIR 1945 FC 25 (V 32)=
1945 FCR 1, Umayal Achi v. Lakshmi Achi 8
(1894) ILR 18 Bom 452, Yellawa v. Bhimangavda 4
(1894) ILR 18 Bom 679, Rachawa v. Shivayogappa 4
(1893) 20 Ind App 99=ILR 20 Cal 834 (PC), Ismail Ariff v. Mohamed Chouse 5

Mr. M. V. Goswami, Advocate, for Appellant; M/s. S. C. Agarwala and D. P. Singh, Advocates of M/s. Ramamurthi and Co., for Respondent No. 1.

The following judgment of the Court was delivered by

GROVER, J.: This is an appeal in forma pauperis by special leave from a judgment of the Madhya Pradesh High Court at Jabalpur dismissing the suit of the appellant for a declaration that she was the

owner of the suit properties and for possession thereof.

2. Jangi Jogi had inherited from his father properties consisting of some groves and a house in village Mukundpur which was in the erstwhile State of Rewa which later became a part of the State now called Madhya Pradesh. He had a son Laldas who is stated to have died in 1945 leaving the appellant, his widow, as his heir and legal representative. After the death of Laldas Jangi Jogi is alleged to have married Mst. Jugli Bai in the year 1948. Jangi Jogi himself died sometime in 1950. Respondent No. 1 is stated to have raised a claim to the properties of Jangi Jogi by virtue of a gift deed. On the basis of that deed he moved the Criminal Courts under Section 145, Criminal Procedure Code and on December 29, 1962 an order was made directing the possession of the properties to be delivered to the said respondent. The appellant, therefore, instituted a suit in the Court of Civil Judge at Rewa for a declaration in respect of her rights and for possession of the properties mentioned in the plaint. The suit was instituted by the appellant along with Jugli Bai the widow of Jangi Jogi. Respondent No. 1 who was the sole defendant in the suit put up several pleas claiming, inter alia, that he had been in continuous possession of the suit properties for more than twelve years and had become the owner. Alternatively it was pleaded if any one could have any interest it would be plaintiff No. 2 Jugli Bai but she had as a matter of fact not joined in the suit and her thumb impression on the plaint had been obtained by fraud. On the pleadings of the parties the trial Court framed as many as 12 issues. During the pendency of the suit plaintiff No. 2 Jugli Bai entered into compromise with respondent No. 1 giving up all her claims.

3. The trial Court found that the thumb impression of plaintiff had not been obtained by fraud but that she had changed sides much to the disadvantage of the appellant. As regards the deed of gift set up by respondent No. 1, it was found that Jangi Jogi had never made such a gift. It was further found that the appellant was in possession until she had been dispossessed by respondent No. 1 by means of the proceedings under Section 145, Cr. P. C. According to the trial Court the said respondent had illegally occupied the lands for some time and since the proceedings under Sec. 145, Cr. P. C., resulted in his favour he was

put into possession through the process taken under those proceedings. So far as the title of respondent No. 1 was concerned it was found that his position was that of a mere trespasser. The trial Court, however, non-suited the appellant on the ground that since her husband had died in the lifetime of Jangi Jogi the latter's estate devolved on his widow Jugli Bai who would be his only heir and she had entered into a compromise with respondent No. 1. The appellant went up in appeal to the Court of District Judge, Rewa. The learned District Judge examined the point whether the compromise entered into by one of the plaintiffs Jugli Bai with the defendant was valid and should have been given effect to by the trial Court. According to him it could not be said that the appellant had no right or interest in the properties left by Jangi Jogi. He felt that the compromise which had been entered into by Jugli Bai and the defendant should not have been accepted, as the appellant was not a party to that compromise. He was further of the view that the trial Court had not decided all the matters which arose for decision. He, therefore, set aside the decree of the trial Court and remanded the case with directions to re-admit the suit under its original number and dispose it of in accordance with law. Respondent No. 1 filed a second appeal before the High Court. The High Court took the view that the present appellant could have no interest in the properties left by Jangi Jogi. She could not take advantage of the provision of Section 3 (2) of the Hindu Women's Rights to Property Act, 1937 which conferred certain rights on the widow of a predeceased son in view of the decision of Federal Court in *Umayal Achi v. Lakshmi Achi*, 1945 FCR 1=(AIR 1945 FC 25). The aforesaid Act had been extended to Rewa State by the Part C (State Laws) Act, 1950 which came into force on April 16, 1950. It was urged, *inter alia*, before the High Court that the appellant could take a boy in adoption and as soon as such an adoption was made its effect would be that the adoptee would be the son not only of the widow but of her deceased husband as well and further that she had a claim for maintenance over the suit lands. The High Court disposed of this contention by saying—

"It is not possible to prejudge the results of an adoption which may, or may not, be made by Smt. Ranibai at all. Similarly, this is not a case in which the right

of maintenance was sought to be enforced against Smt. Jugli Bai on the property which was inherited by her from the last male holder, Jangi Jogi. It may be possible to take up these questions in appropriate proceedings."

According to the High Court the compromise which had been entered into between Jugli Bai and respondent No. 1 did not adversely affect the right, title or interest of the appellant as she had no right, title or interest in the suit lands. It was contended on behalf of the appellant that she was in possession of the properties at the time respondent No. 1 dispossessed her by committing an act of trespass and, therefore, she was entitled to restoration of possession of those properties from the trespasser. The High Court disposed thus of by saying that the rightful claimant on the death of Jangi Jogi was Jugli Bai alone and owing to the compromise entered into by her respondent No. 1 was clothed with the same rights which were possessed by her. It was further held by the High Court that the compromise had been properly and lawfully recorded and given effect to by the trial Court under O. 23, R. 3 of the Civil Procedure Code.

4. Now Jugli Bai had filed an application under O. 23, R. 1, Civil Procedure Code, on February 19, 1959 before the trial Court saying, *inter alia*, that her signature or thumb impression on the plaint had been obtained by misrepresentation by the appellant. The application stated that she was not interested in prosecuting the suit and therefore she was withdrawing the same. The following portion from that application may be reproduced—

"... plaintiff No. 2 withdraws her plaint and the statement of claim made therein, and so far as she is concerned she withdraws the suit and prays that no claim be decreed in her favour nor any relief mentioned in plaint be granted in her favour. On the other hand, the plaint may be dismissed to the extent of her claim. She is also filing herewith a compromise to that effect arrives (arrived?) at with the defendant, which may be accepted"

An application was also filed under O. 23, R. 3 of the Civil Procedure Code, which purported to bear the thumb impression of Jugli Bai and was signed by respondent No. 1. All that was stated therein was that the suit of plaintiff No. 2 in respect of suit lands be dismissed and no relief be granted in accordance with the prayer made in the plaint. It is difficult to see

how on the basis of these applications the suit of the appellant could be dismissed. It cannot be disputed that the appellant who is the widow of a predeceased son of Jangi Jogi was entitled to receive maintenance so long as she did not re-marry out of the estate of her father-in-law. Although her claim for maintenance was not a charge upon the estate until it had been fixed and specifically charged thereupon her right was not liable to be defeated except by transfer to a bona fide purchaser for value without notice of a claim or even with notice of the claim unless the transfer was made with the intention of defeating her right. The Courts in India have taken the view that where a widow is in possession of a specific property for the purpose of her maintenance a purchaser buying with notice of her claim is not entitled to possession of that property without first securing proper maintenance for her: (vide *Rachawa v. Shivayogappa*, (1894) ILR 18 Bom 679). In *Yellawa v. Bhimangavda*, (1894) ILR 18 Bom 452 it was taken to be the settled practice of the Bombay High Court not to allow the heir to recover the family property from a widow entitled to be maintained out of it without first securing a proper maintenance for her out of the property or by such other means as might be deemed sufficient. It is clear from the provisions of the Explanation appearing in Section 14 of the Hindu Succession Act that a situation was contemplated where a female Hindu could be in possession of joint family properties in lieu of maintenance. It may be mentioned that after the enforcement of the Hindu Adoptions and Maintenance Act, 1956 the rights of widowed daughter-in-law to maintenance are governed by Section 19 of that Act which, however, could not be applicable. In the present case it is difficult to understand how the appellant could be deprived of the possession of properties by a trespasser. Moreover she was presumably in possession of these properties in lieu of her right of maintenance and could not be deprived of them even by Jugli Bai without first securing proper maintenance for her out of the aforesaid properties.

5. The rights of the appellant who was in possession qua respondent No. 1 who was found by the trial Court to be a trespasser have not been properly considered by the High Court. On this point reference may be made to a decision of the Privy Council in *Ismail Ariff v.*

Mohamed Ghouse, (1893) 20 Ind App 99 (PC). In that case in a suit for a declaration that the plaintiff was absolute owner of the land in suit and for an injunction, the defence was that the land was subject to a wakf created by the plaintiff's predecessor in title and that the defendant was mutwali thereof. Both Courts found in favour of the plaintiff's possession, and that the defendant was not the mutwali nor possessed of any interest in the land, but differed as to the dedication. It was held that the plaintiff was entitled to a declaration as against the defendant that he was lawfully entitled to possession and the relief consequent thereon. The following observation of Sir Richard Couch may be reproduced with advantage:

"It appears to their Lordships that there is here a misapprehension of the nature of the plaintiff's case upon the facts stated in the judgment. The possession of the plaintiff was sufficient evidence of title as owner against the defendant. By Section 9 of the Specific Relief Act (Act 1 of 1877), if the plaintiff had been dispossessed otherwise than in due course of law, he could, by a suit instituted within six months from the date of the dispossession, have recovered possession, notwithstanding any other title that might be set up in such suit. If he could thus recover possession from a person who might be able, to prove a title, it is certainly right and just that he should be able, against a person who has no title and is a mere wrongdoer, to obtain a declaration of title as owner, and an injunction to restrain the wrongdoer from interfering with his possession."

6. Keeping the above statement of law in view it must be held that the High Court was in error in considering that since Jugli Bai had entered into some compromise with respondent No. 1 the trial Court was justified in dismissing the appellant's suit. It is somewhat difficult to understand the observation of the High Court that respondent No. 1 was "clothed with the very same rights" which were possessed by Jugli Bai. If the finding of the Trial Court was right that respondent No. 1 was a mere trespasser, it is not possible to see how Jugli Bai could effect a transfer of all her rights by merely filing a petition to the effect that she did not wish to prosecute the suit as a co-plaintiff. As has been pointed out the appellant had a possessory title and was entitled to restoration of possession in case it

was found that respondent No 1 had no right, title or interest whatsoever and was a mere trespasser. The appellant was further entitled to remain in possession if she could establish that she had entered into possession by virtue of her claim or right to maintenance until the person laying a claim to the estate of Jangi Jogi made some proper arrangement for the payment of maintenance to her. These are, however, matters on which no final opinion need be expressed as the District Judge was of the opinion that the trial Court had not given a proper decision on all the issues and for that reason the suit had been remanded for a fresh decision on all the questions of fact and law. In the view that we have taken the decision of the High Court has to be reversed and that of the District Judge restored.

7. The appeal is thus allowed with costs here and in the High Court. The amount of court-fee shall be recovered by the Government from respondent No 1 in accordance with Order 17, Rule 8 of the Supreme Court Rules. Costs of appellant's Advocate to be taxed against Respondent No 1 and made recoverable from him.

MKS/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 1122
(V 56 C 205)
(From Kerala)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

The Commissioner of Income-tax,
Kerala, Appellant v. M/s Manick Sons,
Respondent

Civil Appeal No. 2459 of 1966, D/- 14-2-1969

Income-tax Act (1922), Section 33 (4) —
Appeal against assessment for a certain
year — Tribunal has no jurisdiction to
reopen the concluded assessment for the
preceding year.

M was assessed to tax as a registered
firm in the assessment year 1952-53 on an
income computed at Rs 15,331 inclusive
of Rs. 15,000 being undisclosed income.
For the assessment year 1953-54 the In-
come-tax Officer brought to tax Rupees
1,31,179 being the total of business in-

*(Income-tax Referred Case No. 20 of
1964, D/- 2-8-1965—Kerala)

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come of Rs. 56,487 and the unexplained
cash credits of Rs. 74,692 which he treat-
ed as income from other sources. M was
assessed as an unregistered firm that year.
In second appeal against the assessment
for 1953-54 the Tribunal reduced the in-
come from business to Rs. 28,820 and con-
firmed the finding of the Appellate Assis-
tant Commissioner that cash credits ag-
gregating to Rs 46,620 had remained un-
explained. Then observing that there were
certain special features in the case which
needed proper consideration in deter-
mining the final assessment the Tribunal
aggregated the income for the assessment
years 1952-53 and 1953-54 and rounding
it off at Rs 1,00,000 apportioned the
amount in equal shares at Rs 50,000 for
each of the two years and directed the
Income-tax Officer to reopen the assess-
ment for the year 1952-53.

Held that the amalgamation of the in-
come for the two years and apportionment
was without authority of law. (1967) 68
ITR 722 (SC), Distinguished

(Para 4)

The power conferred by sub-section (4)
of Section 33 is wide, but it is still a
judicial power which must be exercised
in respect of matters that arise in the ap-
peal out of the order of assessment made
by the Income-tax Officer and the Ap-
pellate Assistant Commissioner and ac-
cording to law. It cannot assume powers
which are inconsistent with the express
provisions of the Act or its scheme.

(Para 5)

An assessment which has become final
may be reopened in appeal by the Ap-
pellate Assistant Commissioner or the
Tribunal or in revision by the Commis-
sioner, or under an order of rectification
of mistake, or pursuant to a notice of
reassessment. The Tribunal hearing an
appeal may give directions for reopening
assessment of the year to which the ap-
peal relates. It cannot give any directions
to reassess in case of a period not cover-
ed by that year.

(Para 5)

The Tribunal was entitled to enquire
whether the source of the cash credits
was explained. If it held that they re-
presented capital or income of earlier
years, it could exclude them from income
liable to be taxed in the year to which
the appeal related. But the Tribunal had
no power to find, on amalgamation, of
income an average of more years than
one, or to give credit for what it called
intangible additions, without explaining
why credit was given.

(Para 6)

Even if the assessee had given an undertaking when urging his appeal, to make a voluntary return for the year 1952-53 it must be ignored. There is no sanction in law to enforce that undertaking and the assessment for 1952-53 could not be reopened otherwise than in accordance with law. (Para 5)

Cases Referred: Chronological Paras

(1967) 66 ITR 722 (SC), Commr. of Income-tax, Madras v. S. Nelli-appan 10

Mr. Sukumar Mitra, Senior Advocate, (Mr. B. D. Sharma, Advocate with him), for Appellant; M/s. S. Swaminathan and R. Gopalakrishnan, Advocates, for Respondent.

The following Judgment of the Court was delivered by

SHAH, J.: For the assessment year 1952-53 respondents M/s. Manick & sons were assessed to tax in the status of a registered firm and their income was computed at Rs. 15,331 inclusive of Rs. 15,000 being undisclosed income. For the assessment year 1953-54 the respondents returned Rs. 40,887 as their income from business. The Income-tax Officer discovered an aggregate amount of Rupees 74,692 as "cash credits" which, in his view, were not satisfactorily explained by the respondents. The Income-tax Officer accordingly brought to tax a total income of Rs. 1,31,179 being Rs. 56,487 as income from business and Rs. 74,692 as income from "other sources" and assessed the respondents as an unregistered firm. The Appellate Assistant Commissioner in appeal reduced the income of the respondents from business to Rs. 38,420 and income from "other sources" to Rs. 46,620. In second appeal the Tribunal reduced the income from business to Rs. 28,820 and confirmed finding that the source of the cash credits aggregating to Rs. 46,620 had remained unexplained. But the Tribunal observed that "there were certain special features in the case which needed proper consideration in determining the final assessment." The Tribunal then aggregated the income for the assessment years 1952-53 and 1953-54 for the two years, which he rounded off at Rs. 1,00,000 and apportioned in equal shares in the two years. For the assessment year 1952-53 the Tribunal recorded that the respondents had given an undertaking to file a

voluntary return for assessment on the basis of total income of Rs. 50,000.

2. At the instance of the Commissioner of Income-tax, four questions were referred to the High Court of Kerala:

"(1) Whether it was not beyond the jurisdiction of the Appellate Tribunal to reopen the concluded assessment for assessment year 1952-53 and to direct that the income should be revised in that year at Rs. 50,000 as against Rs. 15,331 already fixed?"

(2) Whether on the facts and circumstances of the case and the evidence on record, the Tribunal was justified in directing that any portion of the cash credits be assessed to income-tax in any year other than the assessment year 1953-54?"

(3) Whether on the facts and circumstances of the case and evidence on record, the Tribunal was justified in finding that a portion of the cash credits was covered by the intangible additions made in 1952-53 and 1953-54 assessment?"

(4) Whether on the facts and circumstances of the case and the evidence on record, the Tribunal was justified in directing that the income under the head 'business' for the assessment year 1953-54 be reduced to Rs. 50,000?"

The High Court declined to answer questions (1) and (2) and answered questions (3) and (4) in the affirmative. The Commissioner appeals with special leave.

3. The judgment of the Tribunal is not a reasoned decision on the questions arising before it: it is cryptic and in parts obscure, and gives no grounds for its conclusion. The judgment again lends countenance to a method of assessment which the Indian Income-tax Act does not warrant. In paragraph 5 of the order the Tribunal observed that the cash credits discovered by the Income-tax Officer aggregated to Rs. 74,692 which amount was reduced by the Appellate Assistant Commissioner to Rs. 50,620. (It is common ground that the correct figure should be Rs. 46,620). The Tribunal then observed that on the evidence on record "these residuary items must remain unexplained." But the Tribunal thought that because in the assessment year 1952-53 the total income of Rs. 15,331 was comparatively small compared to the income of the earlier years "some of that year's profits must have come into the" profits of the next year. The Tribunal then set out

a consolidated statement of account for two years

			Rs.
"1. Trade profits assessed for assessment year 1952-53			15,331
2. Trade profits on the basis of books and without the estimates and additions impugned in this appeal (Rs 56,487 less Rs 45,600)			40,887
3 Trading deficiency :			
(a) Palluruthy branch	1,000		
(b) Payeratty branch	5,000		6,000
	<hr/>		
4. Unexplained cash credits	50,620		
Less set off—			
Intangible addition for 1952-53	Rs 15,000		
Intangible addition for 1953-54 as above	Rs. 6,000	21,000	29,620
	<hr/>		
Assessable for both the years	..		91,835"
			<hr/>

and observed—

"The assessee has undertaken to file a voluntary return for assessment year 1952-53 on the basis of a total income of Rs 50,000. In these circumstances, the total business income of the assessee for the year under appeal is reduced to Rs. 50,000 only."

The unexplained cash credits found by the Appellate Assistant Commissioner and accepted by the Tribunal were Rs 46,620. The total income of the two years on the basis adopted by the Tribunal was therefore Rs. 87,833. But the income of the two years was rounded off at Rs 1,00,000 and divided equally between the two years. For making up a consolidated statement of account the Tribunal gave no reasons nor did it give any reasons "for debiting the intangible additions" of Rs 15,000 and Rs 6,000 against the cash credits. Counsel for the respondents suggested that the Tribunal was presumably of the view that Rs 15,000 brought to tax as business income in the assessment in 1952-53 must have been entered in the books of account of the next year and that Rs 6,000 called "trading deficiency" in the two branches was entered as cash credit.

4. The appeal before the Tribunal raised a simple question — whether the cash credits aggregating to Rs 46,620 or any part thereof were liable to be taxed as income of the respondents in the year 1953-54. For that purpose the Tribunal had to consider whether the respondents furnished any explanation leading to a justifiable inference that the amount or a part thereof did not represent income of the respondents. In the view of the Tribunal the cash credits had remained unexplained. But the Tribunal still reduced the cash credits by Rs. 21,000, and then proceeded to amalgamate the income for the two years and to divide it equally. For reducing the cash credits by Rs. 21,000 no reasons have been given, and amalgamation of the income for the two years and apportionment is without authority of law.

5. An assessment which has become final may be reopened in appeal by the Appellate Assistant Commissioner or the Tribunal or in revision by the Commissioner, or under an order of rectification of mistake, or pursuant to a notice of reassessment. The Tribunal hearing an appeal may give directions for reopening assessment of the year to which the appeal

relates: it cannot give any directions to reassess in case of a period not covered by that year. There is no sanction in law to enforce the undertaking given by the respondent when urging his appeal in respect of the year 1953-54, to make a voluntary return for the year 1952-53; and even if the respondents carried out that undertaking the assessment of 1952-53 could not be reopened otherwise than in the manner prescribed by law. The undertaking must therefore be ignored. Under S. 33 (4) of the Income-tax Act, 1922, the Income-tax Appellate Tribunal may, after giving both parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit. The power conferred by that sub-section is wide, but it is still a judicial power which must be exercised in respect of matters that arise in the appeal and according to law. The Tribunal in deciding an appeal before it must deal with questions of law and fact which arise out of the order of assessment made by the Income-tax Officer and the order of the Appellate Assistant Commissioner. It cannot assume powers which are inconsistent with express provisions of the Act or its scheme.

6. The Tribunal was entitled to enquire whether the source of the cash credits was explained: if it held that they represented capital or income of earlier years, it could exclude them from income liable to be taxed in the year to which the appeal related. But the Tribunal had no power to find on amalgamation of income an average of more years than one, or to give credit for what it called intangible additions, without explaining why credit was given.

7. There is no warrant for the claim made by Counsel for the respondents that the order passed by the Tribunal was by consent. The Tribunal has not stated so, and if the order was made by consent of the departmental authorities and the respondents, the objection should have been prominently raised when the Commissioner asked for a reference to the High Court.

8. Counsel urged that the final order passed by the Tribunal operates to the prejudice of the respondents, and the Commissioner is not aggrieved by the order. Counsel said that even though the Tribunal has found that the total income for the two years in question was approximately Rs. 91,838 (which if a correct account had been made would have been Rs. 87,838), the Tribunal has directed as-

sessment of Rs. 50,000 in the year 1952-53 and another Rs. 50,000 in the year 1953-54. But this is only a superficial way of looking at the matter. In the assessment year 1952-53 the respondents were assessed in the status of a registered firm and the income of the firm had to be distributed amongst the partners, and the shares of the partners could be assessed to tax in their hands. The rate of tax on this income unless the partners have large individual income would be comparatively low. In the year 1953-54 the respondents were an unregistered firm and the total income of the unregistered firm was liable to be taxed.

9. It was also contended that the arguments raised before this Court were never set up either before the Tribunal or before the High Court and should not be permitted to be raised. The questions raised clearly flow from the contentions raised before the Tribunal and contemplate an enquiry into matters urged by Counsel by the Commissioner.

10. The decision of this Court, Commr. of Income-tax, Madras v. S. Nelliappan, (1967) 66 ITR 722 (SC) on which reliance was placed by Counsel for the respondents has little bearing in this case. In S. Nelliappan's case, (1967) 66 ITR 722 (SC) it was held that the conclusion whether a cash credit in the books of account of an assessee is properly explained is one on a question of fact on which no reference can be made to the High Court under Section 66 of the Indian Income-tax Act. The Court in that case did not lay down that it is open to the Tribunal to make a consolidated assessment of tax in respect of the assessment of income for the two years and then divide the income in equal shares.

11. Turning then to the questions, Counsel for the respondents conceded that the Tribunal had no jurisdiction to direct the Income-tax Officer to reopen the assessment for the year 1952-53. He submitted however that the Tribunal did not give any such directions: it merely recorded an undertaking given by the respondents that they will voluntarily submit a return for Rs. 50,000 for the year 1952-53. But the context in which the statement recording the undertaking occurs in paragraph 7 of the judgment of the Tribunal and the direction given in paragraph 8 leave no room for doubt that the Tribunal did give a direction to the Income-tax Officer to reassess the income for the year 1952-53. On the answer to the first ques-

tion no further enquiry need be made on the second question

12 The Tribunal has given no reasons in support of the view that the "intangible additions" of Rs 21,000 covered a part of the cash credits. Our attention has also not been invited to any evidence which establishes a connection between the cash credits for Rs 21,000 and the additions of Rs 15,000 made in the assessment for 1952-53 and Rs. 6,000 added in 1953-54

13 The fourth question contemplates an inquiry whether the Tribunal was justified in directing that the income under the head "business" for the assessment year 1953-54 be reduced to Rs 50,000. The question is somewhat misleading. The direction of the Tribunal was that the total income of the respondents be reduced to Rs 50,000 for the year 1953-54, the business income being Rs 28,820 and the balance being income from other sources. For reasons already set out the Tribunal had no jurisdiction to proceed to combine the income for the two years 1952-53 and 1953-54 and to divide it for the purpose of assessment between the two years equally. The Tribunal had to assess the income for the year in question

14. The appeal is allowed, and the answers to the questions recorded by the High Court are discharged. The answers to the questions will be as follows

Q (1) — Tribunal had no jurisdiction.

Q. (2) — Tribunal had no jurisdiction.

Q (3) — in the negative

Q (4) — in the negative.

There will be no order as to costs in this appeal

MKS/D V C

Appeal allowed.

AIR 1969 SUPREME COURT 1126
(V 56 C 206)

(From Punjab and Haryana)*

M HIDAYATULLAH, C. J., S. M. SIKRI,
R S BACHAWAT, G K. MITTER
AND K. S. HEGDE, JJ.

Lachhman Dass and others etc., Appellants v. Municipal Committee, Jalalabad and others etc., Respondents.

Civil Appeals Nos 1407 and 1569 of 1968, D/- 12-2-1969

*(L. P. A. No 37 of 1967, D/- 3-5-1967—
Punjab & Har.)

IM/IM/A694/69/D

(A) Constitution of India, Articles 14, 19 (1) (f) — Displaced Persons (Compensation and Rehabilitation) Act (1954), Section 20B — Section is unconstitutional being ultra vires Arts. 14 and 19 (1) (f) — ILR (1967) 2 P & H 574, Approved, L. P. A. No. 37 of 1967, D/- 3-5-1967 (P & H), Affirmed. (Para 5)

(B) Constitution of India, Art. 31 (2) — Displaced Persons (Compensation and Rehabilitation) Act (1954), S. 20B — Section is ultra vires Art. 31 (2) — L. P. A. No 37 of 1967, D/- 3-5-1967 (P & H), Reversed.

Article 31 (2) provides for two things, (1) the acquisition or requisition should be for a public purpose, and (2) the law should provide for compensation and either it should fix the amount of compensation or specify the principles on which and the manner in which the compensation has to be determined or given. Section 20B of Displaced Persons (Compensation and Rehabilitation) Act (1954) violates both these provisions of the Article.

(Paras 11, 12)

The section enables the Central Government to deprive rightful owner of the property if it is of the opinion that it is not expedient or practicable to restore the whole or part of the property. The Central Government is not concerned with justness but whether it would be politic to restore the property. It may transfer to rightful owner any property being of the same value as the property to be restored, but the section does not say value at what point of time, whether at the time the property was taken possession of by the Custodian, the Central Government or the displaced person, or at the time the title of the rightful owner is extinguished. The section does not fix any compensation or lay down any principles for compensation. (Paras 10, 13)

Under the section the Central Government is entitled not to restore property to serve a purpose other than a public purpose and consequently the section is ultra vires Article 31 (2) L. P. A. No 37 of 1967, D/- 3-5-1967 (P & H), Reversed. (Para 12)

It may be that insofar as the title vested in the displaced person the case would come within Article 31 (2A), but then the section is not severable and it has to be declared void as a whole. (Para 15)

(C) Constitution of India, Article 136 — New plea — Point not raised before High Court cannot be allowed to be raised before Supreme Court. (Para 15)

Cases Referred: Chronological Paras
(1967) ILR (1967) 2 Punj & Har 574,
Kirpal Singh v. Central Govern-
ment 1, 5

(1957) AIR 1957 SC 599 (V 44)=
1957 SCR 801, Amar Singh v. Custodian, Evacuee Property Punjab 6

M/s S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co., for Appellants (In C. A. No. 1407 of 1968) and Respondents Nos. 2 to 7 (In C. A. No. 1569 of 1968); Mr. Bishan Narain, Senior Advocate, (M/s. A. Sreedharan Nambiar and S. P. Nayar, Advocates, with him), for Appellants (In C. A. No. 1569 of 1968) and Respondents Nos. 2, 4 and 5 (In C. A. No. 1407 of 1968); Mr. U. P. Singh, Advocate, for Respondent No. 1 (In C. A. No. 1407 of 1968).

The following judgment of the Court was delivered by

SIKRI, J.: The Municipal Committee, Jalalabad, respondent before us in these appeals, filed an application under Articles 226 and 227 of the Constitution praying that Section 20B of the Displaced Persons (Compensation and Rehabilitation) Act, 1954 — hereinafter referred to as the Compensation Act — be declared ultra vires the Constitution and that the memorandum dated March 14, 1963, communicated by the District Rent and Managing Officer, Jalalabad, be quashed. The learned Single Judge, following an earlier judgment of the Punjab and Haryana High Court in Kirpal Singh v. The Central Government, ILR (1967) 2 Punj & Har 574, held that Section 20B of the Compensation Act was ultra vires and quashed the impugned order dated March 14, 1963, and directed the restoration of the property in dispute to the Municipal Committee. An appeal was taken to the Letters Patent Bench but this was dismissed in limine. Two appeals have been filed against this judgment, one by the Union of India and its officers who are interested only in the question of the vires of the section, and the other by Lachhmandas and others to whom the shops in dispute have been transferred.

2. The relevant facts may be stated shortly. The Nawab of Mamdot became an evacuee in 1947 on the partition of the country and his property was taken over by the Custodian as evacuee property. In 1949, the District Rent and Managing Officer treated five shops, situated in Chowk Kalan, Jalalabad, as belonging to the Nawab of Mamdot and began to recover the rent of the shops from the tenants.

The Municipal Committee protested and lengthy correspondence ensued between the Municipal Committee and the Custodian. Eventually the Municipal Committee filed a Civil Suit in 1958 against the Union of India for a declaration that the said shops were their own property and not evacuee property. Ultimately, the Trial Court, by order dated January 8, 1962, made a reference to the Custodian General for determining the question whether the shops in dispute were evacuee property or not. The Deputy Custodian General, exercising his powers under Section 27 of the Administration of Evacuee Property Act, 1950 (hereinafter referred to as the Evacuee Act) held that the property in dispute had been wrongly taken over as evacuee property and ordered that the five shops be released in favour of the Municipal Committee, Jalalabad. On this, the Municipal Committee applied to the Regional Settlement Commissioner, under Rule 37 of the Administration of Evacuee Property (Central) Rules, 1950 for the restoration and possession of the five shops. On March 14, 1963, the District Rent and Managing Officer, Jalalabad, sent a memorandum to the Municipal Committee stating that the property in dispute had already been transferred to the occupants and disposed of under the Compensation Act and that its assessed price was Rs. 6542/-. In the memorandum it was further stated:

"It is not, therefore, expedient or practicable to restore the above property to you and it has, therefore, been decided to transfer you any other immovable property in the compensation pool of the equal amount in lieu thereof under Section 20B of the D. Ps. (C & R) Act, 1954." The memorandum also listed some properties which were available for transfer to the Municipal Committee. This is the memorandum that has been quashed by the High Court.

3. The above proposal was not acceptable to the Municipal Committee. It was pointed out by the Municipal Committee in reply that it was incorrect that all the five shops had been transferred and that the assessment price was Rs. 6452/-. According to the Municipal Committee only one shop out of these, in possession of Dogar Mal Ram Chand, had been auctioned for Rs. 10,100/- although the sale had not matured.

4. It appears that one shop was released in favour of the Municipal Committee but the Department refused to release the other shops. After unsuccessfully ap-

proaching the Settlement Officer, with delegated powers of the Settlement Commissioner, the writ application under Article 226 was filed in the High Court

5 In ILR (1967) 2 Punj & Har 574 the High Court had held that Section 20B of the Compensation Act was unconstitutional being ultra vires Articles 14 and 19 (1) (f) of the Constitution. The High Court was, however, of the opinion that this section did not violate Article 31 (2) of the Constitution. As we have come to the conclusion that Section 20B violates Article 31 (2) of the Constitution, we need not consider whether the reasoning of the High Court is correct regarding the section being ultra vires Article 14 or 19 (1) (f). Section 20B is in the following terms

"20B (1) Where any person is entitled to the restoration of any property by virtue of an order made by the Custodian-General under Section 27 of the Administration of Evacuee Property Act, 1950, or by the competent officer or the appellate officer under the Evacuee Interest Separation Act, 1951, and the Central Government is of opinion that it is not expedient or practicable to restore the whole or any part of such property to that person by reason of the property or part thereof being in occupation of a displaced person or otherwise, then, notwithstanding anything contained in the said Acts or this Act, it shall be lawful for the Central Government.—

(a) to transfer to that person in lieu of the property to be restored or any part thereof, any immovable property in the compensation pool or any part thereof, being in the opinion of the Central Government as nearly as may be of the same value as the property to be restored or, as the case may be, any part thereof, or

(b) to pay to that person such amount in cash from the compensation pool in lieu of the property to be restored or part thereof, as the Central Government having regard to the value of the property to be restored or part thereof, may in the circumstances deem fit.

(2) Where in pursuance of sub-sec. (1) any person has been granted any immovable property from the compensation pool or has been paid any amount in cash from the compensation pool, his right, title and interest in the property to be restored shall be deemed to have been extinguished."

6 Before we deal with the constitutionality of this section, we may briefly refer to its background. This is set out in detail by this Court in *Amar Singh v.*

Custodian, Evacuee Property, Punjab, 1957 SCR 801 = (AIR 1957 SC 599). In brief, a number of steps were taken by Government to rehabilitate the displaced persons coming from West Pakistan. The first legislative measure enacted to achieve this purpose was the East Punjab Evacuees' (Administration of Property) Ordinance, 1947. Various other Acts were passed which are set out at p 809 of SCR = (at p 603 of AIR) of the above judgment. It is enough for the purposes of this case to consider the effect of the provisions of the Compensation Act and the Evacuee Act. Under Section 7 of the Evacuee Act property was notified as being evacuee property, and under Sec. 8 the property declared to be evacuee property vested in the Custodian. Under Section 9, the Custodian was empowered to take possession of the property vested in him, and the Custodian was entitled under Section 10 to administer, preserve and manage any evacuee property. In exercise of the powers he granted leases and made allotments out of the evacuee property, in favour of displaced persons.

7. By 1954 it was decided that displaced persons should be paid compensation in respect of the property left by them in the territories now forming part of West Pakistan. With that end in view the Compensation Act was passed. Section 12 enabled the Central Government to acquire property which had been declared evacuee property and vested in the Custodian. After acquisition the title of the evacuee was extinguished and the evacuee property vested absolutely in the Central Government free from all encumbrances. All the property acquired under this section formed part of the compensation pool. Cash balances lying with the Custodian and certain other contributions and assets were also thrown in the compensation pool. Elaborate rules were framed under the Compensation Act for the purpose of paying compensation to displaced persons out of the compensation pool. One of the ways of paying compensation was transfer of property.

8. It is not disputed that Lachhman Dass and others were granted sanads under the Compensation Act and thus purported to acquire ownership rights in the shops.

9. The objects and reasons for enacting Section 20B were given as follows—

"Instances have come to notice where some properties were wrongly declared to be evacuee property and they were

also acquired. In such cases, the Custodian-General is empowered under Section 27 of the Administration of Evacuee Property Act, 1950 to restore such property to the non-evacuee owner. Similarly, a competent officer has also power under the Evacuee Interest Separation Act, 1951, to declare a share in a property to be non-evacuee after the whole of it has been declared to be evacuee property and has been acquired. It is not sometimes possible to restore the original property to the non-evacuee owner because of its transfer to a displaced person. To overcome this difficulty, it is proposed to insert a new Section 20B on the lines of Section 20A."

10. We may first analyse the provisions of Section 20B. It proceeds on the basis that the property to be restored had in fact not properly vested in the displaced person or the Central Government. Ordinarily, the rightful owner would be entitled to have the property restored to him. But the section enables the Central Government to deprive him of that property if it is of the opinion that it is not expedient or practicable to restore the whole or part of the property. The section mentions one reason why it may not be expedient or practicable, and that is that the property is in the occupation of a displaced person. Even if this is assumed to be an adequate reason, it makes it almost non-controlling by saying that any other reason will be good enough. This is the only meaning we can give to the word "otherwise". In other words, this means that if the Central Government likes the property or its lessee or licensee or transferee and it finds it irksome or does not want to annoy that person it could deprive the rightful owner of his property. The Central Government is not concerned with justness but whether it would be politic to restore the property. If the Central Government has decided to deprive the rightful owner of the property it may transfer to that person any property being, again in the opinion of the Central Government, as nearly as may be, of the same value as the property to be restored, but the section does not say value at what point of time; whether at the time the property was taken possession of by the Custodian the Central Government or the displaced person, or at the time the title of the rightful owner is extinguished. The section further gives an alternative to the Central Government to offer cash from the compensation pool, having regard to the value of the pro-

perty. Here again no indication is given whether the cash has to be equivalent to the full value of the property and no indication as to the point of time at which value is to be ascertained. Under sub-section (2) after the rightful owner has been granted any immovable property from the compensation pool or has been paid any cash then his title is extinguished.

11. It seems to us that the High Court was not right in holding that the section did not violate Article 31 (2) of the Constitution. Article 31 (2) provides for two things: (1) the acquisition or requisition should be for a public purpose; and (2) the law should provide for compensation and either it should fix the amount of compensation or specify the principles on which and the manner in which the compensation has to be determined or given.

12. In our view, Section 20B violates both these provisions of the article. There is no doubt that to provide for rehabilitation of displaced persons was a public purpose but it does not serve any public purpose to provide that if a displaced person is in occupation of somebody's property he should not be given other property because it will not be expedient or practicable to do so. A public purpose may be served if it had been provided that a displaced person may not be ousted because his business would be ruined or that he would be completely thrown on the street, but to provide in the section that if the Central Government does not think it expedient or practicable for its own convenience or for the convenience of a lessee or licensee who is not a displaced person it may not restore property serves no public purpose. In our view, under the section the Central Government is entitled not to restore property to serve a purpose other than a public purpose and consequently the section is ultra vires Article 31 (2).

13. Further, in our opinion, the section does not fix any compensation or lay down any principles for compensation. Sub-section (1) (a) of Section 20B may perhaps be taken as laying down some principle, namely, that the value should be the same but it does not prescribe the point of time at which the value is to be ascertained. In sub-clause (b) nothing is said about the cash being equivalent to the value of the property which is sought not to be restored. The Central Government might, having regard to the value of the property, decide that cash to the extent of 50 per cent of its value should be paid. In doing this it would

be having regard to the value of the property but it would be following another rule, namely, that the cash should be half of the value of the property which is laid down in the section

14. We are quite aware that the Central Government was faced with the problem mentioned in the "objects and reasons" set out above, and this problem had to be tackled, but the problem should and can be tackled in accordance with law and the Constitution.

15. It was sought to be argued before us that Article 31 (2A) applied in this case, but it seems to us that insofar as the property was still part of the compensation pool the effect of the extinguishment of the title of the rightful owner would be to vest the property in the Central Government. It may be that insofar as the title vested in the displaced person the case would come within Article 31 (2A), but then the section is not severable and it has to be declared void as a whole. We need not consider the point that even if the section is severable it would be void under Article 19(1) (f). The points we have mentioned above would also be relevant in considering the reasonableness of the restrictions.

16. We may mention that the learned counsel on behalf of Lachman Dass and others, the displaced persons to whom the shops had been purported to have been transferred under the sanads, tried to attack the validity of the order of the Custodian General under Section 27 of the Evacuee Act on the ground that they were not heard. This point was not taken in the High Court and we cannot allow it to be raised before us at this stage.

17. In the result the appeals fail and are dismissed with costs, one hearing fee SSG/D.V.C. Appeals dismissed.

AIR 1969 SUPREME COURT 1130
(V 56 C 207)

(From Madras)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ

R. Obliswami Naidu, Appellant v. Addl. State Transport Appellate Tribunal, Madras and others, Respondents

Civil Appeal No 1426 of 1963, D/- 17-2-1969

* (Writ Petn. No 903/68, D/- 16-4-1963 - Mad.)

FM/TM/A913/69/D

Motor Vehicles Act (1939), Ss. 47 (3) and 57 (3) — Grant of stage carriage permit — Procedure — Question of number of stage carriages on the route cannot be decided while entertaining application for stage carriage permit.

In view of Sections 47 and 57 before granting a stage carriage permit two independent steps have to be taken. Firstly there should be a determination by the R. T. A. under Section 47 (3), of the number of stage carriages for which stage carriage permits may be granted in that route. Thereafter applications for stage carriage permits in that route should be entertained. 1967-2 SCWR 857, Followed (Para 8)

Thus where the R. T. A. determines the number of stage carriages required on the route at the time of entertaining application for stage carriage permit the procedure is not in accordance with law. (Para 4)

If a contrary view, viz that the R. T. A. can determine the question as to the number of stage carriages required on a route at the time it considers applications made by operators for stage carriage permit for that route, is taken it will throw open the door for manipulations and nepotism. The operator who happens to apply for the route first will be in a commanding position. The R. T. A. will have no opportunity to choose between competing operators and hence public interest would suffer. Such a view cannot also be justified by suggesting that sub-section (3) of Section 57 is wide enough to allow the competing operators to apply for the route in question when the first application is published and representations called for. Section 57 (3) merely permits representations to be made in respect of the application published. Such representations cannot take the form of competing applications. The word "representations" in Section 57 (3) does not include applications for the route. (Para 5, 7)

Cases Referred: Chronological Para
(1967) Civil Appeal No 95 of 1965.
D/- 27-10-1967 = (1967) 2 SCWR
857 (SC), M/s. Jaya Ram Motor
Service v. Rajarathinam 8
(1963) AIR 1963 SC 64 (V 50) =
1963-3 SCR 523, Abdul Mateen
v. Ram Kaulash Pandey 8

Mr. D. Narasaraju, Senior Advocate.
(M/s. Subrahmaniam, Vineet Kumar, J. Ramamurthy, P. S. Khera and Mrs. Shyamla Pappu, Advocates with him), for

Appellant; Mr. S. T. Desai, Senior Advocate (M/s. A. R. Ramanathan and R. Gopalakrishnan, Advocates with him), for Respondent No. 2.

The following Judgment of the Court was delivered by

HEGDE, J.: The scope of Section 47(3) of the Motor Vehicles Act, 1939 (to be hereinafter referred to as the Act) comes up for consideration in this appeal by certificate.

2. The facts of the case necessary for the purpose of deciding the point in issue are few, and they are as follows: —

On August 8, 1966 the appellant applied to the R. T. A., Coimbatore for a permit to ply a stage carriage on the route Bhavani to Vellithiruppur. That was entirely a new route. No stage carriage was plying on that route at that time. The R. T. A. published that application under Section 57 (3) of the Act. Respondents Nos. 2-3 and others made representations against that application contending that there was no need to grant a stage carriage permit for that route. The R. T. A. overruled their objection and granted the permit asked for on October 9, 1967. As against the order of the R. T. A. some of the objectors went up in appeal to the State Transport Appellate Tribunal, Madras. The Additional State Transport Appellate Tribunal allowed the appeal by its order of February 22, 1968 holding that the procedure adopted by the R. T. A. was not in accordance with law inasmuch as it had failed to determine the question of the need for a service in that route before entertaining the application for a stage carriage permit. The Tribunal held that the procedure adopted by the R. T. A. contravened Section 47 (3) of the Act. The appellant challenged that order before the High Court of Madras in Writ Petition No. 908 of 1968. The High Court dismissed that application. Hence this appeal.

3. Section 47 of the Act prescribes the procedure to be adopted by the R. T. A. in considering applications for stage carriage permit. That section reads:

"A Regional Transport Authority shall, in considering an application for a stage carriage permit, have regard to the following matters namely:

(a) the interests of the public generally;
(b) the advantages to the public of the service to be provided, including the saving of time likely to be effected thereby

and any convenience arising from journeys not being broken;

(c) the adequacy of other passenger transport services operating or likely to operate in the near future, whether by road or other means, between the places to be served;

(d) the benefit to any particular locality or localities likely to be afforded by the service;

(e) the operation by the applicant of other transport services, including those in respect of which applications from him for permits are pending;

(f) the condition of the roads included in the proposed route or area; and shall also take into consideration any representations made by persons already providing passenger transport facilities by any means along or near the proposed route or area or by any association representing persons interested in the provision of road transport facilities recognised in this behalf by the State Government, or by any local authority or police authority within whose jurisdiction any part of the proposed route or area lies:

Provided that other conditions being equal, an application for a stage carriage permit from a co-operative society registered or deemed to have been registered under any enactment in force for the time being shall, as far as may be, be given preference over applications from individual owners.

(2) A Regional Transport Authority shall refuse to grant a stage carriage permit if it appears from any time-table furnished that the provisions of this Act relating to the speed at which vehicles may be driven are likely to be contravened:

Provided that before such refusal an opportunity shall be given to the applicant to amend the time-table so as to conform to the said provisions.

(3) A Regional Transport Authority may having regard to the matters mentioned in sub-section (1), limit the number of stage carriages generally or of any specified type for which stage carriage permits may be granted in the region or in any specified area or on any specified route within the region."

4. Sub-section (3) of Section 47 of the Act requires the Regional Transport Authority to limit the number of stage carriage permits that may be granted in a route having regard to the matters mentioned in sub-section (1) of that section. The question for determination is whether the determination as to the number of stage

carriages required on a route should be done at a stage anterior to that of entertaining applications for stage carriage permits or that it could be done at the time it considers applications made by operators for stage carriage permits in that route. The R T A has proceeded on the basis that that question can be decided while considering the applications made to it for permits by operators whereas the Appellate Tribunal and the High Court have taken a contrary view.

5. Sub-section (3) of Section 47 of the Act if read by itself does not throw any light on the controversy before us but if Sections 47 and 57 of the Act are read together it appears to us to be clear that the view taken by the Appellate Tribunal and the High Court is the correct view. If contrary view is taken it will throw open the door for manipulations and nepotism. There may be possibility of the personality of the applicant influencing the decision of the R T A. on the question of need for a stage carriage permit in the route and thereby public interest which should be the main consideration while taking a decision under Section 47 (3) may suffer. If we accept the view taken by the R. T. A. as correct, an operator who happens to apply for the route first will be in a commanding position. The R T. A. will have no opportunity to choose between competing operators and hence public interest might suffer.

6. Mr Narasaraaju, learned Counsel for the appellant tried to meet the difficulty by suggesting that sub-section (3) of Section 57 of the Act is wide enough to allow the competing operators to apply for the route in question when the first applicant's application is published and representations called for. Section 57 (3) reads:-

"On receipt of an application for a stage carriage permit or a public carrier's permit, the Regional Transport Authority shall make the application available for inspection at the office of the Authority and shall publish the application or the substance thereof in the prescribed manner together with a notice of the date before which representations in connection therewith may be submitted and the date, not being less than 30 days from such publication, on which, and the time and place at which, the application and any representation received will be con-

(Proviso is not relevant for our present purpose)

7. We are unable to accept this contention. That sub-section merely permits representations to be made in respect of the application published. Such representations cannot take the form of competing applications. It is difficult to accept the contention that the word "representations" in Section 57 (3) includes applications for the route. That apart if we accept Mr Narasaraaju's contention then the whole thing will become unworkable. If at the time of making his representation an operator can also make an application for a stage carriage permit for that route, that application again will have to be published under Section 57 (3) and objections called for. Extending the logic of Mr Narasaraaju's argument as we ought to, at the time of making representations to those applications, further applications can be made. This may turn out to be an unending chain.

8. On an examination of the relevant provisions of the Act and the purpose behind Sections 47 and 57, we are convinced that before granting a stage carriage permit two independent steps have to be taken. Firstly there should be a determination by the R T. A. under Section 47 (3), of the number of stage carriages for which stage carriage permits may be granted in that route. Thereafter applications for stage carriage permits in that route should be entertained. The R. T. A. is not competent to grant stage carriage permits for more carriages than fixed under Section 47 (3). Our above conclusion accords with the view expressed by this Court in Civil Appeal No 95 of 1965 (SC), M/s Jaya Ram Motor Service v. S Rajarathnam. Therein the Court observed

"The scheme of Section 47 is that when a person makes an application under Sections 45 and 46 the Authority first considers it under Section 47 (1) in the light of the matters set out therein and also the representations if any, made by the persons mentioned therein. The Authority then fixes under Section 47 (2) having regard to the matters mentioned in Section 47 (1), the number of stage carriages for which permits may be granted in the region or on any specified route within such region. Having fixed the limit the Authority publishes under Section 57 (3), the application with a notice of the date before which representations in connection therewith may be submitted and the date on which such application and re-

presentations would be considered. The proviso to Section 57 (3) lays down that if the grant of a permit has the effect of increasing the number of vehicles operating in that region or in any specified area thereof or on the route within such region beyond the limit fixed under Section 47 (3), the Authority may dismiss the application summarily. If it does not exceed such limit and the Authority decides to grant a permit it has to consider the application and the representations submitted to it in conformity with the procedure laid down in Section 57. Therefore Section 47 envisages two stages of the inquiry; (i) the fixing of the number of permits under Section 47 (3) and (ii) the consideration thereafter of the application for grant of a permit and the representations if any by the persons mentioned in Section 47 (1). It would therefore seem that once the Authority has fixed the number of vehicles to be operated in the region or the area or the particular route and the number of permits to be granted therefor, the stage of inquiry under Section 47 (3) is over. The next thing that the Authority has to consider is whether grant of a permit would be within such limit or not. If it does not exceed the limit the Authority has to consider the application and the representation if any, in connection therewith and to grant or refuse to grant the permit under Section 48 (1). Therefore, once the limit is fixed, if the grant of an application does not have the effect of exceeding that limit, the only question before the Authority would be whether the applicant is a person fit to be granted the permit or not in the light of the matters set out in sub-section (1) of Section 47. The question of the number of permits to be granted, having been already canvassed and decided, cannot become the subject at that stage of any further controversy. This is clear from the fact that Section 48 (1) which empowers the Authority to grant or refuse to grant the permit starts with the words "subject to the provisions of Section 47". It is therefore clear that the Authority has first to fix the limit and after having done so, consider the application or representations in connection therewith in accordance with the procedure laid down in S. 57. As held in *Abdul Mateen v. Ram Kailash Pandey*, 1963-3 SCR 523 at p. 529 = (AIR 1963 SC 64 at p. 67) the Authority may modify the limit fixed by it under Section 47 (3) but once such a limit is fixed, it cannot ignore it while considering the

applications before it under Section 48. Section 47 (3), as observed there,

"is concerned with a general order limiting stage carriages generally etc., on a consideration of matters specified in Section 47 (1). That general order can be modified by the Regional Transport Authority, if it so decides, one way or the other. But the modification of that order is not a matter for consideration when the Regional Transport Authority is dealing with the actual grant of permits under Section 48 read with Sec. 57 for at that stage what the Regional Transport Authority has to do is to choose between various applicants. . . That, in our opinion, is not the stage when the general order passed under Section 47 (3) can be reconsidered for the order under Section 48 is subject to the provisions of Section 47, which includes Section 47 (3) under which a general order limiting the number of stage carriages etc. may have been passed."

That being so, if an application is refused such refusal is under Section 48 (1) and the appellant who is denied the permit has a right of appeal under Section 64 (1) (a)".

In the result this appeal fails and the same is dismissed with costs.

MVJ/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 1133 (V 56 C 208)

(From Calcutta: AIR 1966 Cal 120)

J. M. SHELAT AND V. BHARGAVA, JJ.

Arati Paul, Appellant v. Registrar, Original Side, High Court, Calcutta and others, Respondents.

Civil Appeal No. 745 of 1966, D/- 10-3-1969.

Arbitration Act (1940), Ss. 2 (a) and (b) and 21 — Agreement to refer disputes in pending suits to arbitration of sole Judge extra cursum curiae — Under terms of agreement Judge to act in dual capacity as arbitrator and a Judge — Order passed in pursuance of agreement in partition suit — On facts order held to be judgment and preliminary decree and not award — Registrar of High Court bound to file it on record under Rules of High Court — No mandamus can be issued against Registrar to take it off the record so long as the order is not vacated by appropriate remedy — (Constitution of

IM/IM/B759/69/D

India, Art. 226 — Mandamus, writ of) — (Civil P. C. (1908), S. 96 — Appeal against consent decree).

In a partition suit and a testamentary suit pending before Justice Mallick of the High Court the parties put forward an agreement referring their disputes in both the suits to the sole arbitration of Mallick J *extra cursum curiae* jurisdiction of the High Court. The agreement ran as follows — It is recorded that all the parties agreed to abide by any decision that will be given and no evidence need be taken except or to what his Lordship might desire and the evidence need not be recorded in any formal manner. Parties agree that his Lordship would have all the summary powers including the power to divide and partition the properties and to make such decrees as his Lordship thinks fit and proper and for the purpose of partition if necessary to engage or appoint Surveyors and Commissioners as his Lordship thinks best. It is further recorded that all parties agree that they will not prefer any appeal from or against the decree or order that may be passed by his Lordship the Hon'ble Mr Justice Mallick. In pursuance of this agreement Mallick, J., passed an order dated 1-4-1963 in the partition suit. This order was filed in the record as a judgment in spite of objection and thereupon the objector presented a letter of demand to the Registrar of the Original side of the High Court to recall, cancel and withdraw the filing of the order of Mallick, J., from the record of the suit and failing to get any response filed petition under Article 226 for a writ of mandamus against the Registrar. The main question in dispute was whether the order of Mallick, J., amounted to an award or a judgment in the suit.

Held (1) that in the facts and circumstances of the case the order passed by Mallick J. was not an award of an arbitrator but amounted to judgment and decree of Court. In a case like the present, where the arbitration agreement envisages that the Presiding Officer of the Court should himself act as an arbitrator, he, in such circumstances, will obviously occupy a dual capacity. He will be both an arbitrator to decide the matters referred to him by the agreement of the parties, and a Court before which the suit continues to remain pending having jurisdiction to deal with the suit in accordance with the provisions of the Arbitration Act. Even assuming without de-

ciding that there was no competent reference to arbitration by the presiding officer in a pending suit the order passed by Mallick, J., must be held to be a preliminary decree passed by him as a Court seized of the partition suit. On the other hand, even if it be held that there was a competent reference it was clear that, after deciding the matters left to his decision as an arbitrator by the parties, Mallick, J., proceeded further to deal with the suit himself as a Court and to pass a preliminary decree in it which course being adopted by him was envisaged by the parties themselves when they stated that he could make such decrees in the suit as he thought fit. The actual order passed by Mallick, J., also made it clear that, in passing that order, he purported to act as the Court deciding the suit and not as the arbitrator to whom some matters in dispute were referred by the parties. English and Indian Case law regarding nature of such order and its appealability discussed and distinguished.

(Para 17)

(2) that the remedy sought by the writ petitioner could not be allowed so long as the judgment stood and was not vacated. Since the order of Mallick, J., was a judgment the Registrar under the Rules of the Calcutta High Court was bound to file it on the record and retain it there. The appropriate remedy was to have the judgment vacated. The High Court was therefore right in dismissing the writ petition. AIR 1966 Cal 120, Affirmed.

(Para 15)

Cases Referred.	Chronological	Paras
(1937) AIR 1937 Andh Pra 700		
(V 44) = 1956 Andh WR 517,		
E Kotamma v N Mangamma		15
(1915) AIR 1945 Bom 478 (V 32) =		
47 Bom LR 388, K. P. Dalal v.		
R S Jamadar		13
(1938) 1938-2 All ER 109 = 107		
LJ KB 295, Wyndham v. Jackson		7
(1937) 1937-3 All ER 677 = 157		
LT 305, Wyndham v. Jackson		7
(1934) AIR 1934 Mad 397 (V 21) =		
ILR 58 Mad 31, N. Venkata		
Somayajulu Garu v. Venkamma		12
(1929) AIR 1929 All 747 (V 16) =		
ILR 51 All 903, Bajjnath v. Dhani		
Ram		14
(1920) AIR 1920 Mad 800 (V 7) =		
ILR 42 Mad 625, Chinna Venkata-		
sami Naicken v. Venkatasami		
Naicken		11
(1911) ILR 38 Cal 421 = 9 Ind Cas		
296, Baikanta Nath Goswami v.		
Sita Nath Goswami		8

- (1903) ILR 26 Mad 76, Nidanarthi Mukkanti v. Thammana Ramayya 10, 15
- (1898) ILR 23 Bom 752 = 1 Bom LR 366, Sayad Zain v. Kalabhai Lallubhai 8
- (1897) 1897 Bom PJ 413, Raoji Trimbak Nagarkar v. Govind Vinayak Nagarkar 8
- (1896) 1896 AC 136 = 65 LJQB 321, Robert Murray Burgess v. Andrew Morton 6
- (1874) LR 5 PC 516 = 30 LT 729, Pisani v. Attorney General of Gibraltar 16
- (1866) 1 Sc and Div 70, White v. Buccleuch (Duke) 5
- (1866) 1 Sc & Div 47 = 14 LT 835, Bickett v. Morris 5
- (1855) 2 Macq 478 = 2 Jur NS 647, Magistrates of Renfrew v. Hoby 6
- (1854) 1 Macq 714 = 24 LT OS 39, Dudgeon v. Thomson 6
- (1849) 6 Bell's SC App 308, Craig v. Duffus 6

Mr. M. C. Chagla, Senior Advocate, (M/s. D. N. Mukherjee and P. K. Sen, Advocates with him), for Appellant; Mr. B. Sen, Senior Advocate (S. C. Mazumdar, Advocate and G. S. Chatterjee, Advocates for Sukumar Basu, Advocate, with him), for Respondents (Nos. 1 and 2); M/s. N. N. Goswami and S. N. Mukherjee, Advocates, for Respondents (Nos. 3 and 4).

The following judgment of the Court was delivered by

BHARGAVA, J. — This appeal, by special leave, is directed against a judgment of the Appellate Bench of the High Court of Calcutta dated 18th February, 1965* dismissing an appeal against an order of a single Judge by which he dismissed a petition under Article 226 of the Constitution on 26th August, 1964. The facts leading up to this litigation are that one Shrish Chandra Paul died in the year 1930, leaving behind his widow Pramila Sundari, his daughter Arati, and 4 sons Balai, Kanai, Netai and Gour. In the year 1945, Netai died leaving his mother Pramila Sundari as his sole heiress. On 27th September, 1946, a deed of gift in respect of two premises Nos. 60/11 and 60/12 in Gouri Beria Lane was executed by Pramila Sundari in favour of her three sons Balai, Kanai and Gour. On 18th March, 1952, there was an agreement for partition between Pramila Sundari and her three sons Balai, Kanai and Gour, by

which the joint estate left by Shrish Chandra Paul was partitioned into four lots and a small portion of the property was left joint. On 13th June, 1957, Pramila Sundari instituted Suit No. 1045 of 1957 against Balai, Kanai and Gour for a declaration that the deed of gift and the agreement of partition were void and inoperative, and for a fresh declaration of the shares of the parties and partition of the joint properties. In this suit, Arati was also impleaded as a defendant. On 26th August, 1957, Pramila Sundari executed a will bequeathing her entire estate absolutely to Arati Paul and Gour in equal shares. On 13th January, 1958, Pramila Sundari died and, consequently, on 12th December, 1958, an order was made in Suit No. 1045 of 1957 transposing Arati Paul as the plaintiff. On 3rd February, 1960, Arati Paul applied in the Calcutta High Court for grant of Letters of Administration, with a copy of the will of Pramila Sundari annexed. This testamentary proceeding was contested and was marked in the year 1962 as Testamentary Suit No. 12 of 1962. On 17th December, 1962, the Testamentary Suit No. 12/1962 and the Partition Suit No. 1045/1957 appeared in the peremptory list of Mallick, J., and the Testamentary Suit was partly heard. On 2nd and 3rd January, 1963, there was further hearing in the testamentary suit. On 4th January 1963, an agreement was put forward before Mallick, J. referring the dispute in both the suits to the sole arbitration of Mallick, J. extra cursum curiae. Since this reference is of importance we may quote it in full:—

"It is recorded that all the parties consent to this Testamentary Suit as well as the partition suit being Suit No. 1045 of 1957 and all the disputes involved in these two matters be settled and referred to the sole arbitration of the Hon'ble Mr. Justice P. C. Mallick and the parties agreed to abide by any decision that will be given and no evidence need be taken except or to what his Lordship might desire and the evidence need not be recorded in any formal manner. Parties agree that his Lordship would have all the summary powers including the power to divide and partition the properties and to make such decrees as his Lordship thinks fit and proper and for the purpose of partition if necessary to engage or appoint Surveyors and Commissioners as his Lordship thinks best.

It is recorded that all the parties have referred this matter to the Learned Judge—

* (reported in AIR 1966 Cal 120).

in what is known as Extra Cursum Curiae jurisdiction of this Court.

It is further recorded that all parties agree that they will not prefer any appeal from or against the decree or order that may be passed by his Lordship the Hon'ble Mr Justice Mallick."

2 When this note was recorded all the parties to the two proceedings were represented through their counsel. In pursuance of this agreement, Mallick, J. passed an order in Suit No 1045/1957 on 1st April, 1963. It may be mentioned that the main dispute in the present case is whether this order of Mallick, J. in this partition suit amounts to an award or a judgment in a suit. On the same day, by a separate order, he also granted Letters of Administration in the Testamentary Suit. On 5th April, 1963, Arati Paul filed an objection to the recording of this order as a judgment. On 4th May, 1963, drafts of decrees drawn up in terms of that order were issued. On 13th May, 1963, Arati Paul applied for change of her Attorney in the partition Suit No 1045/1957. On 17th May, 1963, the order of Mallick, J. dated 1st April, 1963 was filed on the record of Suit No 1045/1957 as a judgment. On 24th July, 1963, the application of Arati Paul for change of Attorney was allowed. Thereafter, on 20th August, 1963, Arati Paul presented a Letter of Demand to the Registrar of the Original Side of the High Court to recall, cancel and withdraw the filing of the order of Mallick, J. dated 1st April, 1963 from the record of the suit and to take it off the file of that suit.

3 Failing to get any response, Arati Paul, on 4th September, 1963, presented a petition under Article 226 of the Constitution praying for issue of a writ in the nature of mandamus directing the Registrar of the High Court on the Original Side to forthwith recall, cancel and withdraw the filing of the said pretended Award (that is how the order of Mallick, J. was described in this petition) dated 1st April, 1963 as a judgment in the said Suit No 1045/1957 as part of the records of the said suit, and another writ of mandamus directing the Registrar of the High Court to forthwith take off the said pretended Award dated 1st April, 1963 from the file and/or records of the said Suit No. 1045/1957. In this petition, apart from the Registrar of the High Court on the Original Side, Balai, Kanai and Gour were also impleaded as opposite parties. This petition under Article 226

of the Constitution was numbered as Matter No 366 of 1963 and was summarily rejected by Banerjee, J. on 5th September, 1963. On 16th September, 1963, Appeal No. 228 of 1963 was entertained against this judgment under the Letters Patent, but an application presented for an interim injunction restraining the Registrar from taking any steps pursuant to the judgment of Mallick, J. dated 1st April, 1963 pending disposal of the appeal was rejected. On 27th November, 1963, Arati Paul obtained special leave to appeal from this Court against the refusal of the interim injunction by the interlocutory order dated 16th September, 1963. While this appeal was still pending in this Court, the Appellate Bench of the High Court, on 28th April, 1964, allowed Appeal No 228 of 1963, directed issue of a Rule in Matter No 366 of 1963, and ordered stay of all proceedings pursuant to the order of Mallick, J. dated 1st April, 1963, till the final disposal of the Rule. Since the appeal in this Court had become infructuous, it was not prosecuted and was dismissed for non-prosecution on 29th April, 1964. On 10th June, 1964, two of the parties Kanai and Balai took out a notice of motion for revocation of Letters of Administration which had been granted to Arati Paul by the order of Mallick, J. dated 1st April, 1963 in the Testamentary Suit. This notice was returnable on 15th June, 1964. Matter No 366 of 1963, having been remanded by the Appellate Bench, appeared for final hearing before Sinha, J. on 15th July, 1964, but it was directed to go out of the list as an objection was taken on behalf of Kanai and Balai to the matter being taken up by him on the ground that he was a member of the Appellate Bench which had directed issue of the Rule in that Matter. On 16th July, 1964, this Matter No. 366/1963 was mentioned before the Chief Justice for being assigned to some other Judge, when a direction was made by the Chief Justice that a letter should be written by the party concerned to his Secretary. On 27th July, 1964, the Notice of Motion taken out by Kanai and Balai for revocation of Letters of Administration was partly heard by Mallick, J. who recorded the following minutes—

"Part Heard The Rule issued by the Appeal Court in Matter No. 366/63 in the matter of Arati Paul v. Registrar, O. S., appears to be intimately connected with the application that is now pending before me. I direct that this matter with

the said Matter No. 366 be placed before the Hon'ble C. J. for proper determination. Let this matter along with the matters appear day after tomorrow when I shall give directions. Interim Order to continue except that Arati Paul will collect rent."

It appears that, simultaneously with these proceedings, an application for taking proceedings for Contempt of Court were also pending before him in this connection. Hearing in Matter No. 366/1963 was concluded on 12th August, 1964, and then an order was made that this Matter as well as the proceedings relating to Notice of Motion for revocation of the Letters of Administration and the application for taking proceedings for contempt should appear in the list for judgment one after the other. On 26th August 1964, Mallick, J. passed an order discharging the Rule in Matter No. 366/1963 as well as dismissing the other two applications. Subsequently, on 1st September, 1964, the preliminary decree drawn up on the basis of the order of Mallick, J. dated 1st April, 1963 in Partition Suit No. 1045/1957 was signed by him, and on 3rd September, 1964, the decree was filed. On 21st September, 1964, Arati Paul filed Appeal No. 226 of 1964 challenging the order dated 26th August, 1964 passed by Mallick, J. dismissing Matter No. 366 of 1963. The appeal was dismissed by the Appellate Bench of the High Court on 18th February, 1965 and the order of the High Court in the appeal was filed on 16th March, 1965. Arati Paul then applied for a certificate under Article 133 (1) of the Constitution for leave to appeal to this Court. That having been refused, she obtained special leave from this Court and has now come up in this appeal challenging the confirmation by the Appellate Bench of the order of dismissal of Matter No. 366 of 1963.

4. The prayer in the writ petition (Matter No. 366/1963) has been pressed before us by Mr. Chagla on behalf of the appellant on the sole ground that the order of Mallick, J. dated 1st April, 1963 was in the nature of an award made by an arbitrator and not a judgment in the partition suit, so that the appellant was entitled to obtain a writ for its recall, cancellation and withdrawal and for taking it off the record of the suit. Being a mere award of an arbitrator, it could not be treated as a judgment in the suit, nor could a decree be drawn up

on its basis. On behalf of the respondents other than the Registrar of the High Court on the Original Side, Mr. Goswami has argued that, even though, under the agreement dated 4th January, 1963, Mallick, J. was requested to act *extra cursum curiae* and the suit was left to his arbitration, he, in fact, when passing the order dated 1st April, 1963, acted as a Court and passed a preliminary decree. According to him, a preliminary decree in a suit for partition can only be passed by a Court and not by an arbitrator when giving an award in the dispute referred to him. He has, therefore, urged that the Registrar was right in filing that order on the record of Suit No. 1045 of 1957 as a judgment, and no writ of mandamus can be issued to him to recall, cancel or withdraw it or take it off the record. Learned Counsel for the Registrar also urged that all that the Registrar did was to file the order of Mallick, J. in accordance with the Rules of Court, because it was a judgment passing a preliminary decree in the suit, so that the appellant was not entitled to the writ of mandamus sought in Matter No. 366 of 1963.

5. Mr. Chagla, in support of his argument, relied primarily on two decisions of Courts in England and on the principle enunciated by Russell in his book on "The Law of Arbitration", 17th Edn. In this book at p. 117, Russell has enunciated the principle as follows:—

"The subject-matter of an action may be referred to a Judge as arbitrator. The Judge in such a case will, if such is the intention of the parties, be merely an arbitrator and have no special powers by virtue of the fact that he is a Judge, and his award will not be subject to appeal." After laying down this principle, Russell goes on to elaborate it in the subsequent notes with reference to some decisions, and one of these principles enunciated is:

"When, with the consent of both parties, a judge deviates from the regular course of procedure of the court, he ceases to act judicially and becomes an arbitrator, whose decision is subject to no appeal." In support of this last proposition, Russell has quoted the decisions in *Bickett v. Morris*, (1866) 1 Sc & Div 47 (HL) and *White v. Buccleuch (Duke)*, (1866) 1 Sc & Div 70 (HL). We examined the decisions in these two cases, but could not find any specific statement in them that the decision given by a Judge on deviation from the regular course of procedure of the Court has to be held to be an

award, though it was held in both cases that it would not be subject to an appeal.

6. The principal case on which reliance is placed on behalf of the appellant is the decision of the House of Lords in *Robert Murray Burgess v. Andrew Morton*, 1896 AC 136. In that case, a suit was first brought for recovery of a certain amount and the cause was set down for trial before the Lord Chief Justice, when there being no likelihood of its being reached, the parties, with the consent of the learned Judge, agreed to withdraw it from trial, and to state a special case for the decision of the court. It was held by the House of Lords that the special case so stated did not raise directly any question of law and its decision only depended on questions of fact, so that the statement of the special case did not confer jurisdiction on the Court to deal with it as such. The learned Judges of the Divisional Court seized of the special case pointed out the incompetency and inexpediency of trying such a question by means of a special case, but expressed their willingness to do the best they could to decide it, if the parties desired them to do so, and on that footing, they heard the case and gave judgment. On appeal, the Court of Appeal reversed that judgment. This judgment of the Court of Appeal was brought up before the House of Lords which had to consider the nature of the judgment given by the Divisional Court. Lord Watson in his speech held—

"There are several decisions of this House, in cases coming from Scotland, which appear to me to affirm that the judgment of a court below, pronounced *extra cursum curiae*, is in the nature of an arbitrator's award, and that, as a general rule at least, no appeal from it will lie. An appeal was held, on that ground, to be incompetent in *Craig v. Duffus*, (1849) 6 Bell's SC App 308, *Dudgeon v. Thomson* (1854) 1 Macq 711 and *Magistrates of Renfrew v. Hoby*, (1855) 2 Macq 478." Lord Shird also expressed a similar view, taking note of the fact that, as soon as it became apparent to the learned Judges of the Divisional Court that the special case raised only a question of fact for their determination, they would have been warranted in declining to give judgment on it. It was apparent that the learned Judges yielded to the entreaties of both parties in entertaining and disposing of the case, and on this basis, expressed his opinion as follows—

"I agree in thinking that the proceeding was *extra cursum curiae*, and that the decision of the dispute between the parties was of the nature of an award by arbitrators as, indeed, the learned Judges of the Divisional Court seem themselves to have thought, as appears not only from the terms of Wills J's judgment, but from the observations of both Judges when the defendant proposed to appeal."

7. Reliance was also placed on the decision of Goddard, J. in *Wyndham v. Jackson*, (1937) 3 All ER 677. The facts of that case were that the plaintiff issued a writ in the Chancery Division claiming an account and payment of all sums due to her under a contract entered into by the plaintiff with the defendant. An order was made in the action by consent directing an account and the master, who dealt with that order, extended the ambit of his enquiry beyond the terms of the order at the invitation of both parties, gave a decision on a matter which was not covered by the Judge's order for an account, and issued a certificate to the effect that a certain sum was due from the defendant to the plaintiff. The question that was raised before Goddard, J. by the plaintiff was that she was entitled to recover the amount certified by the master on the ground that the certificate was equivalent to an award having been made pursuant to an oral submission by counsel, who asked him to deal with all matters in dispute, though not technically covered by the order directing an account. It was also submitted on her behalf that the minute in the master's book, indicating an order that he was prepared to make on the plaintiff's application for an order for payment, was also an award entitling her, not only to the amount mentioned but also to the costs of the Chancery proceedings. After considering the views expressed in a number of cases, Goddard, J. held—

"I must take it that it has been finally decided in a matter between the parties, that the certificate was given *ex cursum curiae*. Then as I find it was the result of a hearing which both parties requested, and to which they assented, I think it falls within the line of cases on which the plaintiff relies, and can be enforced as an award."

This case went up in appeal before the Court of Appeal whose decision is reported in *Wyndham v. Jackson*, (1938) 2 All ER 109. That Court differed from Goddard, J. on the nature of the order made by the master and held that the

determination by the master was not a final determination and was never intended to be treated as a final arrangement between the parties. That matter was still to go before the Judge who had made the order for account and the master's certificate could not be binding until it had been confirmed by the Judge. The position of the master was held to be exactly analogous to the position of an arbitrator to whom the court may have referred a matter to make a report to the court in order that the court may give a final decision between the parties. On this view, the Appeal Court did not go into the question whether the decision given by the master amounted to a decision given *extra cursum curiae* and whether it was enforceable as an award. The award of the master, being treated as provisional and subject to confirmation by the Judge, could obviously not be enforced as such. Thus, the view expressed by Goddard, J. that the decision of the master could be enforced as an award, if it had been final, was neither affirmed nor set aside.

8. The cases in India relied upon are two decisions of the Bombay and Calcutta High Courts. In *Sayad Zain v. Kalabhai Lallubhai*, (1898) ILR 23 Bom 752, before the case came to a regular hearing before the Court of the First Class Subordinate Judge, Surat, the parties as well as their pleaders signed an application which ran as follows:—

"We have decided that the Court should make a settlement of the dispute between us according to Chapter XXXVIII of the Civil Procedure Code, and we will abide by whatever decision the Court may give.

We have specially decided that the Court should have full authority to obtain information from the parties in whatever way the Court may think proper, but the parties are not to produce any evidence except documentary records."

The Subordinate Judge, in pursuance of this agreement, proceeded to deal with the case and ordered defendant to pay plaintiff a certain sum, having dispensed with the requirement of going through the formal procedure of rejecting the suit and registering their application as a fresh suit, because the parties referred him to the decision in *Raoji Trimbak Nagarkar v. Govind Vinayak Nagarkar*, (1897) Bom PJ 413. An appeal against this decision was taken to the High Court of Bombay which noted the fact that the Subordi-

nate Judge had referred to the case mentioned above and held:—

"The very mention of that case shows that the parties must have intended that the decision of the Subordinate Judge as arbitrator should be final. In that case, as in this the parties solemnly agreed by themselves and by their pleaders to abide by the decision of the Court to be made in a particular way. They cannot, therefore, appeal from it."

The Court further expressed the opinion that:

"The fact that the express provisions of Chapter XXXVIII of the Civil Procedure Code were knowingly disregarded, shows that the proceedings were *extra cursum curiae*, and thus the judgment of the Subordinate Judge was in the nature of an arbitrator's award, against which an appeal cannot be entertained if the competency of the Appellate Court is objected to by the party holding the judgment. The fact that the Subordinate Judge gave his award in the form of a decree will not make it a decree from which a regular appeal can lie."

In *Baikanta Nath Goswami v. Sita Nath Goswami*, (1911) ILR 38 Cal 421 after the hearing of a suit in a Munsif Court had commenced and some evidence had been recorded, the parties agreed to leave the questions in dispute between them to the determination of the Munsif after he had inspected the locality, and also agreed not to raise any objection to the decision so arrived at by the Munsif and to hold themselves bound by the decision of the Munsif. It was specifically stated in the agreement that neither of the parties shall be competent to raise any objection to the decision or to prefer an appeal. Acting on this submission, the Munsif made a local inspection and passed an order with which the plaintiffs were not content, so that they applied to the Munsif under Section 623 of the Civil Procedure Code, 1882, for a review. The Munsif granted the review and passed a second order in modification of his first order, and again embodied the order in what purported to be a decree in the suit. Against this decree, an appeal was filed by the defendants before the District Judge who entertained the appeal and made an order of remand. On second appeal, the High Court of Calcutta held that the first judgment of the Munsif was in the nature of an award and that it did not lose that character because he embodied the operative part of that judgment in what purported to be

a decree in the suit. He was in fact an arbitrator by the submission of the parties and his decision was an award. It was not open to him to alter that award when made or to review his decision. It was further held that no appeal, consequently, lay to the District Judge against that decision. It is on the basis of these cases that it was argued that, in the present case also, the order made by Mallick, J. should be held by us to be in the nature of an award made by an arbitrator, so that it cannot be treated as a decree and filed as such in the partition suit which was pending before him.

9. As against these cases cited on behalf of the appellant, our attention has been drawn on behalf of the respondents to the views in Halsbury's Laws of England, and to certain decisions of Courts in India. In Halsbury's Laws of England, Third Edn Vol. 2, at p. 8 in para. 15, it is stated —

"An arbitration agreement must be an agreement to refer disputes to some person or persons other than a court of competent jurisdiction. In principle, a judge sitting *extra cursum curiae* may sit as arbitrator under an arbitration agreement and a reference to a foreign court has been treated as an arbitration agreement for the purpose of exercising the jurisdiction to grant a stay of proceedings arising out of the same subject-matter. An agreement that the decision of a judge sitting in court should be unappealable is however, despite the language of some of the decisions cited, not an arbitration agreement, the decision, when given, is a judgment not an award and the judge is not placed in the position of an arbitrator." Reliance is placed particularly on the last sentence of the above extract from Halsbury's Laws of England.

10. In *Nidamarthi Mukkanti v. Thamraia Ramayya*, (1903) ILR 26 Mad 78 parties in a suit pending before the District Munsif presented a petition undertaking that both parties would abide by the decision of the Court that may be passed, as it thinks just, after perusing the documents filed by both parties and all the records in the said suit, and after measuring the sites and inspecting the marks, etc., which are thereon. The District Munsif ordered accordingly, inspected the site, and found in favour of the plaintiff and pronounced judgment giving him the order claimed, and granted the injunction. It was held by the Madras High Court on appeal that the District

Munsif acted as arbitrator by consent of parties and that, consequently no appeal lay from his decision which must be looked on as an award. It was, however, added that, as no attempt had been made to attack that award on any of the grounds specified in Section 521 of the Civil Procedure Code, the Court must look on the decree of the District Munsif as one passed in accordance with the award and uphold it as such.

11. In *Chinna Venkatasami Naicken v. Venkatasami Naicken*, ILR 42 Mad 625 = (AIR 1920 Mad 800) in a suit for money due upon a mortgage bond, after the examination of some witnesses, parties agreed to refer the questions of law and fact arising in the case to the decision of three persons, viz., the Subordinate Judge and two friends of the parties. An award was made by the majority. Thereupon, an application was presented by the defendants to set aside the award on various grounds. The Subordinate Judge overruled the objections and passed a decree in accordance with the award. In the revision before the Madras High Court, the main ground taken was that the reference to the Subordinate Judge as one of the arbitrators was illegal and that the whole award was vitiated thereby. *Seshagiri Ayyar, J.*, in confirming the decree of the Subordinate Judge held —

"In my opinion, therefore, although the procedure adopted by the Subordinate Judge in dealing with the matter as if it was a reference under the second schedule and as if the provisions of the Code applied was wrong, inasmuch as a decree was passed in terms of the award, the defendant as a party to the reference is not entitled to contest its finality and to request that the case should be heard again."

Wallis, C. J., said —

"I think a reference of the suit to the Presiding Judge must be held to be altogether *extra cursum curiae* and not the less so when two others are joined with him, and that the decree passed in accordance with their decision must be regarded as a consent decree, and as not subject to the provisions of the second schedule."

12. In *N. Venkata Somayajulu Gara v. A. Venkanna*, ILR 58 Mad 31 = (AIR 1934 Mad 397) in a suit claiming an easement of necessity in respect of certain lands, the District Munsif, at the request of the defendant made a local inspection of the site, whereafter the plaintiff was examined-in-chief and some documents

were filed. Thereafter, the parties requested the Court to give a decision on the evidence already on the record and intimated that they proposed to adduce no further evidence. The Munsif gave his decision partly in favour of the plaintiff and partly against him. The plaintiff appealed to the Subordinate Judge who dismissed the appeal, holding it to be barred by reason of the joint statement given by the parties before the Munsif. On further appeal, the High Court of Madras held that, although the proceeding was not *extra cursum curiae*, the right of appeal was nevertheless barred by reason of the special agreement.

13. In *K. P. Dalal v. R. S. Jamadar*, AIR 1945 Bom 478 in an application registered as a suit for ejectment from a premises, the Judge trying the suit, at the first hearing of the suit, after pleadings of parties had been put in, enquired of the advocates of the parties as to whether they wanted a formal trial or whether they were prepared to leave the matter to him to be summarily decided as an arbitrator after hearing the respective advocates and inspecting the premises. Both the advocates agreed to the learned Judge hearing the facts from them and after inspection of the premises by the Court to submit to his decision as suggested. Thereafter, the Judge inspected the premises and ultimately on a further agreement by both parties that the matters in dispute should be decided by the Judge as an arbitrator, he gave his decision. When the case came up in revision before the Bombay High Court, the learned Judge of that Court referred to the quotations from Halsbury's Laws of England and Russell on Arbitration which we have noticed earlier, and expressed his opinion that he did not think that those observations necessarily meant that the Judge ceased to be a Judge and became a pure arbitrator in the sense that he could refer the dispute to himself and also remit the award to himself. The order of the trial Judge dismissing the application and making no order as to costs was upheld on the view that the trial Judge had not lost his capacity as a Judge and had not become a pure arbitrator governed by the Arbitration Act and, therefore, the provisions of that Act would not apply to him, so that the order passed by the trial Judge was correct.

14. In *Baijnath v. Dhaní Ram*, ILR 51 All 903 = (AIR 1929 All 747) a suit for declaration, removal of certain en-

croachments, and a perpetual injunction came for trial before the Munsif where the parties agreed that the Munsif should decide the case on inspection of the documents filed by the parties and on inspection of the locality. They further agreed to accept the decision of the Munsif. The Munsif wrote a judgment and decreed the suit in part. There was an appeal to the District Judge which was dismissed and the second appeal came before the High Court of Allahabad which was also dismissed. While the appeal before the District Judge was pending an application for review of judgment was also presented before the Munsif. In disposing of this application, the Munsif held that he was an arbitrator and that his decision was binding on the parties, so that an application for review did not lie as there was no sufficient cause for review. This order was again taken up in Revision before the High Court, and the question arose whether the Munsif could not entertain the application for review because he was an arbitrator. The Court held:—

"The Munsif, in accepting the position of an arbitrator, had a two-fold capacity. He was an arbitrator, but he was also the court. If the arbitrator left anything undecided, the parties would be entitled to go to the court and to ask the court to remit the award to the arbitrator. The fact that the two capacities were constituted in the same person should not deprive a party of his right of having matters set right."

On this view, the Court was of the opinion that an application for review lay against the judgment of the Munsif, allowed the revision and directed the Munsif to take up the application for review afresh and consider it on the merits.

15. In *Kotamma v. Mangamma*, AIR 1957 Andh Pra 700, in a suit for mandatory injunction directing the defendants to remove certain constructions and for a permanent injunction restraining them from obstructing the flow of surplus water from plaintiff's land, the parties, after a Commissioner appointed to inspect the locality had prepared certain plans and submitted his reports, signed and filed a memorandum before the District Munsif in the following terms:—

"Both parties agreed to abide by the decision of the Hon'ble Court after personal inspection. The parties are not adducing oral evidence. Documentary evidence can be received."

The District Munsif inspected the locality, placed on record a detailed note of the physical features of the locality, etc., and on the basis of the Commissioner's plans and reports and his own personal inspection, gave a judgment for the plaintiffs. A decree was also drawn up in the usual course. The first defendant preferred an appeal which was rejected by the first appellate court on the ground that it was incompetent. In second appeal before the Andhra Pradesh High Court, the question arose whether the first appellate Court was right in holding that no appeal lay to it from the decree of the trial Court. A learned single Judge of the Andhra Pradesh High Court differed from the view expressed in *Nidamarthi Mukkanti's case*, (1903) ILR 26 Mad 76 (Supra) and held that there could not be a reference to arbitration by the Judge to himself. He expressed the view by saying

"It would be fantastic to say that in a case like the present, the Court made a reference to itself, fixed the time for the making of the award, stayed its hand till the expiry of the time fixed for the submission of the award, received the award, gave time for objections to the award, heard the objection and, finding no grounds for setting aside the award, pronounced judgment in accordance therewith."

He went on to hold —

"The Arbitration Act of 1910 makes it clear that a reference to arbitration could be made only in accordance with the Act and the procedure prescribed by the Act should have been followed before Sections 17 and 39 of the Act barring appeals from decrees on awards, could be invoked. Consequently, the decision of the trial Court could not be treated as the award of an arbitrator and the decree that followed, could not be held to be a decree on an award and therefore not open to appeal."

He then proceeded to examine the question whether, there being no statutory provisions barring a right of appeal in that case, there was any principle of law which denied the parties of the right of appeal. He stated the fact that, in that case, there was no express agreement not to appeal but the controversy turned on the question whether, by their conduct, the parties should be deemed to have given up their right of appeal and whether the waiver of the right of appeal should be implied from the terms of the agreement between the parties.

The learned Judge held that there had been no waiver of the right of appeal, so that the appeal before the first appellate Court was competent. The order dismissing that appeal was set aside and the case was remanded for a decision of the appeal on merits.

16 Reference may also be made to a decision of the Privy Council in *Pisani v. Attorney-General of Gibraltar*, (1874) LR 5 PC 516. In that case, the Crown claimed certain lands as escheated for want of heirs of the deceased owner. The defendants to the action were a purchaser from that owner, a person who claimed that the purchaser was only a trustee for him, and certain legatees and beneficiaries under a will of the deceased. During the course of trial it became evident that the title of the Crown by escheat was unsustainable, but, instead of dismissing the suit, the Court, with the consent of the parties, allowed an amendment of the pleadings by the addition of a prayer that the rights of the several defendants might be ascertained and declared by the decree of the Court. The Court then enquired into the rival claims of the defendants, and declared their respective rights. One of the defendants preferred an appeal from the judgment to the Privy Council and a preliminary objection was taken to the competency of the appeal. The Judicial Committee of the Privy Council held that, though the amendment of the pleadings in the Court below could not have been made except by consent of parties and though the Court below had been invited by the rival claimants to adjudicate upon their rights inter se, there was no stipulation that the right of appeal should be given up. The parties did not contemplate that the Judge was to hear the cause otherwise than as a Judge or that the litigation was not to go on subject to all the incidents of a cause regularly heard in Court, including an appeal to the Judicial Committee. There was nothing in the proceedings suggesting that the parties waived their right of appeal. It was in this context that the Judicial Committee made the following observations —

"It is true that there was a deviation from the *cursum curiae*, but the Court had jurisdiction over the subject and the assumption of the duty of another tribunal is not involved in the question. Departures from ordinary practice by consent are of everyday occurrence, but unless there is an attempt to give the Court jurisdic-

tion which it does not possess, or something occurs which is such a violent strain upon its procedure that it puts it entirely out of its course, so that a Court of appeal cannot properly review the decision, such departures have never been held to deprive either of the parties of the right of appeal."

The Privy Council added that it was wrong to regard the decision of the Court as an award of an arbitrator or to attribute an intention to the parties that the decision should not be open to appeal.

17. A review of all these decisions shows that the question as to the nature of an order made in circumstances similar to those with which we are concerned has been considered both in England and in India primarily for the purpose of deciding whether such an order is subject to an appeal like an ordinary judgment of a Court from which an appeal lies. In some cases, the right of appeal was negatived on the ground that such a decision was in the nature of an arbitrator's award. In other cases, it has been treated as a judgment amounting to a decision by consent of parties. In the case before us, the position is different. No appeal was ever sought to be filed against the order of Mallick, J. dated 1st April, 1963. Further the language of the agreement of the parties, on the basis of which Mallick, J. proceeded to make that order was different from that considered in these various decisions. At the first stage, the parties got it recorded that the matters were to be settled and referred to the sole arbitration of Mallick, J. The parties agreed to abide by any decision that might be given by him and that no evidence need be taken except or to whatever extent Mallick, J. might desire. The evidence need not be recorded in any formal manner. Mallick, J. was to have all the summary powers including the power to divide and partition the properties. The conferment of these powers on Mallick, J., who was already seized of the partition suit, was clearly intended to enable him to function as an arbitrator so as not to be bound by the rules of procedure applicable to him as a Court. At the same time, the parties added that Mallick, J. was to make such decrees as he thought fit and proper and, for the purpose of partition, if necessary, he could engage or appoint surveyors and Commissioners as he thought best. On the face of it, an arbitrator could not pass any decree. The decree could only be passed by Mallick, J. in his capacity of Court

seized of the suit. Even if it be held that the first part of the agreement had the effect of bringing about a reference to him in his capacity as arbitrator, he did not cease to be seized of the partition suit as a Court. Even under the Arbitration Act, if a reference is made to an arbitrator in a suit pending in a Court, the Court does not cease to have jurisdiction over the suit. All that is required by the provisions of the Arbitration Act is that no further proceedings are to be taken by the Court, except in accordance with the other provisions of that Act. The suit continues to remain pending before the Court. In a case like the present, where the arbitration agreement envisages that the Presiding Officer of the Court should himself act as an arbitrator, he, in such circumstances, will obviously occupy a dual capacity. He will be both an arbitrator to decide the matters referred to him by the agreement of the parties, and a Court before which the suit continues to remain pending having jurisdiction to deal with the suit in accordance with the provisions of the Arbitration Act. It is a question whether a reference to arbitration by a Presiding Judge, before whom a suit is pending, can be competently made under the Arbitration Act, but that is a point on which we need express no opinion, because if it be held that there was no reference to arbitration in the present case, the order passed by Mallick, J. must be held to be a preliminary decree passed by him as a Court seized of the partition suit. On the other hand, even if it be held that there was a competent reference, it is clear that, after deciding the matters left to his decision as an arbitrator by the parties, Mallick, J., proceeded further to deal with the suit himself as a Court and to pass a preliminary decree in it which course being adopted by him was envisaged by the parties themselves when they stated that he could make such decrees in the suit as he thought fit. The actual order passed by Mallick, J. also makes it clear that, in passing that order, he purported to act as the Court deciding the suit and not as the arbitrator to whom some matters in dispute were referred by the parties. At the beginning of the order, Mallick J. described himself as "the Court." When making the operative order, he used the following language:—

"In the result, for the present, I will pass a preliminary decree as under:—"

On the face of it, when he passed this order, he acted as a Judge seized of the suit who alone was competent to pass the preliminary decree in the suit. Consequently, we cannot accept the submission made by Mr Chagla that the order made by Mallick, J should be held to be an award of an arbitrator pure and simple and not a decree by a Court.

AIR 1969 SUPREME COURT 1144
(V 56 C 209)

(From Punjab)*

J C SHAH AND A. N. GROVER, JJ.

Giani Ram and others, Appellants v. Ramji Lal and others, Respondents

Civil Appeal No 438 of 1966, D/- 11-3-1959

(A) Punjab Custom (Power to Contest) Act (1 of 1920), Section 8 — Alienation of ancestral land without necessity by Hindu Jat — Suit by competent reversioner — Effect — Declaratory decree enures in favour of all heirs including female heirs — (Custom (Punjab) — Succession) — (Hindu Succession Act (1956), Sections 2, 4 (1)) — Unreported decision in S. A. No 254 of 1962, D/- 18-11-1963 (Punji), Reversed.

Under the customary law in force in the Punjab a declaratory decree obtained by the reversionary heir in an action to set aside the alienation of ancestral property enured in favour of all persons who ultimately took the estate on the death of the alienor. The decree obtained by a competent reversioner did not make the alienation a nullity, it removed the obstacle to the right of the reversioner entitled to succeed when the succession opened and restored the property alienated to the estate of the alienor.

(Para 5)

A Hindu Jat of Hissar district alienated a share in ancestral land without legal necessity in 1916. In 1920 his eldest son sued and obtained a declaratory decree that the sale was ineffective against his reversionary rights. The alienor died in 1959 leaving behind him his widow, three sons and two daughters.

Held that after the enactment of the Hindu Succession Act the estate devolved, by virtue of Sections 2 and 4 (1) of the Act, upon the three sons, the widow and the two daughters and it could not be said that because in the year 1920 the wife and the daughters were incompetent to challenge the alienation of ancestral property, they could not inherit his estate when the succession opened after that Act came into force. Unreported decision in (S. A. No 254 of 1962, D/- 18-11-1963 (Punji), Reversed.

(Para 6)

(B) Civil P. C. (1905), Order 41, Rule 33 — "Which ought to have been passed" —

*(S. A. No. 254 of 1962, D/- 18-11-1963 — Punji)

IM/TM/B763/69/D

18 We are not concerned in this appeal with the question whether it was appropriate for Mallick, J to have dealt with the suit in this manner, nor whether the actual order made by him passing the preliminary decree was correct or was liable to be set aside on the ground of the incorrect procedure adopted by him. As we have mentioned earlier, the sole relief claimed before the High Court was the issue of a writ of mandamus directing the Registrar on the Original Side to recall, cancel and withdraw this order and to take it off the record, on the ground that it was an award and not a judgment of the Court. Since we have held that it was a judgment of the Court, the Registrar on the Original Side, under the Rules of the Calcutta High Court, was bound to file it on the record and retain it there. The appellant could have sought appropriate remedy for having that judgment vacated and, if such a remedy had been sought against that judgment directly, the question whether it was a good judgment and should be retained on the record or not could have been appropriately decided. The remedy sought by the appellant of seeking a writ to restrain the Registrar on the Original Side from keeping the judgment on the record of the suit could not possibly be allowed, while the judgment stood and was not vacated.

19 In the result, we have to hold that the order of the High Court dismissing the petition filed by the appellant was correct and justified. The appeal is dismissed, but, in view of the special circumstances of this case, we direct parties to bear their own costs.

KSB

Appeal dismissed

Meaning of — Decree allowing claims of female heirs who had not appealed passed — (Custom (Punjab) — Succession) — (Words and phrases).

The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the subordinate court, it may pass or make such further or other decree or order as the justice of the case may require.

(Para 8)

Held on facts that as the claim of the alienee to retain any part of ancestral land after the death of the alienor was negatived it would be perpetrating grave injustice to deny to the widow and the two daughters their share in the property to which they were in law entitled, and that the case was one in which the power under Order 41, Rule 33, Code of Civil Procedure ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed though they had not appealed against the decree of the lower appellate court.

(Para 9)

(C) Punjab Custom (Power to Contest) Act (1 of 1920), Section 8 — Alienation of ancestral land without necessity by Hindu Jat in 1916 — Decree obtained by competent reversioner in 1920 declaring alienation ineffective against his reversionary interest — Death of alienor after Hindu Succession Act — Held that the latter Act did not retrospectively enlarge the power of the holder of ancestral land and did not nullify the decree obtained before the Act — (Hindu Succession Act (1956), Section 4).

(Para 4)

Mr. Mohan Behari Lal, Advocate, for Appellants; M/s. I. M. Lall and M. L. Agarwal, Advocates, for Respondents.

The following judgment of the Court was delivered by

SHAH, J.: In 1916 Jwala—a Hindu Jat—governed by the customary law of the Punjab sold to one Shadi, without legal necessity, a fourth share in 891 bighas 3 biswas, which was ancestral in his hands. Giani Ram son of Jwala instituted Suit No. 75 of 1920 in the Court of the Senior Subordinate Judge, Hissar, for a declaration that the sale of ancestral lands of Jwala in favour of Shadi was null and void and was ineffective against his reversionary rights. The suit was decreed by the Senior Subordinate Judge Hissar.

The effect of the declaratory decree was that the alienations could not enure beyond the lifetime of Jwala.

2. Jwala died on October 16, 1959, leaving him surviving three sons—Giani Ram, Manphool and Chandgi—his wife Rajni, and two daughters Phulwati and Chhanno. Under the Hindu Succession Act, 1956 which came into force on June 17, 1956, the estate of Jwala devolved upon his widow, his sons and his daughters in equal shares. In an action filed by the three sons of Jwala, his daughters and widow against the legal representatives of Shadi for a decree for possession of the lands alienated by Jwala the Senior Subordinate Judge, Hissar decreed the suit for a half share in the property claimed by the plaintiffs. The learned Judge was of the view that only the sons of Jwala could claim the benefit of the decree in Suit No. 75 of 1920 and since their share in the estate of Jwala was in the aggregate only a half, the remaining half having devolved upon the widow and the two daughters, a decree for a half share in the lands alienated could issue against the alienee.

3. In appeal by the plaintiff to the District Court, Hissar, the decree was modified. The learned District Judge decreed the claim in its entirety but only in favour of the three sons. In his view the sons were entitled to the ancestral property alienated by Jwala and the widow and the two daughters had no interest therein—the provisions of the Hindu Succession Act notwithstanding. Against that decree a second appeal was preferred by the heirs of Shadi. The High Court of Punjab set aside the decree passed by the District Court and restored the decree of the Trial Court. In the view of the High Court under the Hindu Succession Act, 1956, the two daughters and widow of Jwala could inherit a share in the estate of Jwala, but since by Section 8 of the Punjab Custom (Power to Contest) Act 1 of 1920 only those persons could take the benefit of the declaratory decree obtained by any one of the reversioners, who could contest the alienation by the vendor, and it was a "settled rule of custom that a female heir cannot contest the sale" by a male owner, a half share in the estate of Jwala which devolved upon the sons could be claimed by them, and the widow and the daughters could not obtain benefit of the decree. The High Court also held that the suit filed by the widow and the two

daughters had been dismissed by the Trial Court and the District Court and as they had not filed an appeal in the High Court or even cross objections, the order of dismissal qua them had become final, and no decree could be passed in their favour for possession of any part of the estate. With special leave the appellants have appealed to this Court.

4. A preliminary objection raised by counsel for the respondents that the suit in its entirety should have been dismissed because by the enactment of the Hindu Succession Act Jwala was to be deemed a full owner and notwithstanding the decree passed in Suit No 75 of 1920 his sons had after that Act no subsisting reversionary interest in the property, must stand rejected. The High Court has granted a decree in favour of the three sons for a half share in the property, and the decree is not challenged in an appeal by the respondents. The respondents cannot now be permitted to challenge that part of the decree. In any event there is nothing in the Hindu Succession Act which retrospectively enlarges the power of a holder of ancestral land or nullifies a decree passed before the Act.

5. The Punjab Custom (Power to Contest) Act 1 of 1920 was enacted to restrict the rights exercisable by members of the family to contest alienations made by a holder of ancestral property. By virtue of Section 6 of the Act no person is entitled to contest an alienation of ancestral immovable property unless he is descended in the male line from the great-great-grandfather of the alienor. Under the customary law in force in the Punjab a declaratory decree obtained by the reversionary heir in an action to set aside the alienation of ancestral property enured in favour of all persons who ultimately took the estate on the death of the alienor for the object of a declaratory suit filed by a reversionary heir impeaching an alienation of ancestral estate was to remove a common apprehended injury, in the interest of the reversioners. The decree did not make the alienation a nullity—it removed the obstacles to the right of the reversioner entitled to succeed when the succession opened. By the decree passed in suit No 75 of 1920 filed by Gian Ram it was declared that the alienations by Jwala were not binding after his lifetime, and the property will revert to his estate. It is true that under the customary law the wife and the daughters of a holder of ancestral property could not

sue to obtain a declaration that the alienation of ancestral property will not bind the reversioners after the death of the alienor. But a declaratory decree obtained in a suit instituted by a reversioner competent to sue has the effect of restoring the property alienated to the estate of the alienor.

6. The effect of the declaratory decree in suit No 75 of 1920 was merely to declare that by the sale interest conveyed in favour of the alienee was to endure during the lifetime of the alienor. The conclusion is therefore inevitable that the property alienated reverted to the estate of Jwala at the point of his death and all persons who would, but for the alienation, have taken the estate will be entitled to inherit the same. If Jwala had died before the Hindu Succession Act, 1956 was enacted the three sons would have taken the estate to the exclusion of the widow and the two daughters. After the enactment of the Hindu Succession Act the estate devolved, by virtue of Sections 2 and 4 (1) of the Hindu Succession Act, 1956, upon the three sons, the widow and the two daughters. We are unable to agree with the High Court that because in the year 1920 the wife and the daughters of Jwala were incompetent to challenge the alienation of ancestral property by Jwala, they could not, after the enactment of the Hindu Succession Act, inherit his estate when succession opened after that Act came into force.

7. The second ground on which the learned Judge has founded his judgment also does not appeal to us. The three sons, the two daughters and the widow of Jwala had filed the suit claiming possession of the entire property from the alienee. That suit was decreed by the Trial Court in favour of the sons only to the extent of a half share in the property alienated. The Court held that the widow and the daughters were not entitled to a share because "only those persons can bring a suit for possession on the death of Jwala who had the right to challenge the alienation made by Jwala." In appeal the District Court granted a decree for possession of the entire property on the view that the alienee had no subsisting interest after the death of Jwala. But the District Court granted a decree for possession of the entire property alienated only in favour of the three sons, because in the view of the Court the daughters and the widow of Jwala were not entitled to any share in

the property. According to the High Court if the widow and the daughters were entitled to the share in the property, they had disentitled themselves to that right, because they had not preferred an appeal or filed cross objections to the decree appealed from. The sons, daughters and widow of Jwala filed a suit for a decree for possession of the entire property and their primary claim was that the alienee had no subsisting interest. The District Court accepted that claim and granted a decree in favour of the three sons for the entire property which was alienated. If the alienees are unable to convince the Court that they had any subsisting interest in the property in dispute after the death of Jwala the Court will be competent to adjust the rights between the sons, the daughters and the widow of Jwala in that property.

8. Order 41, Rule 33 of the Code of Civil Procedure was enacted to meet a situation of the nature arising in this case. In so far as it is material the rule provides:

"The Appellate Court shall have power to pass any decree and make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection." The expression "which ought to have been passed" means "which ought in law to have been passed". If the Appellate Court is of the view that any decree which ought in law to have been passed, but was in fact not passed by the Subordinate Court, it may pass or make such further or other decree or order as the justice of the case may require.

9. If the claim of the respondents to retain any part of the property after the death of Jwala is negatived it would be perpetrating grave injustice to deny to the widow and the two daughters their share in the property to which they are in law entitled. In our view, the case was one in which the power under Order 41, Rule 33, Code of Civil Procedure ought to have been exercised and the claim not only of the three sons but also of the widow and the two daughters ought to have been decreed.

10. The appeal is allowed and the decree passed by the High Court is modified. There will be a decree for possession of the lands in suit in favour of the three sons, the widow and the two daughters of Jwala. The interest of the three sons is one-half in the lands in suit and the interest of the widow and the two daughters is the other half in the lands. The plaintiffs will be entitled to mesne profits from the date of the suit under Order 20, Rule 12, Code of Civil Procedure. The appeal will be allowed with costs throughout.

DRR

Appeal allowed.

AIR 1969 SUPREME COURT 1147
(V 56 C 210)

(From Madras)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

M. L. Abdul Jabbar Sahib (In all the Appeals), Appellant v. H. Venkata Sastri and Sons and others etc., Respondents.

Civil Appeals Nos. 272 to 274 of 1966,
D/- 4-2-1969.

(A) Transfer of Property Act (1882), Section 3 — Word "attested" — Meaning — Essential conditions of valid attestation — Identifier or registering officer is not attesting witness — Registration Act (1908), Section 59 — (Words and Phrases — Attested).

The word "attested", occurs in Sec. 3, T. P. Act, as part of the definition itself. To attest is to bear witness to a fact. The essential conditions of a valid attestation under Section 3 of T. P. Act are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e. g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness. (Para 8)

* (O. S. A. Nos. 65, 70 and 71 of 1956,
D/- 28-7-1961—Mad.)

Prima facie, the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 of Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature (Para 10)

(B) Transfer of Property Act (1882), Sections 100, 3 — Scope of Section 100 — Second part of Section 100 does not attract Section 59 of Registration Act — Security bond is not required to be attested — AIR 1939 Mad 202 and AIR 1940 Mad 140, Overruled, O S. A. Nos 65, 70, 71 of 1956, D/- 28-7-1961 (Mad), Reversed — (Registration Act (1908), Sections 59, 17 (1) (b))

The first paragraph of Section 100 of T P Act consists of two parts. The first part concerns the creation of a charge over immovable property. A charge may be made by act of parties or by operation of law. No restriction is put on the manner in which a charge can be made. Where such a charge has been created the second part comes into play. It provides that all the provisions herebefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge. The second part does not address itself to the question of creation of a charge. It does not attract the provisions of Section 59 of Registration Act relating to the creation of a mortgage (Para 14)

With regard to the applicability of the provisions relating to a simple mortgage, the second part of the first paragraph makes no distinction between a charge created by act of parties and a charge by operation of law. Now a charge by operation of law is not made by a signed, registered and attested instrument. Obviously, the second part has not the effect of attracting the provisions of Section 59 to such a charge (Para 15)

If a charge can be made by a registered instrument only in accordance with Section 59 of Registration Act the subsequent transferee will always have notice of the charge in view of Section 3 of T P. Act under which registration of the instrument operates as such a notice. But the basic assumption of the doctrine of notice enunciated in the second paragraph is that there may be cases where the subsequent transferee may not have notice of the charge. The plain implication of this paragraph is that a charge can be made without any writing (Para 16)

If a non-testamentary instrument creates a charge of the value of Rs 100/- or upwards, the document must be registered under Section 17 (1) (b) of the Registration Act. But there is no provision of law which requires that an instrument creating the charge must be attested by witnesses (Para 17)

Thus, where in suit on promissory notes, a security bond is executed by defendant in respect of immovable properties for the benefit of decree-holder as a charge for decree amount such a security bond is not required to be attested. It is valid and operative if it is duly registered AIR 1939 Mad 202 and AIR 1940 Mad 140, Overruled, O S. A. Nos 65, 70, 71 of 1956, D/- 28-7-1961 (Mad), Reversed, AIR 1950 Nag 117, Approved. (Para 18)

(C) Civil P. C. (1908), Sections 47, 73 (1) Proviso (c), Order 7, Rule 7 and Order 6, Rule 17 — Decree declaring that the security bond in respect of immovable property would enure for the benefit of plaintiffs decree-holders for the decretal amount — This relief granted on oral prayer of plaintiffs — Decree should not be construed as containing merely a recital of the fact that a security bond had been exempted, because of omission to amend plaint by adding prayer for enforcement of charge — On its true construction the decree held declared that the security bond created a charge over the properties in favour of plaintiffs for payment of decretal amount and gave them liberty to apply for sale of properties for the discharge of the incumbrance — Properties sold and assets held by court — Under Section 73 (1) proviso (c) proceeds of sale, after defraying expenses of the sale, must be applied in the first instance in discharging the amount due to the decree-holders and the balance left over distributed amongst other decree-holders applying for rateable distribution. (Paras 19, 21)

(D) Civil P. C. (1908), Sections 21, 73 — Letters Patent (Mad), Clause 12 — Decree-holder creditors applying for rateable distribution of assets held by executing court in respect of another decree passed by High Court cannot challenge the decree under which the assets were held, as invalid, on the ground that High Court had no territorial jurisdiction under Clause 12 of Letters Patent to pass decree for sale of properties outside its local limits of its ordinary original jurisdiction — (Evidence Act (1872), Section 115). AIR

1966 SC 634 and AIR 1920 Mad 1019 (FB),
Ref. (Para 20)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 634 (V 53) = 20
- 1966-1 SCR 461, Bahrein Petroleum Co. Ltd. v. P. J. Pappu
- (1962) AIR 1962 SC 199 (V 49) = 20
- 1962-2 SCR 747, Hiralal Patni v. Kali Nath
- (1955) AIR 1955 SC 346 (V 42), 20
- Girja Datt v. Gangotri 9
- (1950) AIR 1950 Nag 117 (V 37) = 18
- ILR (1949) Nag 802, Bapurao v. Narayan
- (1940) AIR 1940 Mad 140 (V 27) = 13
- ILR (1940) Mad 306, Shiva Rao v. Shanmugha Sundaraswami
- (1939) AIR 1939 PC 117 (V 26) = 11
- 1939-2 Mad LJ 762, Surendra Bahadur Singh v. Behari Singh
- (1939) AIR 1939 Mad 202 (V 26) = 13
- ILR (1939) Mad 199, Viswanadham v. M. S. Menon
- (1929) AIR 1929 Cal 123 (V 16) = 9
- ILR 56 Cal 598, Abinash Chandra v. Dasrath Malo
- (1929) AIR 1929 Mad 1 (V 16) = 4, 6
- ILR 52 Mad 123 (FB), Veerappa Chettiar v. Subramanya Ayyar
- (1927) AIR 1927 PC 248 (V 14) = 9
- 54 Mad LJ 43, Shiam Sundara Singh v. Jagannath Singh
- (1920) AIR 1920 Mad 1019 (V 7) = 20
- ILR 43 Mad 675 (FB), Zamindar of Ettiyapuram v. Chidambaram Chetty

M/s. K. N. Balsubramaniam and R. Thiagarajan, Advocates, for Appellant (In all the appeals); Mr. R. Gopalakrishnan, Advocate, for Respondents Nos. 2 to 4 (In C. A. No. 272 of 1966), Respondents Nos. 1 and 2, (In C. A. No. 273 of 1966) and Respondent No. 1 (In C. A. No. 274 of 1966).

The following Judgment of the Court was delivered by :

BACHAWAT, J. On February 23, 1953 the appellant instituted C. S. No. 56 of 1953 on the Original Side of the Madras High Court under the summary procedure of Order 7 of the Original Side Rules against Hajee Ahmed Batcha claiming a decree for Rs. 40,556-1-2 and Rs. 8327-12-9 said to be due under two promissory notes executed by Hajee Ahmed Batcha. On March 9, 1953, Hajee Ahmed Batcha obtained leave to defend the suit on condition of his furnishing the security for a sum of Rs. 50,000 to the satisfaction of the Registrar of the High Court. On March 26, 1953 Hajee Ahmed Batcha exe-

cuted a security bond in favour of the Registrar of the Madras High Court charging several immovable properties for payment of Rs. 50,000. The condition of the bond was that if he paid to the appellant the amount of any decree that might be passed in the aforesaid suit the bond would be void and of no effect and that otherwise it would remain in full force. The bond was attested by B. Somnath Rao. It was also signed by K. S. Narayana Iyer, Advocate, who explained the document to Hajee Ahmed Batcha and identified him. All the properties charged by the bond are outside the local limits of the ordinary original jurisdiction of the Madras High Court. The document was presented for registration on March 29, 1953 and was registered by D. W. Kittoo, the Sub-Registrar of Madras-Chingleput District. Before the Sub-Registrar, Haji Ahmed Batcha admitted execution of the document and was identified by Senkaranarayan, and Kaki Abdul Azib. The identifying witnesses as also the Sub-Registrar signed the document. Hajee Ahmed Batcha died on February 14, 1954 and his legal representatives were substituted in his place in C. S. No. 56 of 1953. On March 19, 1954 Ramaswami, J. passed a decree for Rs. 49,891-13-0 with interest and costs and directed payment of the decretal amount on or before April 20, 1954. While passing the decree, he observed:— "It is stated that the defendant has executed a security bond in respect of their immovable properties when they obtained leave to defend and this will stand enured to the benefit of the decree-holder as a charge for the decree amount."

2. Clauses 3 and 4 of the formal decree provided:—

"(3) that the security bond executed in respect of their immoveable properties by defendants 2 to 4 in pursuance of the order dated 9th March 1953 in application No. 797 of 1953 shall stand enured to the benefit of the plaintiff as a charge for the amounts mentioned in clause 1 supra;

(4) that in default of defendants 2 to 4 paying the amount mentioned in Cl. 1 supra on or before the date mentioned in Clause 2 supra the plaintiff shall be at liberty to apply for the appointment of Commissioners for sale of the aforesaid properties."

3. The appellant filed an application for (a) making absolute the charge decree dated March 31, 1954 and directing sale of the properties; and (b) appointment of

Commissioners for selling them On April 23, 1954 the Court allowed the application, appointed Commissioners for selling of the properties and directed that the relevant title deeds and security bond be handed over to the Commissioners. The Commissioners sold the properties on May 29 and 30, 1954. The sales were confirmed and the sale proceeds were deposited in Court on July 2, 1954.

4. All the three respondents are simple money creditors of Hajee Ahmed Batcha. The respondents Venkata Sastri and Sons filed O S No 13 of 1953 in the Sub-Court, Vellore, and obtained a decree for Rs 5500 on March 27, 1953. Respondent H R Gowramma instituted O S No 14 of 1953 in the same Court and obtained a money decree on April 14, 1953. The two decree-holders filed applications for execution of their respective decrees. One Rama Sastri predecessor of respondents H R Chidambara Sastri and H R Gopal Krishna Sastri obtained a money decree against Hajee Ahmed Batcha in O S No 364 of 1951/52 in the Court of the District Munsiff, Shumoga, got the decree transferred for execution through the Court of the District Munsiff, Vellore, and filed an application for execution in that Court. On June 7, 1954 the aforesaid respondents filed applications in the Madras High Court for (i) transfer of their execution petitions pending in the Vellore Courts to the file of the High Court and (ii) an order for rateable distribution of the assets realized in execution of the decree passed in favour of the appellant in C S No 56 of 1953. The appellant opposed the applications and contended that as the properties were charged for the payment of his decretal amount, the sale proceeds were not available for rateable distribution amongst simple money creditors. The respondents contended that the security bond was invalid as it was not attested by two witnesses and that decree passed in C S No 56 of 1953 did not create any charge. Balakrishna Ayyar, J. dismissed all the applications as also exemption petitions filed by the respondents. He held that the decree in C S No 56 of 1953 did not create a charge on the properties. But following the decision in *Veerappa Chettiar v Subramanya Ayyar*, ILR 52 Mad 123 = (AIR 1929 Mad 1) (FB) he held that the security bond was sufficiently attested by the Sub-Registrar and the identifying witnesses. The respondents filed appeals against the orders. On March 25, 1953

the Divisional Bench hearing the appeals referred to a Full Bench the following question

"Whether the decision in ILR 52 Mad 123 = (AIR 1929 Mad 1) (FB) requires reconsideration"

5. The Full Bench held:-

"In our opinion, such signatures of the registering officer and the identifying witnesses endorsed on a mortgage document can be treated as those of attesting witnesses if (1) the signatories are those who have seen the execution or received a personal acknowledgment from the executant of his having executed the document, (2) they sign their names in the presence of the executant and (3) while so doing they had the animus to attest. The mere presence of the signatures of the registering officer or the identifying witnesses on the registration endorsements would not by themselves be sufficient to satisfy the requirements of a valid attestation, but it would be competent for the parties to show by evidence that any or all of these persons did in fact intend to and did sign as attesting witness as well"

6. The Full Bench held that the decision in *Veerappa Chettiar's Case*, ILR 52 Mad 123 = (AIR 1929 Mad 1) (FB) (supra) can be held to be correct to this limited extent only and not otherwise. At the final hearing of the appeals, the Divisional Bench held that (1) a charge by act of parties could be created only by a document registered and attested by two witnesses, (2) the security bond was not attested by two witnesses and was therefore invalid, (3) the decree in C S No 56 of 1953 should be construed as containing nothing more than a recital of the fact of there having been a security bond in favour of the plaintiff, and the sale in execution of the decree must be regarded as a sale in execution of a money decree, and (4) the respondents were entitled to an order for rateable distribution. Accordingly, the Divisional Bench allowed the appeals, directed attachment of the sale proceeds and declared that the respondents were entitled to rateable distribution along with the appellant. The present appeals have been filed after obtaining special leave from this Court.

7. The following questions arise in these appeals. (1) Is the security bond attested by two witnesses, (2) if not, is it invalid? (3) does the decree in C S No 56 of 1953 direct sale of the properties for the discharge of a charge thereon, and

(4) are the respondents entitled to rateable distribution of the assets held by Court? As to the first question, it is not the case of the appellant that K. S. Narayana Iyer is an attesting witness. The contention is that the Sub-Registrar D. W. Kittoo and the identifying witnesses Senkaranarayana and Kaki Abdul Aziz attested the document. In our opinion, the High Court rightly rejected this contention.

8. Section 3 of the Transfer of Property Act gives the definition of the word "attested" and is in these words:—

"'Attested', in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary."

It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Section 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

9. "In every case the Court must be satisfied that the names were written *animo attestandi*", see *Jarman on Wills*, 8th Ed. p. 137. Evidence is admissible to show whether the witness had the intention to attest. "The attesting witnesses must subscribe with the intention that the subscription made should be complete at-

testation of the will, and evidence is admissible to show whether such was the intention or not," see *Theobald on Wills*, 12th Ed. p. 129. In *Girja Datt v. Gangotri*, AIR 1955 SC 346 (351) the Court held that the two persons who had identified the testator at the time of the registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put "*animo attestandi*". In *Abinash Chandra v. Dasrath Malo*, ILR 56 Cal 598=(AIR 1929 Cal 123) it was held that a person who had put his name under the word "scribe" was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a "scribe". In *Shiam Sundar Singh v. Jagannath Singh*, 54 Mad LJ 43=(AIR 1927 PC 248) the Privy Council held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees.

10. The Indian Registration Act, 1908 lays down a detailed procedure for registration of documents. The registering Officer is under a duty to enquire whether the document is executed by the person by whom it purports to have been executed and to satisfy himself as to the identity of the executant: Section 34 (3). He can register the document if he is satisfied about the identity of the person executing the document and if that person admits execution: (Section 35 (1)). The signatures of the executant and of every person examined with reference to the document are endorsed on the document: (Sec. 58). The registering officer is required to affix the date and his signature to the endorsements: (Section 59). *Prima facie*, the registering officer puts his signature on the document in discharge of his statutory duty under Section 59 of Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgment of his signature.

11. The evidence does not show that the registering officer D. W. Kittoo put his signature on the document with the intention of attesting it. Nor is it proved that he signed the document in the presence of the executant. In these circumstances he cannot be regarded as an attesting witness, see *Surendra Bahadur v. Behari Singh* 1939-2 Mad LJ 762 = (AIR 1939 PC 117). Likewise the identifying witnesses Senkaranarayana and Kaki

Abdul Aziz put their signatures, on the document to authenticate the fact that they had identified the executant. It is not shown that they put their signatures for the purpose of attesting the document. They cannot therefore be regarded as attesting witnesses.

12 It is common case that B Somnath Rao attested the document. It follows that the document was attested by one witness only.

13 As to the second question, the argument on behalf of the respondents is that Section 100 of the Transfer of Property Act attracts Section 59 and that a charge can be created only by a document signed, registered and attested by two witnesses in accordance with Sec 59 where the principal money secured is Rs 100 or upwards. The High Court accepted this contention following its earlier decisions in *Viswanadhan v. M. S. Menon*, ILR (1939) Mad 190=(AIR 1939 Mad 202) and *Shiva Rao v. Shanmugasundaraswami*, ILR (1910) Mad 306=(AIR 1910 Mad 140) and held that the security bond was invalid, as it was attested by one witness only. We are unable to agree with this opinion. Section 100 is in these terms—

"Where immovable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property, and all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge."

Nothing in this section applies to the charge of a trustee on the trust property for expenses properly incurred in the execution of his trust, and, save as otherwise expressly provided by any law for the time being in force, no charge shall be enforced against any property in the hands of a person to whom such property has been transferred for consideration and without notice of the charge."

14. The first paragraph consists of two parts. The first part concerns the creation of a charge over immovable property. A charge may be made by act of parties or by operation of law. No restriction is put on the manner in which a charge can be made. Where such a charge has been created the second part comes into play. It provides that all the provisions hereinbefore contained which ap-

ply to a simple mortgage shall, so far as may be, apply to such charge. The second part does not address itself to the question of creation of a charge. It does not attract the provisions of Section 59 relating to the creation of a mortgage.

15 With regard to the applicability of the provisions relating to a simple mortgage, the second part of the first paragraph makes no distinction between a charge created by act of parties and a charge by operation of law. Now a charge by operation of law is not made by a signed, registered and attested instrument. Obviously, the second part has not the effect of attracting the provisions of Section 59 to such a charge. Likewise the Legislature could not have intended that the second part would attract the provisions of Section 59 to a charge created by act of parties. Had this been the intention of the Legislature the second part would have been differently worded.

16 If a charge can be made by a registered instrument only in accordance with Section 59, the subsequent transferee will always have notice of the charge in view of Section 3 under which registration of the instrument operates as such a notice. But the basic assumption of the doctrine of notice enunciated in the second paragraph is that there may be cases where the subsequent transferee may not have notice of the charge. The plain implication of this paragraph is that a charge can be made without any writing.

17. If a non-testamentary instrument creates a charge of the value of Rs 100 or upwards, the document must be registered under Section 17 (1) (b) of the Indian Registration Act. But there is no provision of law which requires that an instrument creating the charge must be attested by witnesses.

18. Before Section 100 was amended by Act 20 of 1929 it was well settled that the section did not prescribe any particular mode of creating a charge. The amendment substituted the words "all the provisions hereinbefore contained which apply to a simple mortgage shall, so far as may be, apply to such charge" for the words "all the provisions hereinbefore contained as to a mortgage shall, so far as may be, apply to the owner of such property, and the provisions of Sections 81 and 82 shall, so far as may be, apply to the person having such charge". The object of the amendment was to make it clear that the rights and liabilities of the parties in case of a charge shall

so far as may be, the same as the rights and liabilities of the parties to a simple mortgage. The amendment was not intended to prescribe any particular mode for the creation of a charge. We find that the Nagpur High Court came to a similar conclusion in *Bapurao v. Narayan*, ILR (1949) Nag 802 at pp. 819-822=(AIR 1950 Nag 117 at pp. 124-125). It follows that the security bond was not required to be attested by witnesses. It was duly registered and was valid and operative.

19. As to the third question, we find that the decree dated March 19, 1954 declared that the security bond in respect of the immovable properties would enure for the benefit of the appellant as a charge for the decretal amount. This relief was granted on the oral prayer of the plaintiffs. We are unable to agree with the High Court that in view of the omission to amend the plaint by adding a prayer for enforcement of the charge, the decree should be construed as containing merely a recital of the fact that a security bond had been executed. In our opinion, the decree on its true construction declared that the security bond created a charge over the properties in favour of the plaintiffs for payment of the decretal amount and gave them the liberty to apply for sale of the properties for the discharge of the incumbrance. Pursuant to the decree the properties were sold and the assets are now held by the Court. The omission to ask for an amendment of the plaint was an irregularity, but that does not affect the construction of the decree.

20. It was suggested that the decree was invalid as the High Court had no territorial jurisdiction under clause 12 of its Letters Patent to pass a decree for sale of properties outside the local limits of its ordinary original jurisdiction. For the purpose of these appeals, it is sufficient to say that the respondents cannot raise this question in the present proceedings. If the decree is invalid and the sale is illegal on this ground, the respondents cannot maintain their applications for rateable distribution of the assets. They can ask for division of the sale proceeds only on the assumption that the properties were lawfully sold. It is therefore unnecessary to decide whether the objection as to the territorial jurisdiction of the High Court has been waived by the judgment-debtor and cannot now be agitated by him and persons claiming through him, having regard to the decisions in *Hiralal Patni v. Kali Nath*, 1962-2 SCR 1969 S.C./73 XII G—5

747 at pp. 751-2=(AIR 1962 SC 199 at pp. 200-201), *Bahrein Petroleum Co., Ltd. v. P. J. Pappu*, (1966) 1 SCR 461 at pp. 462-3=(AIR 1966 SC 634 at pp. 635-636), *Zamindar of Ettiyapuram v. Chidambaram Chetty*, ILR 43 Mad 675=(AIR 1920 Mad 1019) (FB).

21. As to the 4th question we find that the immovable properties have been sold in execution of a decree ordering sale for the discharge of the encumbrance thereon in favour of the appellant. Section 73 (1), proviso (c) therefore applies and the proceeds of sale after defraying the expenses of the sale must be applied in the first instance in discharging the amount due to the appellant. Only the balance left after discharging this amount can be distributed amongst the respondents. It follows that the High Court was in error in holding that the respondents were entitled to rateable distribution of the assets along with the appellant.

22. In the result, the appeals are allowed, the orders passed by the Divisional Bench of the Madras High Court are set aside and the orders passed by the learned Single Judge are restored. There will be no order as to costs.
SSG/D.V.C. Appeals allowed.

AIR 1969 SUPREME COURT 1153 (V 56 C 211)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Sampat Prakash, Petitioner v. The State of Jammu and Kashmir, Respondent.

Writ Petn. No. 361 of 1968, D/- 6-2-1969.

(A) Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), Ss. 13A, 10 and 3 (1) (a) (i) — Section 13A is an exception to Section 10 and other relevant sections — Order of detention with view to detain for more than three months but not more than six months — No necessity to obtain opinion of Advisory Board.

Section 13A authorises the State in the cases specified to detain a person without obtaining the opinion of the Advisory Board, if he is to be detained for a period longer than three months, but not longer than six months from the date of detention. (Para 5)

Section 13A opens with the words "notwithstanding anything contained in this

IM/IM/A865/69/D

Act", and provides that a person may be detained for a period not longer than six months without obtaining the opinion of the Advisory Board. It is plainly contemplated thereby that the Government may decide not to refer the case of the detenu to the Advisory Board, because the period for which he is to be detained is not to exceed six months. Section 13A is an exception to Section 10 as well as to all other relevant provisions of the Act, and in case of conflict Section 13A prevails. (Para 6)

(B) Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), S. 3 (1) (a) (i) — Detention under S. 3 (1) (a) (i) for six months — Opinion of Advisory Board not obtained by virtue of Section 13A (1) — On expiry of six months fresh order of detention issued after cancellation of original order — No proof that Government's action was actuated by illwill or taken for some collateral purpose — Grounds for detention supplied to the detenu along with both orders of detention found not to be identical — Held Government could not be said to have acted mala fide in passing original order or fresh order of detention — (Constitution of India, Articles 32 and 22).

(Paras 7 and 8)

(C) Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), Ss. 8 (2), 3 (1) (a) (i) — Order of detention under S. 3 (1) (a) (i) — Grounds for detention specified in annexure appended to order — Order clearly stating that facts relevant to grounds, except those which the Government considered to be against public interest to disclose, intimated to the detenu — Grounds, held, could not be said to be vague and indefinite merely because annexure was somewhat indefinite and vague due to withholding of those facts.

(Para 9)

(D) Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), S. 3 — Detention — Restrictions to be imposed on detenu — Extent of — (Constitution of India, Arts. 22 and 32).

A detenu is not a convict. Our Constitution, notwithstanding the broad principles of the rule of law, equality and liberty of the individual enshrined therein, tolerates, on account of peculiar conditions prevailing, legislation which is a negation of the rule of law, equality and liberty. But it is implicit in the Constitutional scheme that the power to detain

is not a power to punish for offences which an executive authority in his subjective satisfaction believes a citizen to have committed. Power to detain is primarily intended to be exercised in those rare cases when the larger interest of the State demand that restrictions shall be placed upon the liberty of a citizen curbing his future activities. The restrictions so placed must, consistently with the effectiveness of detention, be minimal.

(Para 10)

Mr. M. K. Ramamurthi, Senior Advocate, (Mrs. Shyamla Pappu and Mr. Vineet Kumar, Advocates, with him), for Petitioner, M/s. R. Gopalakrishnan and R. N. Sachthey Advocates, for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: On March 16, 1968 the petitioner was arrested and ordered to be detained under S. 3 (1) (a) (i) of the Jammu and Kashmir Preventive Detention Act 13 of 1964. On March 26, 1968, he was served with the grounds of detention. On May 3, 1968, the petitioner moved a petition for a writ of habeas corpus in this Court. The petition was rejected by this Court on October 10, 1968. In the meanwhile the order dated March 16, 1968, was revoked on September 16, 1968, and another order was served upon the petitioner on the same day. On September 24, 1968, he was served with the grounds of detention for the fresh order, and his case was referred to the Advisory Board on October 26, 1968. On October 30, 1968, the Advisory Board recommended that the petitioner be detained. The petitioner then moved this petition on November 11, 1968 for a writ of habeas corpus.

2. Two contentions in the nature of preliminary objections were raised in support of the petition. It was urged that (1) the petitioner was, in spite of a specific request, denied a personal hearing before the Advisory Board, and (2) that the Chief Minister who was in charge of the portfolio relating to preventive detention did not apply his mind to the case of the petitioner before making the order of detention. (An affidavit is filed by the Secretary to the Government of Jammu and Kashmir affirming that the petitioner made no request for production before the Board for a personal hearing. He has also affirmed that the Chief Minister did consider the case of the petitioner and directed that the petitioner be detained in custody under the Preventive Detention Act.) In view of this affidavit, Counsel

for the petitioner did not press the two preliminary contentions.

3. Counsel urged that the order of detention was invalid because (1) that the case of the petitioner was not referred to the Advisory Board till September 24, 1968 and on that account his detention was invalid, and he could not be continued in detention thereafter; (2) that in making the detention order the authorities acted mala fide; and (3) the grounds in support of the order were vague and indefinite.

4. By Article 22 of the Constitution certain protection is conferred upon persons who are detained under orders of preventive detention. But Article 35 (c) in its application to the State of Jammu & Kashmir provides:

"no law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, shall be void on the ground that it is inconsistent with any of the provisions of this (Part III) Part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of fifteen years from the commencement of the said Order, except as respects things done or omitted to be done before the expiration thereof."

The protection of clauses (5), (6) and (7) of Article 22 insofar the provisions of the Act enacted by the Jammu and Kashmir Legislature are inconsistent therewith does not avail the petitioner. By Section 3 the Government of Jammu and Kashmir is entitled, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order, to make an order directing that such person be detained. By Section 8 it is provided:

"(1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but not later than five days from the date of detention, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order of the Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose."

Section 9 provides for the constitution of Advisory Board and Section 10 deals with

references to the Advisory Board. By that section the Government is required within thirty days from the date of detention under the order to place before the Advisory Board the grounds on which the order has been made and the representation, if any, made by the person affected by the order. By Section 12 it is provided:

"(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the Government shall revoke the detention order and cause the person to be released forthwith."

Section 13 prescribes the maximum period of detention for which any person may be detained in pursuance of any detention order. Section 13A which was added by Act 8 of 1967 enables the State to detain a person for a period of two years. Section 13A provides:

"(1) Notwithstanding anything contained in this Act, any person detained under a detention order made in any of the following classes of cases or under any of the following circumstances may be detained for a period longer than three months, but not longer than six months, from the date of detention, without obtaining the opinion of any Advisory Board, namely, when such person has been detained with a view to preventing him from acting in any manner prejudicial to —

(i) the security of the State;

(ii) the maintenance of public order;

"Provided that where any such person has been detained with a view to preventing him from acting in any manner prejudicial to the security of the State and the grounds on which the detention order has been made are not communicated to him under the proviso to Section 8 (1), such person may be detained for a period of two years from the date of detention without obtaining the opinion of the Advisory Board.

(2) In the case of every person detained with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order, the provisions of this Act shall have effect subject to the following modifications, namely:—

(a) in sub-section (3) of Section 8, for the words "Twelve days", the words "twenty-four days" shall be substituted.

(b) in sub-section (1) of Section 8,—

(i) for the words "five days" the words "ten days" shall be substituted,

(u) the following proviso shall be inserted at the end, namely —

"Provided that nothing in this sub-section shall apply to the case of any person detained with a view to preventing him from acting in any manner prejudicial to the security of the State, if the authority making the order, by the same or a subsequent order directs that the person detained may be informed that it would be against public interest to communicate to him the grounds on which the detention order has been made.

(c) in Section 10,—

(i) after the words, "In every case where a detention order has been made under this Act" occurring in the beginning, the brackets and words "(other than a case to which the proviso to Section 8 (1) applies)" shall be inserted, and

(u) for the words "thirty days", the words "sixty days" shall be substituted,

(d) in Section 11, for the words "ten weeks" the words "five months" shall be substituted."

5. The effect of Section 13A insofar as it is relevant to this case is to authorise the State in the cases specified to detain a person without obtaining the opinion of the Advisory Board, if he is to be detained for a period longer than three months, but not longer than six months from the date of detention. By sub-section (2) the periods prescribed for the various steps under the Act are doubled: for making report to the District Magistrate when he exercises the power of detention the period is extended to twenty-four days for the Government to serve the grounds of the order under Section 8 (1) the period is extended to ten days, and for the Advisory Board to make its report in cases covered by Section 13A the period is extended to sixty days. Again by the proviso to Section 8 (1) the Government is entitled to withhold in serving grounds upon the detenu that it would be against public interest to communicate to him the grounds on which the detention order has been made.

6. Relying upon the terms of Sec. 10 (1) as amended by Section 13A it was urged that the Government was bound to refer the case of the petitioner within sixty days from the date of detention and

since no reference was made the detention of the petitioner under the order dated March 16, 1968, was unauthorised. This argument is plainly unsustainable. Section 13A opens with the words "notwithstanding anything contained in this Act", and provides that a person may be detained for a period not longer than six months without obtaining the opinion of the Advisory Board. It is plainly contemplated thereby that the Government may decide not to refer the case of the detenu to the Advisory Board, because the period for which he is to be detained is not to exceed six months. Section 13A is an exception to Section 10 as well as to all other relevant provisions of the Act, and in case of conflict Section 13A prevails. The petitioner was detained for six months from March 16, 1968 to September 16, 1968 without obtaining the opinion of the Advisory Board. We will be justified in accepting the contention of the State that it was intended, when the order was passed detaining the petitioner, that he was not to be kept in detention for a period longer than six months and his case fell within the terms of Section 13A (1) and on that account it was not necessary to obtain the opinion of the Advisory Board.

7. It was said by Counsel for the petitioner that the plea of the State was inconsistent with the course of events, and the State Government had taken shelter under the provisions of Section 13A (1) even though they had at no stage any desire to release the petitioner from jail at the expiry of or within six months. The Court will not be justified in assuming from the circumstance that a fresh order has been issued that the Government acted mala fide in making the original order or the fresh order. The only plea raised by the petitioner in support of that plea is in paragraph 15 of the petition, that the cancellation of the earlier order of detention and the service of the fresh order of detention on the petitioner was "a part and parcel of the scheme of the State to suppress the peaceful trade union movement", and that the fresh order of detention was passed mala fide. No particulars are furnished which justify an inference that in resorting to the provisions of the Act the Government's action was actuated by ill-will or taken for some collateral purpose.

8. Reliance was also placed upon the recitals in the grounds supplied to the petitioner on March 16, 1968 and under the fresh detention order dated September

ber 16, 1968, and it was contended that the grounds being identical an inference followed that the previous detention order was continued on the same grounds on which the original order was passed. On comparing the grounds it cannot be said that they are identical. It is stated in the last part of the Annexure to the grounds of detention under order dated September 16, 1968, that from the middle of January to March 1968 the petitioner went underground and during that period he used to attend secret meetings in which he used to stress upon the Government employees that their demands cannot be conceded by the Government unless they resort to violence and that the petitioner was violent by nature and was a perpetual threat to the maintenance of public order. It cannot also be said that merely because the previous order had been passed under which the petitioner was intended to be detained for a period of six months and thereafter in consequence of further information the Government was required to issue a fresh order, the original order or the fresh order was illegal.

9. The plea that the grounds were vague and indefinite cannot also be accepted. It is recited in the order that the petitioner was informed that his detention was ordered on grounds specified in the Annexure appended thereto, which also contained facts relevant thereto except those which the Government considered to be against the public interest to disclose. By virtue of sub-section (2) of Section 8, it is open to the Government not to disclose facts which it considers to be against the public interest to disclose. In the present case the order clearly states that the Government were of the view that facts relevant to the grounds except those which the Government considered to be against public interest to disclose were intimated to the petitioner. The Annexure may appear somewhat indefinite and vague. But that is obviously because facts which in the view of the Government, were against public interest to disclose, were withheld from the petitioner. The Government have power to withhold information about those facts, and they did so. The grounds cannot in the circumstances be said to be vague and indefinite.

10. One more question needs to be dealt with. The petitioner who was present in the Court at the time of hearing of this petition complained that he is subjected to solitary confinement while

in detention. It must be emphasized that a detenu is not a convict. Our Constitution, notwithstanding the broad principles of the rule of law, equality and liberty of the individual enshrined therein, tolerates, on account of peculiar conditions prevailing, legislation which is a negation of the rule of law, equality and liberty. But it is implicit in the Constitutional scheme that the power to detain is not a power to punish for offences which an executive authority in his subjective satisfaction believes a citizen to have committed. Power to detain is primarily intended to be exercised in those rare cases when the larger interest of the State demand that restrictions shall be placed upon the liberty of a citizen curbing his future activities. The restrictions so placed must, consistently with the effectiveness of detention, be minimal.

11. The petition fails and is dismissed.

CWM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 1157
(V 56 C 212)

(From: Mysore)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Visweswaradas Gokuldas, Appellant v.
B. K. Narayan Singh and another, Respondents.

Civil Appeal No. 1851 of 1968, D/- 6-2-1969.

Contract Act (1872), Ss. 7 and 2 (b) —
Offer — Acceptance cannot be by serving copy of plaint in a suit for specific performance through Court. Reg. Appeal No. 231 of 1960, D/- 19-6-1963 (Mys), Reversed.

The defendant agreed to sell to the plaintiff certain quantity of float iron lying in the mining area and gave them the right to win and remove the iron ore. A few days thereafter, the defendant wrote a letter to the plaintiff agreeing to assign the said lease area in favour of the plaintiff on his paying a stipulated sum, at his option, to be decided within three months. After about two months the defendant wrote a letter revoking the offer. There was no acceptance of the offer by the

* (Regular Appeal No. 231 of 1960, D/- 19-6-1963 — Mys).

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plaintiff orally or by a letter before the letter revoking the offer reached him. The plaintiff filed a suit on the original contract claiming a declaration that he was entitled to remain in possession of the mining area before the letter of revocation reached him.

Held, that there was no concluded contract between the parties Reg Appeal No 231 of 1960, D/- 19-6-1963 (Mys), Reversed, (1867) 2 Ch A 527, Foll. (Paras 3, 6)

The letter agreeing to assign the mining area was an offer only. The plant was not an acceptance and the service of the copy of a plaint along with the writ of summons was not a communication of the acceptance. (1864) 33 Beav 529, Distinguished. (Para 6)

It is not usual to accept a business offer by a plant, nor is it usual to communicate an acceptance by serving a copy of the letter through the medium of the Court. (Para 6)

Observations Under the old chancery practice the mere filing of a bill in a suit to enforce specific performance was regarded as sufficient acceptance of the defendant's offer unless the offer had been withdrawn before the filing of the suit. (1832) 6 Madd 316 (324)=56 ER 1112 (1115), (1832) 2 LJ Ch 3, Ref.

But it may well be doubted whether this rule can apply under the present Indian practice and procedure. A plaint in a suit for specific performance should allege a concluded contract (Civil P. C., Sch. I, App. A, Form 48). The offer as well as acceptance should precede the institution of suit. (The precise point, however held did not arise in the case).

(Para 7)

Cases Referred. Chronological Paras

(1867) 2 Ch A 527=38 LJCH 613,	
In re, Pellatt's Case	8
(1864) 33 Beav 529=46 ER 991,	
Bloxam's Case	8
(1832) 2 LJ Ch 3, Agar v Biden	7
(1822) 6 Madd 316=56 ER 1112,	
Boys v. Ayerst	7

Mrs. Shyamla Pappu and Mr. Vineet Kumar, Advocates for Appellant, M/s. K. R. Chaudhuri and K. Rajendra Chaudhuri, Advocates, for Respondent No. 1; Mr. S. V. Gupte, Senior Advocate, (M/s. G. R. Ethurajulu Naidu, B. N. Sen, O. P. Khaitan, A. N. Parikh, K. R. Chaudhuri and K. Rajendra Chaudhuri, Advocates, with him), for Respondent No. 2.

The following Judgment of the Court was delivered by

BACHAWAT, J: The plaintiffs instituted a suit (O. S. No. 55 of 1957) against the defendant alleging that by a contract dated September 2, 1957 the defendant had agreed to assign to the plaintiffs his leasehold interest under a mining lease in respect of 184 acres of land in Kudrekavave Kaval, Hosadurga Taluk, and claiming specific performance of the contract. The Trial Court decreed the suit. The defendant filed an appeal against the decree. The High Court allowed the appeal and dismissed the suit. The present appeal has been filed by the plaintiffs after obtaining a certificate under Article 133 of the Constitution. The main question arising in this appeal is whether there was a contract alleged in the plaint.

2. Under a contract dated August 3, 1957, the defendant agreed to sell to the plaintiffs 40,000 tons of float iron lying in the aforesaid mining area and gave them the right to win and remove the iron ore. We are not directly concerned with this contract in this appeal. On September 2, 1957 the defendant wrote the following letter to the plaintiffs—

"Further to our agreement dated 3rd August 1957 I hereby agree to assign the said lease area of 184 acres for iron and manganese ores, in your favour, subject to your paying me one lakh and eighty thousand rupees at your option to be decided by you within three months from this date".

3. This document though worded as an agreement was in point of law an offer only. As a matter of fact, on September 2, 1957 the plaintiffs had not agreed to purchase the mining lease. Until both parties were bound there could be no concluded contract. The promise to keep the offer open for three months was not supported by any consideration. The defendant was at liberty to revoke the offer at any time before its acceptance by the plaintiffs. On October 31, 1957, the defendant posted a letter to the plaintiffs revoking the offer. This letter reached the plaintiffs on November 6, 1957. Before that date the plaintiffs did not accept the offer either orally or by any letter sent to the defendant.

4. On November 1, 1957, the plaintiffs filed a suit (O. S. No. 46 of 1957) against the defendant claiming a declaration that they were entitled to remain in possession of the mining area. The primary object

of the suit was to enforce the plaintiffs' rights under the contract dated August 3, 1957. The defendant filed his written statement in that suit on November 5, 1957. The High Court held that the plaintiffs accepted the offer of September 2, 1957 by their plaint in O. S. No. 46 of 1957, and that this acceptance was communicated to the defendant before November 6, 1957. We are unable to agree with this finding.

5. The pleadings and issues raised the question whether a contract was made on September 2, 1957. If the plaintiffs desired to set up a new case that the contract was concluded in November 1957 they should have amended their pleadings accordingly. We need not say anything more on this point because we find that the plaintiffs have failed to establish the new case.

6. In paragraphs 14 and 19 of the plaint in O. S. No. 46 of 1957 the plaintiffs alleged that by the letter dated September 2, 1957 the defendant agreed to assign the mining lease, that they were ready and willing to perform the contract and that they reserved their right to file a suit for specific performance. The suggestion was that the contract was concluded on September 2, 1957 and that in breach of the contract the defendant failed to apply for and obtain the necessary consent of the Central Government to the assignment of the mining lease. Paragraph 17 and the prayer portion of the plaint suggested that by virtue of this contract and the earlier contract dated August 3, 1957 they were entitled to remain in possession of the mining area. The suggestion was an attempt to add to the terms of the offer of September 2, 1957. On acceptance of the offer according to its terms the plaintiffs could not get a possessory right before execution of a conveyance of the mining lease. In point of law, the plaint was not an acceptance of the offer, nor was it intended to be an acceptance. It is not usual to accept a business offer by a plaint; nor is it usual to communicate an acceptance by serving a copy of the plaint through the medium of the Court. We shall be straining the language of Sections 2 (b), 3 and 7 of the Contract Act if we were to hold that the plaint was an acceptance and that the service of a copy of the plaint along with the writ of summons was a communication of the acceptance.

7. Under the old chancery practice the mere filing of a bill in a suit to enforce

specific performance was regarded as sufficient acceptance of the defendant's offer unless the offer had been withdrawn before the filing of the suit, see *Boys v. Ayerst*, (1822) 6 Madd 316 (324)=56 ER 1112 (1115), *Agar v. Biden*, (1833) 2 L.J. Ch 3, Fry on Specific Performance, 8th Ed. Article 306, page 142, Pomeroy on Specific Performance, 3rd Ed., Art. 66, pp. 169-170. It may well be doubted whether this rule can apply under our present practice and procedure. A plaint in a suit for specific performance should allege a concluded contract, see the Code of Civil Procedure 1st Schedule Appendix A, Form No. 48. The offer as well as the acceptance should precede the institution of the suit. However, the precise point does not arise in this case. O. S. No. 46 of 1957 was not a suit for specific performance of the contract. Before the present suit for specific performance of the contract was instituted, the offer had been withdrawn.

8. Counsel for the appellant relying on *Bloxam's Case*, (1864) 33 Beav 529 submitted that the communication of an acceptance was not necessary. The argument is misconceived. We have held that the plaint in O. S. No. 46 of 1957 was not an acceptance. There was no other acceptance either oral or in writing. Mere mental assent of the plaintiffs to the defendant's proposal is not sufficient. In the peculiar facts of *Bloxam's Case*, (1864) 33 Beav 529 a contract to take shares was concluded by an oral application for shares followed by allotment though no notice of allotment was given to the applicant. Ordinarily there is no contract unless there is an acceptance of the application for shares and the acceptance is communicated to the applicant, see *In re: Pellatt's Case*, (1867) 2 Ch A 527. In the last case Lord Cairns, L. J., pointed out that *Bloxam's case*, (1864) 33 Beav 529 turned on its own special facts. *Bloxam* was orally informed that if he did not receive an answer within a certain time he was to consider his application granted. In the peculiar circumstances, *Bloxam* could be regarded as having dispensed with the necessity of the communication of the acceptance. In the present case we are not concerned with a contract to take shares. The defendant made an offer to assign a mining lease. No acceptance was made or communicated to the defendant before he withdrew the offer. There was no concluded contract and the appeal must fail on this ground.

9 The High Court held that the assignment of the mining lease could not be lawfully made without the sanction of the State Government and the approval of the Central Government and that as the governments concerned could not be compelled to accord the necessary sanction and approval, the contract to assign the mining lease could not be specifically performed and on this ground the High Court dismissed the suit. We do not think it necessary to express any opinion on this question. The appeal is liable to be dismissed in view of our conclusion that there was no concluded contract between the parties

10. In the result, the appeal is dismissed. The appellant will pay one set of costs to the respondents

MVJ/D V C

Appeal dismissed

AIR 1969 SUPREME COURT 1160 (V 56 C 213)

(From Calcutta (1965) 1 ITJ 98)

J C SHAH, V RAMASWAMI AND
A. N. GROVER, JJ.

Commissioner of Income Tax, West Bengal III Calcutta (In all the appeals), Appellant v. Imperial Chemical Industries (India) Private Ltd. (In all the appeals), Respondent

Civil Appeals Nos 1549 to 1552 of 1968,
D/- 20-2-1969

(A) Income-tax Act (1922), Sec. 66 (1) — Reference under Section 66 (1) — High Court cannot embark upon reappraisal of evidence and arrive at finding of fact contrary to those of Appellate Tribunal — (1965) 1 ITJ 98 (Cal), Reversed.

The High Court is not a Court of Appeal in a reference under Section 66 (1) and it is not open to the High Court in such a reference to embark upon a reappraisal of the evidence and to arrive at findings of fact contrary to those of the Appellate Tribunal. It is the duty of the High Court while hearing the reference to confine itself to the facts as found by the Appellate Tribunal and to answer the question of law in the context of those facts. It is true that the finding of fact will be defective in law if there is no evidence to support it or if the finding is perverse. But in the hearing of a reference under Section 66 (1), it is not open to the assessee to challenge such a finding of fact unless he has applied for the

reference of the specific question under Section 66 (1). (Para 5)

Where the assessee in his application under Section 66 (1) expressly raised the question about the validity of the finding of the Appellate Tribunal as regards an agreement but the question was not referred by the Appellate Tribunal to the High Court, the contention of the assessee with regard to the question must be deemed to have been rejected. In absence of any application by assessee before High Court under Section 66 (2) requiring to call for statement of case on that question the High Court would be in error in embarking upon a reappraisal of the evidence as regards that agreement. (1965) 1 ITJ 98 (Cal), Reversed.

(Para 5)

(B) Income-tax Act (1922), S. 10 (2) (xv) — Assessee selling agents in India for principal company in London for variety of goods such as chemicals, dyes, explosives etc. — Amount paid by assessee as compensation to ex agents whom it replaced — Absence of proof of exact terms and conditions of agreement between assessee and its principal in England — Amount held could not be said to be "expenditure laid out wholly and exclusively for the purpose of the business" under Section 10 (2) (xv) — (1965) 1 ITJ 98 (Cal), Reversed.

(Para 6)

(C) Income-tax Act (1922), Sections 3, 4 — Rule of diversion of income by an overriding title — Applicability — Amount of compensation paid by assessee, the selling agents to ex agents who were replaced by assessee — Absence of proof of precise terms of agreement between assessee and its principal — Payment was not by overriding title created either by act of parties or by operation of law — (1965) 1 ITJ 98 (Cal), Reversed.

An obligation to apply the income in a particular way before it is received by the assessee or before it has accrued or arisen to the assessee results in the diversion of income. An obligation to apply income accrued, arisen or received amounts merely to the apportionment of income and the income so applied is not deductible. The true test for the application of the rule of diversion of income by an overriding title is whether the amount sought to be deducted in truth never reached the assessee as his income.

(Para 7)

Where the assessee carrying on business of sole selling agents in large variety

of goods manufactured or purchased by its London principals since 1-4-1948 paid during relevant period commission to the ex agents whom it had replaced in absence of proof of precise terms of agreement between assessee and its principals in London, the payment of compensation to ex agents was not by an overriding title created either by act of parties or by operation of law. Thus the inclusion of these amounts for relevant accounting years in computation of total income of the assessee was justified and correct. (1965) 1 ITJ 98 (Cal), Reversed.

(Paras 7, 8)

Cases Referred: Chronological Paras

(1968) 1968-68 ITR 200 (SC),

Commr. of Income Tax, Bombay
City I v. Greaves Cotton and Co.
Ltd.

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(1967) AIR 1967 SC 819 (V 54) =

1967-63 ITR 609, Commr. of
Income Tax, Madras v. Sri
Meenakshi Mills Ltd., Madurai

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(1966) AIR 1966 SC 1053 (V 53) =

1966-60 ITR 52, India Cements
Ltd. v. Commr. of Income Tax,
Madras

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(1961) AIR 1961 SC 728 (V 48) =

1961-41 ITR 367, Commr. of In-
come Tax, Bombay City II v.
Sitaldas Tirathdas

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(1938) AIR 1938 PC 118 (V 25) =

1938-6 ITR 206, P. C. Mullick v.
Commr. of Income Tax, Bengal

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(1933) AIR 1933 PC 145 (V 20) =

1933-1 ITR 135, Raja Bejoy Singh
Dhudhuria v. Commr. of Income
Tax, Bengal

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Mr. Sukumar Mitra, Senior Advocate (M/s. S. K. Aiyar, R. H. Dhebar, R. B. Sachthey and B. D. Sharma, Advocates with him), for Appellant (In all the appeals); Mr. M. C. Chagla, Senior Advocate (M/s. T. A. Ramachandran and D. N. Gupta, Advocates with him), for Respondent (In all the appeals).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: These appeals are brought by certificate from the judgment of the Calcutta High Court dated 28th September, 1964 in Income Tax Reference No. 18 of 1961.

2. The respondent (hereinafter called the assessee) is a private limited company incorporated in India and is a subsidiary

of the Imperial Chemical Industries, London, which holds the entire share capital of the assessee. The business of the assessee consists mainly of acting as selling agents in India for a large variety of goods such as chemicals, dyes, explosives etc. manufactured or purchased by its London principals and sold in India. The Imperial Chemical Industries (Export) Glasgow (hereinafter referred to as the I. C. I. (Export) Ltd.) is another subsidiary of I. C. I. London which holds the entire share capital of I. C. I. (Export) Ltd. The I. C. I. (Export) Ltd. had appointed as their selling agents in India four companies, viz., (1) Gillanders Arbuthnot and Co. Ltd., Calcutta, (2) Best and Co. Ltd., Madras, (3) Anglo-Thai Co. Ltd., Bombay and (4) Shaw Wallace and Co. Ltd. With effect from 1st April, 1948, the I. C. I. (Export) Ltd. terminated the services of the aforesaid selling agents and appointed the assessee as its sole selling agent. The I. C. I. (Export) Ltd. had agreed to pay to the former selling agents compensation at the rate of two-fifths, two-fifths and one and two-fifths of the commission earned by the assessee for the three years from 1st April, 1948. The compensation was paid to the four companies through the accounts of the assessee. For this purpose the modus operandi adopted was as follows:— The compensation payable to the former agents was spread over a period of three years and on the assumption that the turnover was constant, the compensation payable to the selling agents was on an average, an amount equal to the 11/15th of the commission earned by the assessee at the normal rates. In order to arrive at the amount of commission to be credited to the assessee's profit and loss account each year the assessee in the first place credited the commission account and debited the I. C. I. (Export) Ltd. account with the full amount of compensation earned by it at normal rates on sales effected during the year. Next the assessee transferred from the commission account to a special reserve account called the 'Explosives Ex-Agents Compensation Reserve Account', the proportion payable to the ex-agents as compensation, namely, 11/15th $(2/5 + 2/5 + 7/5 = 11/5 \times 1/3 = 11/15)$ (leaving 4/15th towards commission account) so that funds might be accumulated for payment to the four companies from time to time.

3. The year of account of the assessee is from 1st October to 30th September

every year As a result of the above figures appeared in the assessee's books of method of accounting, the following accounts.—

	Gross Commission	Transfer to Reserve for compensation	Net Commission
1st April 1948 to 30th September 1948	Rs. 2,91,396	Rs. 2,03,503	Rs. 87,893
Year ending 30th September 1949	Rs 7,67,294	Rs. 5,41,526	Rs 2,25,768
Year ending 30th September 1950	Rs. 7,52,204	Rs. 5,29,284	Rs. 2,22,920
Year ending 30th September 1951	Rs 10,20,922	Rs. 4,00,052	Rs. 6,20,870
TOTAL	Rs 28,31,816	Rs 16,74,365	Rs 11,57,451

For the assessment years 1949-50, 1950-51, 1951-52 and 1952-53 the assessee showed the net amounts of commission earned on the selling agencies by the I C I (Export) Ltd., adding a foot-note that the amounts were arrived at after deducting the amount of compensation payable to the out-going agents. By his order dated 28th January, 1957 for the assessment year 1951-52 the Income Tax Officer held that the deductions were not permissible. In an appeal preferred by the assessee the Appellate Assistant Commissioner confirmed the assessment by his order dated 25th November, 1957. The assessee took the matter in further appeal to the Appellate Tribunal which dismissed the appeal. The Appellate Tribunal held that there was no justification for the absence of a written agreement between the I C I (Export) Ltd and the assessee when the former selling agencies were terminated and the assessee was appointed as the sole selling agent. It was observed that the assessee was not collecting any commission on behalf of the out-going agents and it was not their legal obligation to pay compensation to the out-going agents. If the assessee was not entitled to more than 3/5th of commission during the first two years, it should have credited that amount whereas the assessee had actually credited four-fifteenth on a notional basis which was not in consonance with the arrangement. The conclusion reached by the Appellate Tribunal was that "there was no agreement between the assessee and the I C I (Export) Ltd and "if there was one it was not acted upon". It was held by the Appellate Tribunal that the payment of compensation was not because of an overriding title created either by the act of the parties or by operation of law.

4. At the instance of the assessee the following question of law was referred

to the High Court under Section 66 (1) of the Income Tax Act, 1922 (hereinafter called the Act) —

"Whether the inclusion by the Income Tax Officer of Rs 2,03,503, Rs. 5,41,526, Rs 5,29,284 and Rs 4,00,052 in the assessment for the years 1949-50, 1950-51, 1951-52 and 1952-53 for the relevant accounting years ending the 30th September, 1948, 1949, 1950 and 1951 respectively in the computation of the total income of the assessee is justified and correct?" The High Court answered the question in the negative in favour of the assessee holding that the inclusion of the amount of compensation in the total income of the assessee for the relevant assessment years was not justified.

5 On behalf of the appellant it was contended that the High Court had no legal justification for interfering with the finding of the Appellate Tribunal, that there was no proof of the agreement between the assessee and the I C I (Export) Ltd, with regard to the quantum of commission to be paid to the assessee for the period between 1st April 1948 and 31st March, 1951. On this point reference was made by Mr. Chagla to (a) the letter dated 11th March, 1947 from the I C I (Export) Ltd. to M/s. Gillanders Arbuthnot and Co, (b) the affidavits of Mr. W. A. Bell and Mr J. W. Donaldson and (c) the letter dated 3rd January, 1958 of M/s Lovelocke and Lewes, Chartered Accountants, Calcutta. It was argued that these documents established that there was an agreement between the I C I (Export) Ltd and the assessee, that for the period 1st April, 1948 to 31st March, 1951 the assessee was entitled to receive as its commission only the amounts representing the difference between the normal rates of commission and the compensation payable to the former agents

during that period. The Appellate Tribunal had considered all these documents and reached the conclusion that there was no agreement between the I. C. I. (Export) Ltd. and the assessee and "if there was one it was not acted upon". The Appellate Tribunal remarked that the letter dated 11th March, 1947 from the I. C. I. (Export) Ltd. set forth only the terms and conditions subject to which the selling agencies of the out-going agents were terminated. It was silent on the crucial question of commission to be paid to the assessee during the three years from the date of its appointment as sole selling agent. The affidavits of Mr. Bell and Mr. Donaldson were produced for the first time before the Appellate Assistant Commissioner. The affidavits were made many years after the crucial date of the appointment of the assessee as the sole selling agent of the I. C. I. (Export) Ltd. The affidavits did not mention the amount of commission to be paid to the outgoing agents and the affidavits were also not consistent with the entries in the books of accounts of the assessee. The letter of M/s. Lovelocke and Lewes was produced at a very late stage during the hearing of the appeal before the Tribunal and even otherwise the letter merely explains the method of accounting adopted by the assessee and did not carry the matter any further. In the circumstances, the Appellate Tribunal held that there was no agreement between the assessee and the I. C. I. (Export) Ltd. and if there was any such agreement it was not acted upon. It is manifest that the finding of the Appellate Tribunal on this question is a finding on question of fact and the High Court was not entitled to interfere with this finding. It is well established that the High Court is not a Court of Appeal in a reference under Section 66 (1) of the Act and it is not open to the High Court in such a reference to embark upon a reappraisal of the evidence and to arrive at findings of fact contrary to those of the Appellate Tribunal. It is the duty of the High Court while hearing the reference to confine itself to the facts as found by the Appellate Tribunal and to answer the question of law in the context of those facts. It is true that the finding of fact will be defective in law if there is no evidence to support it or if the finding is perverse. But in the hearing of a reference under Section 66(1) of the Act it is not open to the assessee to challenge such a finding of fact unless

he has applied for the reference of the specific question under Section 66 (1). In *India Cements Ltd. v. Commissioner of Income Tax, Madras*, (1966) 60 ITR 52 = (AIR 1966 SC 1053) it was held by this Court that in a reference the High Court must accept the findings of fact reached by the Appellate Tribunal and it is for the party who applied for a reference to challenge those findings of fact, first by an application under Section 66 (1). If the party concerned has failed to file an application under Section 66 (1) expressly raising the question about the validity of the finding of fact, he is not entitled to urge before the High Court that the finding is vitiated for any reason. The same view has been expressed by this Court in *Commissioner of Income Tax, Madras v. Sri Meenakshi Mills Ltd., Madurai*, (1967) 63 ITR 609 = (AIR 1967 SC 819) and *Commissioner of Income Tax, Bombay City I v. Greaves Cotton and Co. Ltd.*, (1968) 68 ITR 200 (SC). In the present case the assessee has in his application under Section 66 (1) expressly raised the question about the validity of the finding of the Appellate Tribunal as regards the agreement but the question was not referred by the Appellate Tribunal to the High Court and the contention of the assessee with regard to the question must be deemed to have been rejected. The assessee did not thereafter move the High Court under Section 66 (2) of the Act requiring it to call for a statement of the case on that specific question. We are therefore of opinion that the High Court was in error in embarking upon a reappraisal of the evidence before the Appellate Tribunal and setting aside the findings of the Appellate Tribunal that "there was no agreement as alleged in the affidavits of Mr. W. A. Bell and Mr. J. W. Donaldson" and "if there was such an agreement it was not acted upon".

6. It was argued by Mr. Chagla that even if the agreement was not established, the amount paid by the assessee as compensation to the ex-agents was an expenditure laid out wholly and exclusively for the purpose of the business and as such is allowable under Section 10 (2) (xv) of the Act. The contrary view point was urged on behalf of the appellant. It was pointed out that the assessee was acting as the agent of the I. C. I. (Export) Ltd. for the payment of compensation to the ex-agents and the payment was made not in the character

of a trader but in the character of the agent of its principal. The contention of the appellant was that the assessee got the right to sell goods after 1st April, 1948 and for getting that right the assessee parted with a portion of its commission for the first two years after 1st April, 1948 and paid very much more than the commission earned in the third year. This position was borne out by the accounts of the respondent which show that the assessee received the commission at full rates and out of it created a reserve account of which these compensations were made to the ex-agents. We have already referred to the finding of the Appellate Tribunal that no agreement between the assessee and the I. C. I. (Export) Ltd. has been proved. In the absence of proof of the exact terms and conditions of the agreement it is not possible to accept the argument of the assessee that the amount paid as compensation to the ex-agents was an "expenditure laid out wholly and exclusively for the purpose of the business" under Section 10 (2) (xv) of the Act.

7 It was finally contended on behalf of the respondent that by virtue of an overriding title the income was diverted before it reached the assessee, and so, the amount of compensation paid to the ex-agents did not form part of the income of the assessee. In other words, the contention was that the compensation payable to the ex-agents was diverted from the income of the assessee by an overriding title arising under the agreement between the assessee and the I. C. I. (Export) Ltd. The argument was stressed that the commission payable as compensation to the ex-agents did not form part of the income of the assessee. We are unable to accept this argument as correct. We have already pointed out that the finding of the Appellate Tribunal is that the precise terms of the agreement between the assessee and the I. C. I. (Export) Ltd. have not been established. In any event, even on the basis of the affidavits of Mr. Bell and Mr. Donaldson the payment of compensation to the ex-agents was apparently made by the assessee for and on behalf of the I. C. I. (Export) Ltd. The assessee's documents suggest that the payment of compensation was the exclusive liability of the I. C. I. (Export) Ltd. and the assessee was not under a legal obligation to pay the amount of compensation to the out-going agents. It is not established that the payment of compensation was by an over-

riding title created either by the act of the parties or by the operation of law. An obligation to apply the income in a particular way before it is received by the assessee or before it has accrued or arisen to the assessee results in the diversion of income. An obligation to apply income accrued, arisen or received amounts merely to the apportionment of income and the income so applied is not deductible. The true test for the application of the rule of diversion of income by an overriding title is whether the amount sought to be deducted in truth never reached the assessee as his income. The leading case on the subject is *Raja Bejoy Singh Dudhuria v Commissioner of Income-tax, Bengal*, 1933-1 ITR 135 = (AIR 1933 PC 145) where the step mother of the Raja had brought a suit for maintenance and a compromise decree was passed in which the step mother was to be paid Rs. 1,100 per month, which amount was declared a charge upon the properties in the hands of the Raja by the Court. The Raja sought to deduct this amount from his assessable income, which was disallowed by the High Court at Calcutta. On appeal to the Judicial Committee Lord Macmillan observed as follows —

"But their Lordships do not agree with the learned Chief Justice in his rejection of the view that the sums paid by the appellant to his step mother were not 'income' of the appellant at all. This in their Lordships' opinion is the true view of the matter.

When the Act by Section 3 subjects to charge 'all income' of the individual, it is what reaches the individual as income which it is intended to charge. In the present case the decree of the Court by charging the appellant's whole resources with a specific payment to his step mother has to that extent diverted his income from him and has directed it to his step-mother, to that extent what he receives for her is not his income. It is not a case of the application by the appellant of part of his income in a particular way, it is rather the allocation of a sum out of his revenue before it becomes income in his hands".

Another case of the Judicial Committee is reported in *P. C. Mullick v. Commissioner of Income-tax, Bengal*, 1938-6 ITR 206 = (AIR 1938 PC 118), where, a testator appointed the appellants as executors and directed them to pay Rs. 10,000 out of the income on the occasion of his addya

sraddha. The executors paid Rs. 5,537 for such expenses, and sought to deduct the amount from the assessable income. The Judicial Committee confirmed the decision of the Calcutta High Court disallowing the deduction and observed that the payments were made out of the income of the estate coming to the hands of the executors and in pursuance of an obligation imposed upon them by the testator. The Judicial Committee observed that it was not a case in which a portion of the income had been diverted by an overriding title from the person who would have received it otherwise and distinguished Bejoy Singh Dudhuria's case, 1933-1 ITR 135=(AIR 1933 PC 145) (supra). In Commissioner of Income-tax, Bombay City II v. Sitaldas Tirathdas, 1961-41 ITR 367=(AIR 1961 SC 728), Hidayatullah, J., speaking for the Court observed as follows:—

"There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee. Where by the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law does not follow. It is the first kind of payment which can truly be excused and not the second. The second payment is merely an obligation to pay another a portion of one's income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable".

In view of the principle laid down in these authorities we are of opinion that the payment of compensation by the assessee to the ex-agents was not by an overriding title created either by act of the parties or by operation of law. We accordingly reject the argument of Mr. Chagla on this aspect of the case.

8. For the reasons expressed we hold that the judgment of the Calcutta High Court dated 28th September, 1964, should be set aside and the question referred by the Appellate Tribunal should be answered in the affirmative and against the assessee. The appeals are accordingly allowed with costs. One hearing fee.

SSG/D.V.C.

Appeals allowed.

AIR 1969 SUPREME COURT 1165
(V 56 C 214)

(From: Punjab)*

M. HIDAYATULLAH, C. J., V. RAMA-SWAMI AND G. K. MITTER, JJ.

Jai Narain, Appellant v. Kishan Chand, Respondent.

Civil Appeal No. 389 of 1966, D/- 27-2-1969.

(A) Houses and Rents — Delhi Rent Control Act (1958), Ss. 57 (2), First Proviso, 14 (1) (j) and 14 (10) — Tenant's eviction under S. 13 (1) (k), Delhi and Ajmer Rent Control Act, 1952 — Delhi Rent Control Act passed during pendency of appeal against order — In revision tenant claiming relief under S. 14 (1) (j) of new Act — Premises situated in area subjected to Slum Areas (Improvement and Clearance) Act, 1956 — Proviso to S. 57 (2) of new Act does not apply to case — Matter is governed by the repealed Delhi and Ajmer Rent Control Act and hence order for eviction of the tenant was the proper order to be made — (Houses and Rents — Delhi and Ajmer Rent Control Act (1952), S. 13 (1) (k)). (Paras 3, 5 and 6)

(B) Civil P. C. (1908), Preamble — Interpretation of Statutes — Statute to be interpreted in furtherance of policy for which it was enacted — This rule applies only where the language of the Statute is not clear. (Para 6)

Mr. C. B. Agarwala, Senior Advocate, (Miss Uma Meththa, M/s. M. L. Kapur and K. K. Sinha, Advocates, with him), for Appellant; Mr. B. C. Misra, Senior Advocate, (M/s. Bishamber Lal and H. K. Puri, Advocates, with him), for Respondent.

The following judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal by a tenant who had rented a shop No. 2687 in Kinari Bazar, Delhi from the respondent on Rs. 13.50 P. per month. In those premises he was selling Usha sewing machines and fans. It appears that the level of the shop was too high from the road and his clients were troubled in going to his shop and so he lowered the level and thereby altered the premises to suit his convenience. The landlord thereupon filed a suit against him for his eviction under Section 13 (1) (k) of the Delhi and Ajmer Rent Control Act, 1952. The suit was filed on November 13, 1957. The

*(Review Appln. No. 23-D of 1963, D/- 25-3-1964 — Punj at Delhi).

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trial Court ordered on February 19, 1959, ejectment and payment of Rs 145 as arrears of rent. An appeal against the order of the trial Court was dismissed by the appellate authority on November 16, 1959. A revision application was then filed by the tenant on March 25, 1960. During the course of that revision he invoked the provisions of the Delhi Rent Control Act, 1958 which had come into force on February 9, 1959 and relied upon Section 14 (1) (j) of the new Act read with Section 57. Previously he had not relied upon the new Act although the Act had been in force during the pendency of the previous proceedings. The High Court acting under Section 14 (1) (j) and sub-sec (10) of the same section, gave him the alternative of paying compensation in the sum of Rs. 500/- which it appears that the landlord himself had assessed as the damages caused by the act of the tenant. The landlord later filed an application for review of the order and pointed out that the new Act was not applicable to the case in view of the first proviso of Section 57 sub-section (2). The High Court thereupon granted the review and reversed its earlier order and ordered the eviction of the tenant.

2. In this appeal it is contended that the High Court was in error in passing the order on review and that the previous order was the correct order in the light of the provisions of the Act of 1958. We have therefore to consider which of the two orders of the High Court is the correct order and whether the review was properly granted or not.

3. As is very frequent in our country, Rent Control Acts are changed from time to time causing numerous difficulties in their interpretation and application. Here too, we have a succession of Acts which were passed, to say nothing of the amendments which were made in the body of each of the Acts as they came. We are concerned first with the Act of 1952, namely, The Delhi and Ajmer Rent Control Act, 1952. Section 13 (1) (k) of that Act gave a right to the landlord to evict a tenant who whether before or after the commencement of the Act had caused or permitted to be caused substantial damage to the premises, or notwithstanding previous notice, had used or dealt with the premises in a manner contrary to any condition imposed on the landlord by the Government or the Delhi Improvement Trust while giving him a lease of the land on which the premises were situated. We

are not concerned with the latter part but with the first part where the tenant before or after the commencement of the Act had caused or permitted to be caused substantial damage to the premises. Whether the lowering of the floor was causing substantial damage to the premises is a question into which we need not go, because the concurrent finding of the Courts of fact is that it did so. This question was not raised before us. Therefore, if Sec. 13 (1) (k) of the Delhi and Ajmer Rent Control Act, 1952 applied, the eviction of the tenant was the proper order to make in view of the finding that he had caused substantial damage to the premises. However, the matter comes to the Court because of the passing of the Delhi Rent Control Act, 1958 which came into force on February 9, 1959. Section 57 (1) of that Act provided that the Delhi and Ajmer Rent Control Act 1952 in so far as it was applicable to the Union Territory of Delhi, was being repealed. While repealing it, a special saving was however made by sub-section (2) of the same section in favour of all suits and other proceedings which were then pending under the repealed Act and it was provided that those suits and proceedings should be continued and disposed of in accordance with the provisions of the Act as if that Act had continued to be in force and the new Act had not been passed. This would have really been a very proper provision to make to separate the operation of the two Acts but the Legislature went still further and added two provisos. We are concerned only with the first of the two provisos on which much dispute has arisen in this case. That proviso reads as follows:

"Provided that in any such suit or proceeding for the fixation of standard rent or for the eviction of a tenant from any premises to which Section 54 does not apply, the Court or other authority shall have regard to the provisions of this Act." This proviso contains a proviso within itself which excepts the case of premises to which Section 54 of the Act does not apply. That section provides as follows:

"Nothing in this Act shall affect the provisions of the Administration of Evacuee Property Act, 1950, or the Slum Areas (Improvement and Clearance) Act, 1956 or the Delhi Tenants (Temporary Protection) Act, 1956."

The effect of the proviso which we have quoted above is vanously described by Counsel on opposite sides. According to Mr. C. B. Agarwala who argued for the

tenant, the words "to which Section 54 does not apply" govern the words "any such suit or proceeding" and not the words "any premises". The High Court in the order passed on review was of the opinion that these words governed the words "any premises". In our opinion, this is the correct view to take of the matter.

4. To begin with, it must be noticed that the proviso speaks of two things, namely, the fixation of standard rent and the eviction of a tenant from any premises. The words "from any premises" cannot be connected with the phrase "for the fixation of standard rent", because then the preposition would have been "of any premises" or "for any premises" and not "from any premises." This means that the first phrase has to be read as complete in itself beginning from the words "for the fixation" and ending with the words, "standard rent". The second phrase then reads "or for the eviction of a tenant from any premises." The words "from any premises" go very clearly with the words "eviction of a tenant" and not with the words "any suit or proceeding".

5. The question then arises, where does the phrase "to which Section 54 does not apply" connect itself? According to Mr. Agarwala that phrase must be connected with the words "in any such suit or proceeding." Since the suits contain two kinds of matters, namely, fixation of standard rent and eviction of a tenant from any premises, we have to turn to the provisions of the statutes to which Section 54 refers, namely, the Administration of Evacuee Property Act, 1950, the Slum Areas (Improvement and Clearance) Act, 1956 and the Delhi Tenants (Temporary Protection) Act, 1956. The first two do not deal at all with the fixation of fair rent and the third speaks of fair rent, but it does not provide for its fixation. It would be pointless to use the language 'any suit or proceeding to which Sec. 54 does not apply' in relation to fixation of standard rent. It follows therefore that the phrase "to which Section 54 does not apply" really governs 'premises'. Read in that way, all the three Acts fall in line, because they provide for premises and not for fixation of standard rent. The Administration of Evacuee Property Act, 1950, the Slum Areas (Improvement and Clearance) Act, 1956 and the Delhi Tenants (Temporary Protection) Act, 1956 all deal with premises and property and therefore the phrase "to which Section 54 does not apply" is connected with the word "premises". That is the view which

the High Court has taken and we think rightly. The proviso did not apply and the matter had to be governed by the old Delhi and Ajmer Rent Control Act, 1952 which had been repealed.

6. It was contended before us that this legislation was intended to soften action against tenants still further and that the policy of the law had been to give more and more protection to the tenants and we must therefore read the statute in consonance with that policy. This would be an argument to consider if the language of the statute was not quite clear. But the language is clear enough to show that the proviso applies only to those cases in which Section 54 cannot be made applicable. It is admitted before us that this area is subjected to the Slum Areas (Improvement and Clearance) Act, 1956. If that is so, then, on the terms of the proviso on which much reliance is placed by Mr. Agarwala, the provisions of the Delhi Rent Control Act, 1958 cannot be taken into consideration. They are to be taken into consideration only in those cases to which the Acts mentioned in Section 54 do not apply, that is to say, in respect of premises not governed by those statutes. Since this shop is governed by one of the statutes, the proviso has no application. The High Court's view was therefore right. In the circumstances, the appeal fails and will be dismissed with costs.

MKS/D.V.C.

Appal dismissed.

AIR 1969 SUPREME COURT 1167
(V 56 C 215)

(From: Calcutta)*

J. C. SHAH AND A. N. GROVER, JJ.

Smt. Swaran Lata Ghosh, Appellant v. Harendra Kumar Banerjee and another, Respondents.

Civil Appeal No. 662 of 1968, D/- 12-3-1969.

Civil P. C. (1908), S. 33, O. 20, Rr. 4 and 5; O. 49, R. 3 (5) — Contested suit — Trial Court decreeing claim without delivering judgment — High Court also in appeal confirming trial Court's decision without recording reasons — Held there was no real trial of defendant's case.

In a suit in which the pleadings of the parties raised substantial issues of fact for

* (A. F. O. O. No. 99 of 1963, D/- 4-8-1964 — Cal).

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trial, the trial Court after holding a lengthy trial merely decreed the claim without delivering a judgment. In the appeal in which several grounds on merits were raised, the High Court also merely recorded that the plaintiff had sufficiently proved the case.

Held that there had been no real trial of the defendant's case. (Para 13)

Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge, a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate Court will then have adequate material on which it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. (Para 6)

Similarly it was unfortunate that the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plant without recording their reasons. It is true that a Judge of a Chartered High Court is not obliged to record a judgment strictly according to the provisions contained in Rules 4 (2) and 5 of O 20, Code of Civil Procedure. But the privilege of not recording a judgment is intended normally to apply where the action is undefended, where the parties are not at issue on any substantial matter, in a summary trial of an action where leave to defend is not granted, in making interlocutory orders or in disposing of formal proceedings and the like. Order 49 R 3 of the Code of Civil Procedure undoubtedly applies to the trial of suits but the question is not one merely of power but of exercise of judicial discretion in the exercise of that power. The function of a judicial trial is to hear and decide a

matter in contest between the parties in open court in the presence of parties according to the procedure prescribed for investigation of the dispute, and the rules of evidence. The conclusion of the Court ought normally to be supported by reasons duly recorded. This requirement transcends all technical rules of procedure. (Paras 6, 10)

Mr. D. N. Mukherjee, Advocate, for Appellant, Mr. S. C. Majumdar, Advocate, for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: Birendra Krishna Ghosh — hereinafter called "Ghosh" — was practising as an attorney-at-law in the High Court of Calcutta. He died in August 1950. H. K. Banerjee — the first respondent herein — commenced in 1951 an action in the High Court of Calcutta on the original side against Swaran Lata and Arun Kumar — widow and minor son respectively of Ghosh — for a decree for Rs 15,000/- claiming that it was the balance of "capital deposits" due to him from Ghosh and Rs 1,535/- interest due thereon. The plaintiff claimed that he had deposited with Ghosh Rs. 6,000/- on December 10, 1948, for the "specific purpose of investing the amount" and the latter agreed to pay interest at the rate of 6 per cent per annum and to repay the same or any portion thereof when demanded; that on or about February 17, 1948, he had deposited Rs. 10,000/- with Ghosh also for "the specific purpose of investing" that sum, and the latter had agreed to pay interest at the rate of 7 per cent per annum and to repay, the same or part thereof when demanded, that under the agreement Ghosh paid diverse sums of money as interest, and on July 3, 1947 Ghosh repaid Rs 1,000/- out of Rs 6,000/- deposited, and that the balance of Rs 15,000/- and Rs 1,535/- interest due thereon were repayable by the defendants to the plaintiff.

2. Swaran Lata filed a written statement denying the claim of the plaintiff. She denied that the sums of Rs 6,000/- and Rs 10,000/- were entrusted to or deposited with her husband as alleged by the plaintiff, she denied that her husband repaid any amounts towards interest or part payment of principal, and she submitted that the suit was in any event barred by the law of limitation.

3. The trial of the suit commenced before Law, J., on July 12, 1962. In support of the plaintiff's case four witnesses

were examined. The plaintiff tendered in evidence extracts from certain Bank accounts and correspondence. He produced no documentary evidence in support of his case that any amount was deposited with Ghosh, on terms set out in the plaint. Apparently he relied upon the entries in the extracts from the statements of account with the United Bank of India Ltd., the Imperial Bank of India, the Hooghly Bank Ltd. and correspondence between him and Swaran Lata. The learned Judge by order dated August 17, 1962, passed the following order:

"There will be a decree for Rs. 15,000/- with interest on judgment on Rs. 15,000/- at 6 per cent per annum and costs. No interim interest allowed." Pursuant to that order a decree was drawn up.

4. Against the decree Swaran Lata appealed to the High Court under Clause 15 of the Letters Patent, and raised several grounds in the memo of appeal on the merits. The High Court disposed of the appeal by a short judgment observing:

"We think that the plaintiff sufficiently proved the case made in the plaint. On the 10th December, 1946 the plaintiff entrusted and deposited with Birendra Krishna Ghosh a sum of Rs. 6,000/- for the express and specific purpose of investing the sum to yield interest at the rate of 6 per cent per annum. He also entrusted and deposited with Birendra Krishna Ghosh on the 17th February 1948 a sum of Rs. 10,000/- for "the express and specific purpose of investing the sum to yield interest at the rate of 7 per cent per annum."

The Court observed that the amounts paid to Ghosh were deposits, within the meaning of Article 60 of the Indian Limitation Act, 1908, and since interest was paid in respect of both the deposits within three years of the institution of the suit, no question of limitation arose, and the Trial Court had "rightly decreed the suit." The High Court, however, modified the decree passed by the Trial Court and declared that the liability of the defendants was not personal and was limited only to "the assets and properties" of Ghosh received by them. With special leave, Swaran Lata Ghosh has appealed to this Court.

5. The defendants had filed a written statement denying the averments in the plaint and had contested the claim of the plaintiff. The learned Judge apparently raised no issues. We have found in the printed paper book no record of

any issues raised. On behalf of the plaintiff, witnesses were examined to prove the two deposits and the terms of the deposit which it was claimed were orally agreed upon. There was no documentary evidence supporting the case of the plaintiff relating to the agreements between him and Ghosh. There was also no documentary evidence supporting the case of payment of interest on the amounts deposited, or of re-payment of a part of the principal. Indisputably the pleadings of the parties raised substantial issues of fact for trial, and a lengthy trial was held. But the learned Trial Judge delivered no judgment. He merely decreed the claim. The decree was on the face of it erroneous, because it directed Swaran Lata and her minor son Arun Kumar personally to pay the amount decreed.

6. Trial of a civil dispute in Court is intended to achieve, according to law and the procedure of the Court, a judicial determination between the contesting parties of the matter in controversy. Opportunity to the parties interested in the dispute to present their respective cases on questions of law as well as fact, ascertainment of facts by means of evidence tendered by the parties, and adjudication by a reasoned judgment of the dispute upon a finding on the facts in controversy and application of the law to the facts found, are essential attributes of a judicial trial. In a judicial trial the Judge not only must reach a conclusion which he regards as just, but, unless otherwise permitted, by the practice of the Court or by law, he must record the ultimate mental process leading from the dispute to its solution. A judicial determination of a disputed claim where substantial questions of law or fact arise is satisfactorily reached, only if it be supported by the most cogent reasons that suggest themselves to the Judge; a mere order deciding the matter in dispute not supported by reasons is no judgment at all. Recording of reasons in support of a decision of a disputed claim serves more purposes than one. It is intended to ensure that the decision is not the result of whim or fancy, but of a judicial approach to the matter in contest: it is also intended to ensure adjudication of the matter according to law and the procedure established by law. A party to the dispute is ordinarily entitled to know the grounds on which the Court has decided against him, and more so, when the judgment is subject to appeal. The Appellate Court will then have adequate material on which

it may determine whether the facts are properly ascertained, the law has been correctly applied and the resultant decision is just. It is unfortunate that the learned Trial Judge has recorded no reasons in support of his conclusion, and the High Court in appeal merely recorded that they thought that the plaintiff had sufficiently proved the case in the plaint.

7. The defendants it is true led no oral evidence and produced no documentary evidence. But the defendants had apparently no personal knowledge about the transactions and there is no clear evidence on the record that the first defendant Swaran Lata had in her possession any books of account of the deceased which she could have produced and had withheld. The burden of proving the claim in all its details lay upon the plaintiff. Absence of documentary evidence in support of the case made the burden more onerous.

8. We are unable to agree with Counsel for the plaintiff that "for all practical purposes" the action was undefended and that the Trial Judge recorded merely formal evidence in proof of the plaintiff's case. The defendants had filed a written statement denying the plaintiff's claim, had appeared by Counsel at the trial, and had challenged the plaintiff's evidence by intensive cross-examination. The plaintiff who was the principal witness was asked as many as 317 questions and his examination appears to have taken the better part of a day. In the course of the examination in attempting to elicit the truth the learned Judge took no mean or insignificant part. *Three more witnesses were also examined.*

9. We are also unable to agree that the only plea raised at the trial and in the Court of appeal was about the personal liability of the defendants. The evidence led at the trial and the cross-examination amply establish that the defendants defended the claim on the merits. The High Court in appeal modified the decree and restricted it to the estate inherited by the defendants from Ghosh. But there is no reason to hold that the only point argued before the Trial Court related to the extent of liability of the defendants. The grounds in the memorandum of appeal belie that submission.

10. It is true that Rules 1 to 8 of Order 20 of the Code of Civil Procedure are by the express provision contained in Order 49, Rule 3 Clause (5), inapplicable

to a Chartered High Court in the exercise of its ordinary or extraordinary original civil jurisdiction. A Judge of a Chartered High Court is not obliged to record a judgment strictly according to the provisions contained in Rules 4 (2) and 5 of Order 20, Code of Civil Procedure. But the privilege of not recording a judgment is intended normally to apply where the action is undefended, where the parties are not at issue on any substantial matter, in a summary trial of an action where leave to defend is not granted, in making interlocutory orders or in disposing of formal proceedings and the like. Order 49 R. 3 of the C P C undoubtedly applies to the trial of suits but the question is not one merely of power but of exercise of judicial discretion in the exercise of that power. The function of a judicial trial is to hear and decide a matter in contest between the parties in open Court in the presence of parties according to the procedure prescribed for investigation of the dispute, and the rules of evidence. The conclusion of the Court ought normally to be supported by reasons duly recorded. This requirement transcends all technical rules of procedure.

11. We may assume that the learned Trial Judge was satisfied that the claim of the plaintiff deserved to be decreed. But the judgment of the learned Trial Judge was not final it was subject to appeal and unless there was a reasoned judgment recorded by the Trial Judge, an appeal against the judgment may turn out to be an empty formality. A Court of appeal generally attaches great value to the views formed by the Judge of First Instance who had seen the witnesses and noted their demeanour. How the Judge who tried the suit reacted to the evidence of a witness may not always be found from the printed record.

12. The plaintiff's case was founded upon extracts of Bank accounts, the extracts however do not evidence the agreement under which the money passed from the plaintiff to Ghosh. The plaintiff had to prove not only that money passed from him to Ghosh, he had to prove that money passed under the agreement pleaded by him. Oral testimony of the plaintiff had to be examined in the context of several weighty circumstances e.g., complete absence of documentary evidence in the handwriting of Ghosh, absence of correspondence relating to the transactions between Ghosh and the plaintiff, absence of books of account in support of the trans-

actions; improbability of a transaction of the nature pleaded between an attorney and the plaintiff; absence of any previous business or professional relationship between Ghosh and the plaintiff; absence of vouchers supporting the alleged payment of interest and repayment of part of the principal and other important circumstances. In reaching a conclusion the Court had to consider the probabilities and the circumstances in which the plaintiff alleged that he had deposited the two sums of money with Ghosh. It was essentially a case in which there should have been a full record of the reasons which persuaded the learned Trial Judge to reach the conclusion he did. A mere order directing payment of the money, not supported by reasons, does not do duty for a judgment according to law.

13. We are, therefore, constrained to come to the conclusion that there has been no real trial of the defendant's case. It is a very unfortunate state of affairs that eighteen years after the date on which the suit was instituted, we have to remand the suit for trial according to law. But we see no other satisfactory alternative.

14. The decree passed by the High Court is set aside. The suit stands remanded to the Court of First Instance for trial according to law. It will be open to the learned Judge who tries the suit to proceed on the evidence already on the record. If the parties desire to lead any additional evidence, he will give them opportunity in that behalf. If the learned Judge is of the opinion that the witnesses should be examined over again before him, he may adopt that course.

15. As costs till now incurred are thrown away on account of circumstances for which the parties may not be held responsible, we direct that there will be no order as to costs till this date.

16. We may state that the observations made by us in the course of this judgment are not intended to express any opinion by this Court on the merits of the dispute.

MKS/D.V.C.

Decree set aside and
suit remanded.

AIR 1969 SUPREME COURT 1171
(V 56 C 216)

(From Calcutta: AIR 1968 Cal 220)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

State of West Bengal and another, Appellants v. Jugal Kishore More and another, Respondents.

Criminal Appeal No. 14 of 1968, D/-10-1-1969.

Criminal P. C. (1898), Section 82 — Extradition Act (1962) Section 3 — Fugitive Offenders Act (1881) (44 and 45 vict, C. 69) — Presidency Magistrate issuing warrant and sending it to Secretary, Home Department for onward transmission to Government of India for taking further steps for securing presence of accused in India from Hong Kong to undergo trial — Held, issue of warrant and procedure followed in transmitting warrant were not illegal, not even irregular — Though provisions of Extradition Act could not be availed of, that did not bar the requisition made by External Affairs Ministry to authorities in Hong Kong — Fugitive Offenders Act is not rendered inapplicable because India is no more a British possession — AIR 1968 Cal 220, Reversed.

The Chief Presidency Magistrate held an enquiry and recorded an order on July 19, 1965, that on the materials placed before him, a prima facie case was made out of a criminal conspiracy, hatched within his jurisdiction and 'M' was one of the conspirators. He accordingly directed that a non-bailable warrant in Form II Sch. V of the Code of Criminal Procedure be issued for the arrest of 'M' and the warrant be sent to the Secretary Home (Political) Department, Government of West Bengal, with a request to take all necessary steps to ensure execution of the warrant. The Chief Presidency Magistrate forwarded to the Government of West Bengal, the warrant with attested copies of the evidence recorded at the enquiry and photostat copies of documents tendered by the prosecution in evidence "in accordance with the procedure laid down in Government of India, Ministry of External Affairs, letter No. K/52/6131/41 dated 21st May, 1955." The warrant was forwarded by the Government of West Bengal to the Ministry of External Affairs, Government of India. The Ministry of External Affairs forwarded the warrant to the High Commissioner for India, Hong Kong, who in his turn,

requested the Colonial Secretary, Hong Kong, for an order extraditing 'M' under the Fugitive Offenders Act, 1881, (44 and 45 Vict., c. 69), to India for trial for offences described in the warrant. The Central Magistrate, Hong Kong, endorsed the warrant and directed the Hong Kong Police, "pursuant to section 13 of Part II and Section 26 of Part IV of the Fugitive Offenders Act, 1881", to arrest 'M'. 'M' was arrested on November 24, 1965. By order dated April 4, 1966, the Central Magistrate, Hong Kong, overruled the objection raised on behalf of 'M' that the Court had no jurisdiction to proceed in the matter under Fugitive Offenders Act, 1881, since the Republic of India was no longer a "British Possession". On May 16, 1966, father of 'M' moved in the High Court of Calcutta a petition under Section 439 of the Code of Criminal Procedure and Article 227 of the Constitution for an order quashing the warrant of arrest issued against 'M' and all proceedings taken pursuant thereto and restraining the Chief Presidency Magistrate and the Union of India from taking any further steps pursuant to the said warrant of arrest and causing 'M' to be extradited from Hong Kong to India.

Held, the Chief Presidency Magistrate had the power to issue the warrant for the arrest of 'M', because there was prima facie evidence before him that 'M' had committed certain offences which he was competent to try. The warrant was in Form II of Sch. V of the Code of Criminal Procedure. If the warrant was to be successfully executed against 'M' who was not in India, assistance of the executive Government had to be obtained. It was not an invasion upon the authority of the Courts when they were informed that certain procedure may be followed for obtaining the assistance of the executive Department of the State in securing through diplomatic channels extradition of fugitive offenders. Issue of the warrant and the procedure followed in transmitting the warrant were not illegal, not even irregular. (Para 27)

It was true that under the Extradition Act 34 of 1962 no notification had been issued including Hong Kong in the list of the Commonwealth countries from which extradition of fugitives from justice may be secured. The provisions of the Extradition Act, 1962 could not be availed of for securing the presence of 'M' for trial in India. But that did not operate as a bar to the requisition made by the Ministry of External Affairs, Government

of India, if they were able to persuade the Colonial Secretary, Hong Kong, to deliver 'M' for trial in this country.

(Para 28)

By Section 82 of the Code of Criminal Procedure a warrant of arrest may be executed at any place in India. That provision does not impose any restriction upon the power of the Police Officer. The section only declares, in that, every warrant issued by any Magistrate in India may be executed at any place in India. Execution of the warrant is not restricted to the local limits of the jurisdiction of the Magistrate issuing the warrant or of the Court to which he is subordinate. Merely, because for the purpose of the extradition procedure, in a statute passed before the attainment of independence by the former colonies and dependencies, certain territories continue to be referred to as "British Possessions", the statute does not become inapplicable to those territories. The expression "British Possession" in the old statutes merely survives as an artificial mode of reference, undoubtedly not consistent with political realities, but does not imply for the purpose of the statute or otherwise political dependence of the Government of the territories referred to. It is not for the Courts of India to take umbrage at expressions used in the statutes of other countries and to refuse to give effect to Indian laws which govern the problems arising before them. India is now a sovereign republic, but that by itself does not render the Fugitive Offenders Act, 1881, inapplicable to India. AIR 1954 SC 517, held needed to be reconsidered but not referred to larger Bench in view of repeal of the Act by Extradition Act of 1962.

(Para 24)

'Extradition' is the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the courts of the other State. Surrender of a person within the State to another State—whether a citizen or an alien—is a political act done in pursuance of a treaty or an arrangement ad hoc. It is founded on the broad principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. The law relating to extradition between independent States is based on treaties. But the

law has operation—national as well as international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the State the procedure to be followed by the Courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law.

(Para 6)

The functions which the Courts in the two countries perform are therefore different. The Court within whose jurisdiction the offence is committed decides whether there is *prima facie* evidence on which a requisition may be made to another country for surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid the requisition is transmitted to the Police authorities, and the Courts of that country consider, according to their own laws, whether the offender should be surrendered—the enquiry is in the absence of express provisions to the contrary relating to the *prima facie* evidence of the commission of the offence which is extraditable, the offence not being a political offence nor that the requisition being a subterfuge to secure custody for trial for a political offence. (Para 8)

Cases Referred: Chronological Paras

- (1966) 1966-2 All ER 1006 = 1966-3 WLR 23, *In re, Kwesi Armah* 22
 (1966) 1966-3 All ER 177 = 1966-3 WLR 828, *Armah v. Govt. of Ghana* 22
 (1962) 1962-2 All ER 438 = 1963 AC 634, *Zacharia v. Republic of Cyprus* 23
 (1957) AIR 1957 SC 857 (V 44) = 1958 SCR 328 = 1957 Cri LJ 1346, *Mobarak Ali Ahmed v. State of Bombay* 21
 (1954) AIR 1954 SC 517 (V 41) = 1955-1 SCR 280 = 1954 Cri LJ 1337, *State of Madras v. C. G. Menon* 15, 20, 21, 25
 (1952) 1952-1 All ER 1060, *Re. Government of India and Mubarak Ali Ahmed* 21
 (1911) ILR 35 Bom 225 = 12 Cri LJ 356, *Emperor v. Vinayak Damodar Savarkar* 19
 Mr. B. Sen, Senior Advocate, (Mr. P. K. Chakravarti, Advocate with him), for Ap-

pellants; Mr. A. S. R. Chari, Senior Advocate, (M/s. B. P. Maheshwari and Sobhag Mal Jain, Advocates with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

SHAH, J.: In the course of investigation of offences under Sections 420, 467, 471 and 120B I. P. Code the Officer in charge of the investigation submitted an application before the Chief Presidency Magistrate, Calcutta, for an order that a warrant for the arrest of Jugal Kishore More and certain other named persons be issued and that the warrant be forwarded with the relevant records and evidence to the Ministry of External Affairs, Government of India, for securing extradition of More who was then believed to be in Hong Kong. It was stated in the application that More and others "were parties to a criminal conspiracy in Calcutta between May 1961 and December 1962 to defraud the Government of India in respect of India's foreign exchange", and their presence was required for trial.

2. The Chief Presidency Magistrate held an enquiry and recorded an order on July 19, 1965, that on the materials placed before him, a *prima facie* case was made out that a criminal conspiracy was "hatched in Calcutta" within his jurisdiction, and More was one of the conspirators. He accordingly directed that a non-bailable warrant in Form II Sch. V of the Code of Criminal Procedure be issued for the arrest of More, and the warrant be sent to the Secretary Home (Political) Department, Government of West Bengal, with a request to take all necessary steps to ensure execution of the warrant. A copy of the warrant was sent to the Commissioner of Police, Calcutta, for information. In the warrant More was described as Manager, Premko Traders of 7, Wyndhan Street and 28, King's Road, Hong Kong. The Chief Presidency Magistrate forwarded to the Government of West Bengal, the warrant with attested copies of the evidence recorded at the enquiry and photostat copies of documents tendered by the prosecution in evidence "in accordance with the procedure laid down in Government of India, Ministry of External Affairs, letter No. K/52/6131/41 dated 21st May, 1955". The warrant was forwarded by the Government of West Bengal to the Ministry of External Affairs, Government of India. The Ministry of External Affairs forwarded the warrant to the High Commissioner

for India, Hong Kong, who in his turn, requested the Colonial Secretary, Hong Kong, for an order extraditing More under the Fugitive Offenders Act, 1881, (44 and 45 Vict, c 69), to India for trial for offences described in the warrant. The Central Magistrate, Hong Kong, endorsed the warrant and directed the Hong Kong Police, "pursuant to Section 13 of Part II and Section 26 of Part IV of the Fugitive Offenders Act, 1881", to arrest More. The order recited —

"Whereas I have perused this warrant for the apprehension of Jugal Kishore More, * * * accused of an offence punishable by law in Calcutta, Republic of India, which warrant purports to be signed by the Chief Presidency Magistrate, Calcutta, and is sealed with the seal of the Court of the said Magistrate, and is attested by S K Chatterjee, Under Secretary in the Ministry of External Affairs of the Republic of India and sealed with the seal of the said Ministry,

And whereas I am satisfied that this warrant was issued by a person having lawful authority to issue the same,

And whereas it has been represented to me that the said Jugal Kishore More is suspected of being in the Colony,

And whereas Order in Council S R and O No 28 of 1918 by virtue of which Part II of the Fugitive Offenders Act, 1881, was made to apply to a group of British Possessions and Protective States including Hong Kong and British India, appears to remain in full force and effect so far as the law of Hong Kong is concerned

Now therefore under Section 13 of the Fugitive Offenders Act, 1881, I hereby endorse this Warrant and authorise and command you in Her Majesty's name, forthwith to execute this Warrant in the Colony to apprehend the said Jugal Kishore More, * * * wherever he may be found in the Colony and to bring him before a Magistrate of the said Colony to be further dealt with according to law"

3 More was arrested on November 24, 1965. By order dated April 4, 1966, the Central Magistrate, Hong Kong, overruled the objection raised on behalf of More that the Court had no jurisdiction to proceed in the matter under the Fugitive Offenders Act, 1881, since the Republic of India was no longer a "British Possession"

4 On May 16, 1966, Hanuman Prasad—father of More—moved in the High

Court of Calcutta a petition under Section 439 of the Code of Criminal Procedure and Article 227 of the Constitution for an order quashing the warrant of arrest issued against More and all proceedings taken pursuant thereto and restraining the Chief Presidency Magistrate and the Union of India from taking any further steps pursuant to the said warrant of arrest and causing More to be extradited from Hong Kong to India. The petition was heard before a Division Bench of the High Court. A Roy, J, held that the warrant issued by the Chief Presidency Magistrate was not illegal and the procedure followed for securing extradition of More was not irregular. In his view the assumption made by the Central Magistrate, Hong Kong, that for the purpose of the Fugitive Offenders Act, India was a "British Possession" was irrelevant since that was only a view expressed by him according to the municipal law of Hong Kong, and by acceding to the requisition for extradition and surrender made upon that country by the Government of India in exercise of sovereign rights the status of the Republic of India was not affected

5 In the view of Gupta, J, the warrant issued by the Chief Presidency Magistrate and the steps taken pursuant to the warrant were without jurisdiction, that the request made to the Hong Kong Government by the Government of India was also without authority in the absence of a notified order under Section 3 of the Extradition Act, 1962, and the High Court could not ignore the "laws of the land, even to support a gesture of comity to another nation," that, what was done by the Hong Kong authorities pursuant to the request made for the surrender of More was "not an instance of international comity but was regarded as the legal obligation under the Fugitive Offenders Act under which the Central Magistrate, Hong Kong, regarded India as a Colony or Possession of the British Commonwealth". The case was then posted for hearing before B Mukherji, J. The learned Judge held that the Chief Presidency Magistrate had no power to issue the warrant of arrest in the manner he had done, — a manner which in his view was "unknown to the Code of Criminal Procedure", since the Fugitive Offenders Act, 1881, had ceased, on the coming into force of the Constitution, to be part of the law of India and could not on that account be resorted to for obtaining extradition of offenders from another coun-

try; that the instructions issued by the Government of India by letter No. 3516-J dated June 14, 1955, laying down the procedure to be followed by the courts for securing extradition of offenders from the Commonwealth countries should have been ignored by the Chief Presidency Magistrate, and that the Extradition Act 34 of 1962 did not authorise the Chief Presidency Magistrate to issue a warrant and to send it to the Secretary, Home (Political) Department, Government of West Bengal; that there "was no legal basis for the requisition made by the Central Government to Hong Kong" for extradition or surrender of More or for the issue of the warrant by the Chief Presidency Magistrate; and that the demand made by the Government of India to the Government of Hong Kong by making a requisition to Hong Kong for the arrest of More "was not a political act, beyond the purview of law and judicial scrutiny", and being inconsistent with the law was liable to be rectified. He observed that the Central Government had the power under Section 3 of the Extradition Act, 1962, to issue a notification for including Hong Kong in the list of countries from which offenders may be extradited, but since the Government had not issued any notification under that clause in exercise of the executive power the Government could not attempt in violation of the statutory procedure to seek extradition which the law of India did not permit. The learned Judge accordingly ordered that the warrant of arrest dated July 30, 1965, issued by the Chief Presidency Magistrate, Calcutta, against More and all subsequent proceedings taken by the Chief Presidency Magistrate and the other respondents be quashed. The State of West Bengal has appealed to this Court with special leave.

6. Extradition is the surrender by one State to another of a person desired to be dealt with for crimes of which he has been accused or convicted and which are justiciable in the courts of the other State. Surrender of a person within the State to another State — whether a citizen or an alien — is a political act done in pursuance of a treaty or an arrangement ad hoc. It is founded on the broad principle that it is in the interest of civilized communities that crimes should not go unpunished, and on that account it is recognised as a part of the comity of nations that one State should ordinarily afford to another State assistance towards bringing offenders to justice. The law relating to

extradition between independent States is based on treaties. But the law has operation — national as well as international. It governs international relationship between the sovereign States which is secured by treaty obligations. But whether an offender should be handed over pursuant to a requisition is determined by the domestic law of the State on which the requisition is made. Though extradition is granted in implementation of the international commitments of the State the procedure to be followed by the Courts in deciding, whether extradition should be granted and on what terms, is determined by the municipal law.

7. As observed in Wheaton's International Law, Vol. I, 6th Edn., p. 213:

"The constitutional doctrine in England is that the Crown may make treaties with foreign States for the extradition of criminals, but those treaties can only be carried into effect by Act of Parliament, for the executive has no power, without statutory authority, to seize an alien here and deliver him to a foreign power."

Sanction behind an order of extradition is, therefore, the international commitment of the State under which the Court functions, but Courts jealously seek to protect the right of the individual by insisting upon strict compliance with the conditions precedent to surrender. The Courts of the country which make a requisition for surrender deal with the prima facie proof of the offence and leave it to the State to make a requisition upon the other State in which the offender has taken refuge. Requisition for surrender is not the function of the Courts but of the State. A warrant issued by a Court for an offence committed in a country from its very nature has no extra-territorial operation. It is only a command by the Court in the name of the sovereign to its officer to arrest an offender and to bring him before the Court. By making a requisition in pursuance of a warrant issued by a Court of a State to another State for assistance in securing the presence of the offender, the warrant is not invested with extra-territorial operation. If the other State requested agrees to lend its aid to arrest the fugitive the arrest is made either by the issue of an independent warrant or endorsement or authentication of the warrant of the Court which issued it. By endorsement or authentication of a warrant the country in which an offender has taken refuge signifies its

willingness to lend its assistance, in implementation of the treaties or international commitments and to secure the arrest of the offender. The offender arrested pursuant to the warrant or an endorsement is brought before the Court of the country to which the requisition is made, and the Court holds an inquiry to determine whether the offender may be extradited. International commitment or treaty will be effective only if the Court of a country in which the offender is arrested after enquiry is of the view that the offender should be surrendered.

8 The functions which the Courts in the two countries perform are therefore different. The Court within whose jurisdiction the offence is committed decides whether there is *prima facie* evidence on which a requisition may be made to another country for surrender of the offender. When the State to which a requisition is made agrees consistently with its international commitments to lend its aid the requisition is transmitted to the Police authorities, and the Courts of that country consider, according to their own laws, whether the offender should be surrendered — the enquiry is in the absence of express provisions to the contrary relating to the *prima facie* evidence of the commission of the offence which is extraditable, the offence not being a political offence nor that the requisition being a subterfuge to secure custody for trial for a political offence.

9 Prior to January 26, 1950, there was in force in India the Indian Extradition Act 15 of 1903, which as the preamble expressly enacted was intended to provide for the more convenient administration of the Extradition Acts of 1870 and 1873, and the Foreign Jurisdiction Act of 1881 — both enacted by the British Parliament. The Act enacted machinery in Ch II for the surrender of fugitive criminals in case of Foreign States i.e., States to which the Extradition Acts of 1870 and 1873 applied and in Ch II for surrender of fugitive offenders in case of "His Majesty's Dominions". The Extradition Acts of 1870 and 1873 sought to give effect to arrangements made with foreign States with respect to the surrender to such States of any fugitive criminals. Her Majesty may by Order in Council, direct and to prescribe the procedure for extraditing fugitive offenders to such foreign States.

10. As observed in Halsbury's Law of England Vol 16, 3rd Edn, 1161 at p. 567:

"When a treaty has been made with a foreign State and the Extradition Acts have been applied by Order in Council, one of Her Majesty's principal Secretaries of State may, upon a requisition made to him by some person recognised by him as a diplomatic representative of that foreign State, by order under his hand and seal, signify to a police magistrate that such a requisition has been made and require him to issue his warrant for the apprehension of the fugitive criminal if the criminal is in, or is suspected of being in, the United Kingdom."

11 The warrant may then be issued by a police magistrate on receipt of the order of the Secretary of State and upon such evidence as would in his opinion justify the issue of the warrant if the crime had been committed or the criminal convicted in England.

12 The procedure for extradition of fugitive offenders from "British possessions" was less complicated. When the Extradition Act was applied by Order in Council unless it was otherwise provided by such Order, the Act extended to every "British possession" in the same manner as if throughout the Act the "British possessions" were substituted for the United Kingdom but with certain modifications in procedure.

13. Under Part I of the Fugitive Offenders Act, 1881 a warrant issued in one part of the Crown's Dominion for apprehension of a fugitive offender, could be endorsed for execution in another Dominion. After the fugitive was apprehended he was brought before the Magistrate who heard the case in the same manner and had the same jurisdiction and powers as if the fugitive was charged with an offence committed within the Magistrate's jurisdiction. If the Magistrate was satisfied, after expiry of 15 days from the date on which the fugitive was committed to prison, he could make an order for surrender of the fugitive on the warrant issued by the Secretary of State or an appropriate officer. There was also provision for "inter-colonial backing of warrants" within groups of "British possessions" to which Part I of the Fugitive Offenders Act, 1881 had been applied by Order in Council. In such groups a more rapid procedure for the return of fugitive offenders between possessions of the same group was in force. Where in a "British possession", of a group to which part II of the Act applied, a warrant was issued for the apprehension of a person accused of an offence punishable in that posses-

sion and such term is or was suspected of being, in or on the way to another British possession of the same group, a magistrate in the last-mentioned possession if satisfied that the warrant was issued by a person having lawful authority to issue the same, was bound to endorse such warrant, and the warrant so endorsed was sufficient authority to apprehend, with the jurisdiction of the endorsing Magistrate, the person named in the warrant, and to bring him before the endorsing Magistrate or some other Magistrate in the same possession. If the magistrate before whom a person apprehended was brought was satisfied that the warrant was duly authenticated and was issued by a person having lawful authority to issue it, and the identity of the prisoner was established he could order the prisoner to be returned to the British possession in which the warrant was issued, and for that purpose to deliver into the custody of the persons to whom the warrant was addressed or of any one or more of them, and to be held in custody and conveyed to that possession, there to be dealt with according to law as if he had been there apprehended. This was in brief the procedure prior to January 26, 1950.

14. The President of India adapted the Extradition Act, 1903, in certain particulars. The Fugitive Offenders Act, 1881 and the Extradition Act, 1870, in their application to India were however not repealed by the Indian Parliament and to the extent they were consistent with the constitutional scheme they remained applicable. In order to maintain the continued application of laws the British Parliament, notwithstanding India becoming a Republic, enacted the India (Consequential Provision) Act, 1949 which by Section 1 provided:—

“(1) On and after the date of India's becoming a republic, all existing law, that is to say, all law which, whether being a rule of law or a provision of an Act of Parliament or of any other enactment or instrument whatsoever, is in force on that date or has been passed or made before that date and comes into force thereafter, shall, until provision to the contrary is made by the authority having power to alter that law and subject to the provisions of sub-section (3) of this section, have the same operation in relation to India, and to persons and things in any way belonging to or connected with India, as it would have had if India had not become a republic.

(3) His Majesty may by Order in Council make provision for such satisfaction of any existing law to which this Act extends as may appear to him to be necessary or expedient in view of India's becoming a republic while remaining a member of the Commonwealth, and subsection (1) of this section shall have effect in relation to any such laws as modified by such an order in so far as the contrary intention appears in the order. An Order in Council under this section:—

(a) may be made either before or after India becomes a republic, and may be revoked or varied by a subsequent Order in Council; and

(b) shall be subject to annulment in pursuance of a resolution of either House of Parliament.”

15. In 1954 this Court was called upon to decide a case relating to extradition to Singapore, a British Colony, of a person alleged to be a fugitive offender: *State of Madras v. C. G. Menon*, 1955-1 SCR 280 = (AIR 1954 SC 517). In that case Menon and his wife were apprehended and produced before the Chief Presidency Magistrate, Madras, pursuant to warrants of arrest issued under the provisions of the Fugitive Offenders Act, 1881. Arrests were made in pursuance of requisition made by the Colonial Secretary of Singapore requesting the assistance of the Government of India to arrest and return to the Colony of Singapore the Menons under warrants issued by the Police Magistrate of Singapore. Menons pleaded that the Fugitive Act, 1881, under which the action was sought to be taken against them was repugnant to the Constitution of India and was void and unenforceable. The Chief Presidency Magistrate referred two questions of law for decision of the High Court of Madras:—

(1) Whether the Fugitive Offenders Act, 1881, applies to India after 26th January, 1950, when India became a Sovereign Democratic Republic; and

(2) Whether, even if it applied, it or any of its provisions, particularly Part II thereof, is repugnant to the Constitution of India, and is therefore void and/or inoperative.

The High Court held that the Fugitive Offenders Act was inconsistent with the fundamental right of equal protection of the laws guaranteed by Article 14 of the Constitution and was void to that extent and unenforceable against the petitioners. In appeal brought to this Court it was observed:

"It is plain from the * * * provisions of the Fugitive Offenders Act as well as from the Order in Council that British Possessions which were contiguous to one another and between whom there was frequent inter-communication were treated for purposes of the Fugitive Offenders Act as one integrated territory and a summary procedure was adopted for the purpose of extraditing persons who had committed offences in these integrated territories. As the laws prevailing in those possessions were substantially the same, the requirements that no fugitive will be surrendered unless a prima facie case was made against him was dispensed with. Under the Indian Extradition Act, 1903, also a similar requirement is insisted upon before a person can be extradited.

The situation completely changed when India became a Sovereign Democratic Republic. After the achievement of independence and the coming into force of the new Constitution by no stretch of imagination could India be described as a British Possession and it could not be grouped by an Order in Council amongst those Possessions. Truly speaking, it became a foreign territory so far as other British Possessions are concerned and the extradition of persons taking asylum in India, having committed offences in British Possessions could only be dealt with by an arrangement between the Sovereign Democratic Republic of India and the British Government and given effect to by appropriate legislation. The Union Parliament has not so far enacted any law on the subject and it was not suggested that any arrangement has been arrived at between these two Governments. The Indian Extradition Act, 1903, has been adapted but the Fugitive Offenders Act, 1881, which was an Act of the British Parliament has been left severely alone. The provisions of that Act could only be made applicable to India by incorporating them with appropriate changes into an Act of the Indian Parliament and by enacting an Indian Fugitive Offenders Act. In the absence of any legislation on those lines, it seems difficult to hold that Section 12 or Section 14 of the Fugitive Offenders Act has force in India by reason of the provisions of Article 372 of the Constitution. The whole basis for the applicability of Part II of the Fugitive Offenders Act has gone. India is no longer a British Possession and no Order in Council can be made to group it with other British Possessions. The political background and shape of things when Part

II of the Fugitive Offenders Act, 1881, was enacted and envisaged by that Act having completely changed, it is not possible without radical legislative changes to adapt that Act to the changed conditions. That being so, in our opinion, the tentative view expressed by the Presidency Magistrate was right * * *

After this judgment was delivered, the Government of India, Ministry of External Affairs, issued a notification on May 21, 1955, to all State Governments of Part A, B, C & D States. It was stated in the notification that

in a certain case of extradition of an offender, the Supreme Court of India recently ruled that in the changed circumstances, the English Fugitive Offenders Act, 1881, is no longer applicable to India. There can therefore, be no question of issuing a warrant of arrest, addressed to a foreign police or a foreign Court, in respect of persons who are residing outside India except in accordance with the Code of Criminal Procedure, 1898.

(2) In the circumstances, to obtain a fugitive offender from the United Kingdom and other Commonwealth countries, the following procedure may be adopted as long as the new Indian Extradition law is not enacted and the Commonwealth countries continue to honour our requests for the surrender of the fugitive offenders notwithstanding decisions of the Supreme Court,

(a) The Magistrate concerned will issue a warrant for the arrest of the fugitive offender to Police officials of India in the usual form prescribed under the Code of Criminal Procedure, 1898.

(b) The warrant for arrest, accompanied by all such documents as would enable a prima facie case to be established against the accused will be submitted by the Magistrate to the Government of India in the Ministry of External Affairs, through the State Government concerned.

3 This ministry, in consultation with the Ministries of Home Affairs, and Law, will make a requisition for the surrender of a fugitive offender in the form of a letter, requesting the Secretary of State (in the case of dominions, the appropriate authority in the dominion) to get the warrant endorsed in accordance with law. This letter will be addressed to the Secretary of State (or other appropriate authority in case of Dominions) through the High Commissioner for India in the United Kingdom/Dominion concerned and will be accompanied by the warrant issu-

ed by the Magistrate at (a) of para 2 above and other documents received therewith." The Chief Presidency Magistrate Calcutta made out the warrant for the arrest of More pursuant to that notification and sent the warrant to the Secretary, Home (Political) Department, Government of West Bengal. Validity of the steps taken in accordance with the notification by the Chief Presidency Magistrate is questioned in this appeal.

16. To complete the narrative, it is necessary to refer to the Extradition Act 34 of 1962. The Parliament has enacted Act 34 of 1962 to consolidate and amend the law relating to the extradition of fugitive criminals. It makes provisions by Ch. II for extradition of fugitive criminals to foreign States and to commonwealth countries to which Ch. III does not apply. Chapter III deals with the return of fugitive criminals to commonwealth countries with extradition arrangements. By Section 12 it is provided:

"(1) This Chapter shall apply only to any such commonwealth country to which, by reason of an extradition arrangement entered into with that country, it may seem expedient to the Central Government to apply the same.

(2) Every such application shall be by notified order, and the Central Government may, by the same or any subsequent notified order, direct that this Chapter and Chapters I, IV and V shall, in relation to any such commonwealth country apply subject to such modifications, exceptions, conditions and qualifications as it may think fit to specify in the order for the purpose of implementing the arrangement."

Section 13 provides that the fugitive criminals from commonwealth countries may be apprehended and returned. Chapter IV deals with the surrender or return of accused or convicted persons from foreign States or commonwealth countries. By Section 19 it was provided that:—

"(1) A requisition for the surrender of a person accused or convicted of an extradition offence committed in India and who is or is suspected to be, in any foreign State or a commonwealth country to which Chapter III does not apply, may be made by the Central Government:—

(a) to a diplomatic representative of that State or country at Delhi; or

(b) to the Government of that State or country through the diplomatic representative of India in that State or country;

and if neither of these modes is convenient, the requisition shall be made in such other mode as is settled by arrangement made by the Government of India with that State or country.

(2) A warrant issued by a magistrate in India for the apprehension of any person who is, or is suspected to be, in any commonwealth country to which Chapter III applies shall be in such form as may be prescribed."

By Clause (a) of Section 2 the expression "commonwealth country" means "a commonwealth country specified in the First Schedule and such other commonwealth country as may be added to that Schedule by the Central Government by notification in the Official Gazette, and includes every constituent part, colony or dependency of any commonwealth country so specified or added". But in the Schedule to the Act "Hong Kong" is not specified as one of the commonwealth country and no notification has been issued by the Government of India under Section 2 (a) adding to the First Schedule "Hong Kong" as a commonwealth country. It is common ground between the parties that the provisions of the Extradition Act, 1962, could not be resorted to for making the requisition for surrender of the fugitive offender from Hong Kong and no attempt was made in that behalf.

17. Validity of the action taken by the Chief Presidency Magistrate must, therefore, be adjudged in the light of the action taken pursuant to the notification issued by the Government of India on May 21, 1955. Counsel for the respondent More urged that the warrant issued by the Chief Presidency Magistrate was intended to be and could in its very nature be a legal warrant enforceable within India: it had no extra-territorial operation, and could not be enforced outside India, and when the Central Magistrate, Hong Kong, purported to endorse that warrant for enforcement within Hong Kong he had no authority to do so. But this Court has no authority to sit in judgment over the order passed by the Hong Kong Central Magistrate. The Magistrate acted in accordance with the municipal law of Hong Kong and agreed to the surrender of the offender; his action cannot be challenged in this Court.

18. It may also be pointed out that Form II of the warrant prescribed in Schedule V of the Code of Criminal Procedure only issues a direction under the authority of the Magistrate to a Police Officer to arrest a named person and to

produce him before the Court. It does not state that the warrant shall be executed in any designated place or area. By Section 82 of the Code of Criminal Procedure a warrant of arrest may be executed at any place in India. That provision does not impose any restriction upon the power of the Police Officer. The section only declares, in that, every warrant issued by any Magistrate in India may be executed at any place in India. Execution of the warrant is not restricted to the local limits of the jurisdiction of the Magistrate issuing the warrant or of the Court to which he is subordinate.

19 In *Emperor v Vinayak Damodar Savarkar*, (1911) ILR 35 Bom 225 the Bombay High Court considered the question whether a person who was brought to the country and was charged before a Magistrate with an offence under the Indian Penal Code was entitled to challenge the manner in which he was brought into the country from a foreign country. Savarkar was charged with conspiracy under Sections 121, 121A, 122 and 123 of the Indian Penal Code. He was arrested in the United Kingdom and brought to India after arrest under the Fugitive Offenders Act, 1881. When the ship in which he was being brought to India was near French territory Savarkar escaped from police custody and set foot on French territory at Marseilles. He was arrested by the police officers without reference to the French police authorities and brought to India. It was contended at the trial of Savarkar that he was not liable to be tried in India, since arrest by the Indian police officers in a foreign territory was without jurisdiction. Scott, C J., who delivered the principal judgment of the Court rejected the contention. He observed

"Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country." It is true that Savarkar was produced before the Court and he raised an objection about the validity of the trial on the plea that he was illegally brought to India after unlawful arrest in foreign territory. In the present case we are concerned with a stage anterior to that. The respondent More though arrested in a foreign country lawfully by the order of the Central Magistrate, Hong Kong, had not been surrendered and the invalidity of the warrant issued by the Chief Presidency Magistrate

is set up as a ground for refusing to obtain extradition of the offender. But on the principle of *Vinayak Damodar Savarkar's case*, (1911) ILR 35 Bom 225 the contention about the invalidity of the arrest cannot affect the jurisdiction of the Courts in India to try More if and when he is brought here.

20. The Indian Extradition Act 15 of 1903 which was enacted to provide for the more convenient administration of the English Extradition Acts, 1870 and 1873 and the Fugitive Offenders Act, 1881, remained in operation. But after January 26, 1950, India is no longer a "British Possession". In *C G Menon's case*, 1955-1 SCR 280=(AIR 1954 SC 517) it was decided by this Court that application of Sections 12 and 14 of the Fugitive Offenders Act, 1881, for surrendering an offender to a Commonwealth country in pursuance of a requisition under the Fugitive Offenders Act, 1881, is inconsistent with the political status of India. It is somewhat unfortunate that the Court hearing that case was not invited to say anything about the operation of the India (Consequential Provision) Act, 1949.

21. But *C G Menon's case*, 1955-1 SCR 280=(AIR 1954 SC 517) was a reverse case, in that, the Colonial Secretary of Singapore had made a requisition for surrender of the offender for trial for offences of criminal breach of trust in Singapore. Whether having regard to the political status of India since January 26, 1950, the Fugitive Offenders Act, 1881, in so far as it purported to treat India as a "British Possession" imposed an obligation to deliver offenders in pursuance of the India (Consequential Provision) Act, 1949, is a question on which it is not necessary to express an opinion. By the declaration of the status of India as a Republic, India has not ceased to be a part of the Commonwealth and the United Kingdom and several Colonies have treated the Fugitive Offenders Act, 1881, as applicable to them for the purpose of honouring the requisition made by the Republic of India from time to time. In *Re Government of India and Mubarak Ali Ahmed* 1952-1 All ER 1060 an attempt to resist in the High Court in England the requisition by the Republic of India to surrender an offender who had committed offences in India and had fled justice failed. Mubarak Ali a native of Pakistan was being tried in the Courts in India on charges of forgery and fraud. He broke his bail and fled to Pakistan and thereafter to England. He was arrested

on a provisional warrant issued by the London Metropolitan Magistrate on the application of the Government of India. After hearing legal submissions the Metropolitan Magistrate made an order under Section 5 of the Fugitive Offenders Act, 1881, for Mubarak Ali's detention in custody pending his return to India to answer the charges made against him. Mubarak Ali then filed a petition for a writ of habeas corpus before the Queen's Bench of the High Court. It was held that the Fugitive Offenders Act, 1881, was in force between India and Great Britain on January 26, 1950, when India became a republic and it was continued to apply by virtue of Section 1 (1) of the India (Consequential Provision) Act, 1949, and, therefore, the Magistrate had jurisdiction to make the order for the applicant's return. Pursuant to the requisition made by the Government of India, Mubarak Ali was surrendered by the British Government. Mubarak Ali was then brought to India and was tried and convicted. One of the offences for which he was tried resulted in his conviction and an appeal was brought to this Court in Mubarak Ali Ahmed v. State of Bombay, 1958 SCR 328=(AIR 1957 SC 857).

22. There are other cases as well, in which orders were made by the British Courts complying with the requisitions made by the Governments of Republics within the Commonwealth, for extradition of offenders under the Fugitive Offenders Act, 1881. An offender from Ghana was ordered to be extradited pursuant to the Ghana (Consequential Provision) Act, 1960, even after Ghana became a republic: *Re, Kwesi Armah*, 1966-2 All ER 1006. On July 1, 1960, Ghana while remaining by virtue of the Ghana (Consequential Provision) Act, 1960, a member of the Commonwealth became a Republic. Kwesi Armah who was a Minister in Ghana fled the country in 1966 and took refuge in the United Kingdom. He was arrested under a provisional warrant issued under the Fugitive Offenders Act, 1881. The Metropolitan Magistrate being satisfied that the Act of 1881 still applied to Ghana and that a *prima facie* case had been made out against the applicant in respect of two alleged contraventions of the Ghana Criminal Code, 1960, by corruption and extortion when he was a public officer, committed Kwesi Armah to prison pending his return to Ghana to undergo trial. A petition for a writ of habeas corpus before the Queen's Bench Division of the High Court was refused. Edmund Davies,

J., was of the view that the Act of 1881 applied to the Republic of Ghana, in its new form, just as it did before the coup d'état of February 1966. The case was then carried to the House of Lords: *Armah v. Government of Ghana*, 1966-3 All ER 177. The questions decided by the House of Lords have no relevance in this case. But it was not even argued that a fugitive offender from a republic which was a member of the Commonwealth could not be extradited under the Fugitive Offenders Act, 1881.

23. There is yet another recent judgment of the House of Lords dealing with repatriation of a citizen of the Republic of Cyprus: *Zacharia v. Republic of Cyprus*, 1962-2 All ER 438. Warrants were issued against Zacharia on charges before the Courts in Cyprus of offences of abduction demanding money with menaces and murder. Under the orders issued by a Bow Street Magistrate under Section 5 of the Fugitive Offenders Act, 1881, Zacharia was committed to prison pending his return to Cyprus. An application for a writ of habeas corpus on the ground that the offences alleged against him were political and that the application for the return of the fugitive was made out of motive for revenge was rejected by the Queen's Bench Division and it was ordered that Zacharia be repatriated. The order was confirmed in appeal to the House of Lords.

24. Merely because for the purpose of the extradition procedure, in a statute passed before the attainment of independence by the former Colonies and dependencies, certain territories continue to be referred to as "British Possessions," the statute does not become inapplicable to those territories. The expression "British Possession" in the old statutes merely survives as an artificial mode of reference, undoubtedly not consistent with political realities but does not imply for the purpose of the statute or otherwise political dependence of the Government of the territories referred to. It is not for the Courts of India to take umbrage at expressions used in statutes of other countries and to refuse to give effect to Indian laws which govern the problems arising before them. It is interesting to note that by express enactment the Fugitive Offenders Act, 1881, remains in force as a part of the law of the Republic of Ireland: see *Ireland Act, 1949* (12, 13 & 14 Geo. 6 c. 41). In *Halsbury's Laws of England*, 3rd Edn., Vol. 5 Article 987,

p 433 — in dealing with the expression "Her Majesty's Dominions" in old statutes, it is observed

"The term 'Her Majesty's Dominions' means all the territories under the sovereignty of the Crown, and the territorial waters adjacent thereto. In special cases it may include territories under the protection of the Crown and mandated and trust territories. References to Her Majesty's dominions contained in statutes passed before India became a republic are still to be construed as including India, it is usual to name India separately from Her Majesty's dominions in statutes passed since India became a republic."

In foot-note (1) on p 433 it is stated, British India, which included the whole of India except the princely States, and the Government of India Act, 1935 as amended by Section 8 of the India and Burma (Miscellaneous Amendments) Act, 1940, formed part of Her Majesty's dominions and was a British possession, although it was not included within the definition of "colony". The territory comprised in British India was partitioned between the Dominions of India and Pakistan (Indian Independence Act, 1947), but the law relating to the definition of Her Majesty's dominions was not thereby changed, and it was continued in being by the India (Consequential Provision) Act, 1949 (12, 13 and 14 Geo 6 c 92), passed in contemplation of the adoption of a republican constitution by India. India is now a sovereign republic, but that by itself does not render the Fugitive Offenders Act, 1881, inapplicable to India.

25 If the question were a live question, we would have thought it necessary to refer the case to a larger Bench for considering the true effect of the judgment in *C. G. Menon's case*, 1955-1 SCR 280=(AIR 1954 SC 517). But by the Extradition Act 34 of 1962 the Extradition Act, 1870 and the latter Acts and also the Fugitive Offenders Act, 1881, have been repealed and the question about extradition by India of fugitive offenders under those Acts will not hereafter arise.

26 We are not called upon to consider whether in exercise of the power under the Fugitive Offenders Act a Magistrate in India may direct extradition of a fugitive offender from a "British Possession", who has taken refuge in India. It is sufficient to observe that the Colonial Secretary of Hong Kong was according to the law applicable in Hong Kong com-

petent to give effect to the warrant issued by the Chief Presidency Magistrate, Calcutta and the Central Magistrate, Hong Kong, had jurisdiction under the Fugitive Offenders Act, and, after holding inquiry, to direct that More be surrendered to India. The order of surrender was valid according to the law in force in Hong Kong, and we are unable to appreciate the grounds on which invalidity can be attributed to the warrant issued by the Chief Presidency Magistrate, Calcutta, for the arrest of More. That the Chief Presidency Magistrate was competent to issue a warrant for the arrest of More against whom there was *prima facie* evidence to show that he had committed an offence in India is not denied. If the Chief Presidency Magistrate had issued the warrant to the Commissioner of Police and the Commissioner of Police had approached the Ministry of External Affairs, Government of India, either through the local Government or directly with a view to secure the assistance of the Government of Hong Kong for facilitating extradition of More, no fault can be found. But Gupta, J., and Mukherji, J., thought that the notification issued by the Government of India setting out the procedure to be followed by a Magistrate, where the offender is not in Indian territory and his extradition is to be secured, amounted to an invasion on the authority of the Courts. We do not think that any such affront is intended by issuing the notification. The Fugitive Offenders Act, 1881, had not been expressly repealed even after January 26, 1950. It had a limited operation: the other countries of the Commonwealth were apparently willing to honour the international commitments which arose out of the provisions of that Act. But this Court on the view that since India had become a Republic, held that the Fugitive Offenders Act could not be enforced in this country, that decision presented to the Government of India a problem which had to be resolved by devising machinery for securing the presence of offenders who were fugitives from justice. The notification issued was only in the nature of advice about the procedure to be followed and did not in any manner seek to impose any executive will upon the Courts in matters judicial. Observations made by Mukherji, J., that the notification issued by the Central Government authorising the Chief Presidency Magistrate to issue the warrant in the manner he had done, came "nowhere near the law" and "to a Court of law it is waste paper

beneath its notice" appear to proceed upon an incorrect view of the object of the notification.

27. The Chief Presidency Magistrate had the power to issue the warrant for the arrest of More, because there was *prima facie* evidence before him that More had committed certain offences which he was competent to try. The warrant was in Form II of Sch. V of the Code of Criminal Procedure. If the warrant was to be successfully executed against More who was not in India, assistance of the executive Government had to be obtained. It is not an invasion upon the authority of the Courts when they are informed that certain procedure may be followed for obtaining the assistance of the executive Department of the State in securing through diplomatic channels extradition of fugitive offenders. In pursuance of that warrant, on the endorsement made by the Central Magistrate, Hong Kong, More was arrested. The warrant was issued with the knowledge that it could not be enforced within India and undoubtedly to secure the extradition of More. Pursuant to the warrant the Ministry of External Affairs, Government of India, moved through diplomatic channels, and persuaded the Colonial Secretary of Hong Kong to arrest and deliver More. Issue of the warrant and the procedure followed in transmitting the warrant were not illegal, not even irregular.

28. One more argument remains to be noticed. It is true that under the Extradition Act 34 of 1962 no notification has been issued including Hong Kong in the list of the Commonwealth countries from which extradition of fugitives from justice may be secured. The provisions of the Extradition Act, 1962 cannot be availed of for securing the presence of More for trial in India. But that did not, in our judgment, operate as a bar to the requisition made by the Ministry of External Affairs, Government of India, if they were able to persuade the Colonial Secretary, Hong Kong, to deliver More for trial in this country. If the Colonial Secretary of Hong Kong was willing to hand over More for trial in this country, it cannot be said that the warrant issued by the Chief Presidency Magistrate for the arrest of More with the aid of which requisition for securing his presence from Hong Kong was to be made, was illegal.

29. We are unable to agree with the High Court that because of the enactment of the Extradition Act 34 of 1962

the Government of India is prohibited from securing through diplomatic channels the extradition of an offender for trial of an offence committed within India. There was, in our judgment, no illegality committed by the Chief Presidency Magistrate, Calcutta, in sending the warrant to the Secretary, Home (Political) Department, Government of West Bengal, for transmission to the Government of India, Ministry of External Affairs, for taking further steps for securing the presence of More in India to undergo trial.

30. The appeal must therefore be allowed and the order passed by the High Court set aside. The writ petition filed by More must be dismissed.

RSK/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 1183
(V 56 C 217)

(From Calcutta)*

M. HIDAYATULLAH, C. J., J. C. SHAH,
V. RAMASWAMI, G. K. MITTER AND
A. N. GROVER, JJ.

Commissioner of Income-tax, Central Calcutta (In both the Appeals), Appellant v. M/s. Gold Mohore Investment Co. Ltd. (In both the Appeals), Respondent.

Civil Appeals Nos. 1236 and 1237 of 1967, D/- 3-4-1969.

Income-tax Act (1922), Section 10 — Business — Assessee dealer in shares — Issuance of bonus shares to assessee in respect of ordinary shares held by him — Bonus shares — Mode of valuation. I. T. Ref. No. 65 of 1954, D/- 27-4-1963 (Cal), *Reversed*.

Where bonus shares are issued in respect of ordinary shares held in a Company by an assessee, who is a dealer in shares, their real cost to the assessee cannot be taken to be nil or their face value. The proper method of valuation is to spread the cost of the old or the original shares over the old shares and the new issue viz., the bonus shares taken together where the bonus shares rank *pari passu*. (1959) 36 ITR 257 (SC) held did not express final opinion in the matter. (1968) 68 ITR 213 (SC) and AIR 1964 SC 1464. Foll.; I. T. Ref. No. 65 of 1954, D/- 27-4-1963 (Cal), *Reversed*. (Para 7)

* (I. T. Ref. No. 65 of 1954, D/- 27-4-1963. — Cal.)

IM/IM/B823/69/D

Cases Referred. Chronological Paras
 (1968) 1968-68 ITR 213 (SC), Commr.
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 Ltd 7
 (1964) AIR 1964 SC 1464 (V 51) =
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 Pat 559, Dalmia Investment Co
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 (1959) 1959-36 ITR 257 (SC), Eme-
 rald and Co Ltd v Commr
 of Income Tax, Bombay 8
 Mr B Sen, Senior Advocate, (M/s T
 A Ramachandran and R N Sachthey,
 Advocates with him), for Appellant (In
 both the appeals), Mr Sachin Chaudhuri,
 Senior Advocate (M/s A N Mitter and
 I N Shroff, Advocates with him), for
 Respondent (In both the Appeals)

The following Judgment of the Court
 was delivered by

HIDAYATULLAH, C. J. These are two
 appeals by the Commissioner of Income-
 tax, Central, Calcutta against Messrs
 Gold Mohore Investment Co Ltd and
 arise out of Income-tax Reference 65/54
 decided by the Calcutta High Court on
 August 27, 1963. The point involved in

the appeals is the valuation of bonus
 shares in the assessment years ending
 March 31, 1950 and 1951, respectively.
 The previous years corresponding to the
 assessment years were the financial years
 ending 31st March, 1949 and 1950, res-
 pectively

2 The Assessee Company is a dealer
 in shares. Its method of valuation at the
 opening and closing of the stocks is to
 value shares at the cost in the Assessment
 Year 1949-50. The Company held 2,500
 shares of the face value of Rs 10 each
 in the Howrah Mills Co Ltd. They had
 been purchased at Rs 85 per share and
 the total cost to the Assessee Company
 was Rs 2,12,500. In June 1948 bonus
 shares were issued by the Howrah Mills
 Co Ltd in proportion of three shares for
 every two original shares. The bonus
 shares were to rank *pari passu* with the
 old shares. As a result, the Assessee
 Company obtained 3750 shares of the
 face value of Rs 10 each. On August 2,
 1948, the Assessee Company sold the ori-
 ginal shares for Rs 72,087/8/-, i.e. at
 about Rs 29 per share. On March 18,
 1949 the Assessee Company sold 3,750
 shares for Rs 95,250, that is to say, at
 Rs 25 per share. The Assessee Company
 computed a loss of Rs 84,041/12/- It
 calculated the loss in the following man-
 ner:

	"Dr	Sold		Cr.
O S 2500	Shares (old)	2,12,500-0-0	2-9-48 (2500) (old)	Sh. 72,087-0-0
21-6-48	Cost of transfer of shares	1,379-4-0	18-3-49 (2750) (bonus) " (1000) (bonus)	sh. 70,125-0-0 sh. 25,125-0-0
2-7-48	By crediting capital reserve a/c with the face value of bonus shares received free of cost		Loss to P & L a/c 6250 sh.	81,041-12-0
	(3750)	37,500-0-0		
		2,51,379-4-0		2,51,379-4-0

The bonus shares when they were issued
 were included in the trading account Ac-
 cording to the Assessee Company the

bonus shares had fetched as profit
 Rs 95,250 less the face value of the
 shares, Rs. 37,500. This profit was set

off against the loss on the original shares Rs. 2,12,500 less Rs. 72,087/8/-, giving the overall loss of Rs. 84,041/12/-, as stated above.

3. The Income-tax Officer did not accept this mode of calculation. According to him the loss was Rs. 46,541-12-0 as follows:

"Dr.		Sold		Cr.	
		Rs.	n.p.		Rs. n.p.
O. S. 2500	sh. (sold)	2,12,500-0-0		2-4-48 (2500) sh.	72,087-8-0
21-6-48	Cost of			old	
	transfer	1,379-4-0		(2750)	70,125-0-0
2-7-48	of shares	Nil		bonus	
	(3700) sh.			(1000)	25125-0-0
	bonus (sc)			bonus	
		Loss to P & L a/c			46,541-12-0
		2,13,879-4-0			2,13,879-4-0.

On appeal to the Tribunal as to which method was correct, the Tribunal accepted the method of valuation of the Income-tax Officer.

4. In the Assessment year 1950-51, the account year being 1949-50, the Assessee Company held 122 first preference shares of Fort Gloster Jute Company Ltd. which had cost to the assessee Company Rs. 22,893/12/-. In the year of account

there was an issue of bonus shares (second preference) and the Assessee Company received 137 shares of the face value of Rs. 100 each. The Assessee Company sold 125 shares (second preference) for Rs. 14,500. It was, therefore, left with 122 shares (first preference) and 12 shares (second preference). The Assessee Company returned a profit of Rs. 1,997 as follows:

"Dr.		Rs.	n. p.		Cr.		Rs.	n. p.
O. S. (122) 1st Pref.		23,883-12-0		18-3-49	(125) 2nd Pref.		14,500-0-0	
(137) 2nd Pref.		13,703-0-0			C. S. (122) 1st			
Profit P & L a/c		1,997-0-0			1st Pref.			
(259)					(12) 2nd		23,883-12-0	
					Pref.		1,200-0-0	
		39,583-12-0			(259)		39,583-12-0".	

It will be seen that the cost of bonus shares was shown at the face value of the shares plus a minor charge of Rs. 3. Rupees 13,703 were credited to capital reserve. The Income-tax Officer spread out the cost of 122 1st preference shares

(Rs. 23,883/12/-) over the 122 shares (first preference) and 137 shares (second preference). He worked out the average cost at Rs. 92/3/6 per share and found the profit to be Rs. 2,973. His method of calculation was as follows:

"Dr.		Sold.		Cr.	
O. S. 122 1st Pref.		23,883-12-0		125 Pref.	14503-0-0
137 2nd Pref.		Nil		G. S. 122 1st	
free of				Pref. 12	
cost				2nd Pref.	
Profit to P & L		2973-9-0		-92/3/6	12357-5-0
a/c					
(259)		26,857-5-0		(259)	26,857-5-0

5 The Tribunal confirmed the assessment as made by the Income-tax Officer. It may be pointed out that the Appellate Assistant Commissioner had in each case confirmed the order of the Income-tax Officer.

6 The Income-tax Appellate Tribunal then made a reference to the High Court and referred the following questions for the determination of the High Court:

"1949-50

"Whether in the facts and circumstances herein stated the assessee carrying on share dealing business, can add Rs 37,500 being the face value of bonus shares issued to it free of cost on the basis of its old share-holding, as cost of its share holding for the purpose of determining loss in dealing in Howrah Mills Co Ltd. shares"

1950-51.

"Whether in the facts and circumstances herein stated, the assessee carrying on share dealing business, can add Rs 13,700 being the face value of bonus shares issued to it free of cost on the basis of its old share holdings, as cost of its share holding for the purposes of determining profit in dealing in Fort Gloster Jute Co shares?"

The High Court, by its judgment dated August 27, 1963, following its decision in Income-tax reference No 54/1960 (from which Civil Appeal 1239 of 1967 is also being decided today) held in favour of the Assessee Company. The High Court purported to follow a decision of the Patna High Court reported in *Dalmia Investment Co Ltd v Commissioner of Income-tax, Bihar*, 1961-41 ITR 705 (Pat).

7. Mr Sen, in dealing with these appeals, points out that the decision of the Patna High Court in 1961-41 ITR 705 (Pat) was reversed by this Court in *Commissioner of Income-tax, Bihar v. Dalmia Investment Co Ltd*, 1964-52 ITR 567 = (AIR 1964 SC 1464) and the decision of this Court has further been followed in *Commissioner of Income-tax, Central Calcutta v Gold Mohore Investment Co Ltd* 1963-68 ITR 213 (SC). He contends that the method adopted by the Income-tax Officer in relation to the Fort Gloster Jute shares is the method approved of by this Court, namely, that where the shares are *pari passu* and the valuation is to be made at cost, the price of the original shares must be spread over the old and the new shares and they must be held to have been purchased at the average cost and that the profit or loss

is to be calculated accordingly. In the decision of this Court in *Dalmia Investment Co Ltd*, 1964-52 ITR 567 = (AIR 1964 SC 1464) four methods of calculation were considered. The first method is to take the cost as equivalent to the face value of the bonus shares. This method was followed by the Assessee Company. The second method is to take the cost of the bonus shares at Nil, a method adopted by the Income-tax Officer in relation to the Howrah Mills Co Ltd. A third method is to take the cost of the original shares and to spread it over the original shares and the bonus shares taken collectively, and a fourth method is to find out the fall in the price of the original shares at the stock exchange and to attribute this to the bonus shares. After considering all the four methods, this Court held that the correct method to apply in cases where bonus shares rank *pari passu* is to follow the third method, namely, to take the cost of the original shares and to spread it over all the original as well as the bonus shares and to find out the average price of all the shares.

8 These cases would normally have been decided on the strength of the ruling of this Court but a doubt arose because in an earlier decision reported in *Emerald and Co Ltd v Commissioner of Income-tax, Bombay*, 1959-36 ITR 257 (SC) this Court seemed to have approved of another method. In that case the bonus shares were not sold. In applying different methods, the difference was only Rs 18 and the Court did not, therefore, express a final view on the matter and accepted the calculation of the Tribunal which was to ignore the bonus shares which were not sold and to calculate the profit and loss on the basis of the original shares, their cost and sale prices. The Court observed as follows:

"... The bonus shares are still there, and have not been sold. When they are sold, the question will arise as to what they cost. The books of the assessee company, as stated in the statement of the case, include the closing stock at cost price. In calculating profit and loss in the manner done by the Tribunal, there is no departure from this system. All the ordinary shares which were bought were sold. Their purchase price is known, as also their sale price. The first assessment is closed so far as the assessee company is concerned ...".

In other words, this Court did not go

into the question of the valuation of the bonus shares at all but decided the case on the basis of the original holding, its cost price and its sale price. The matter was gone into more closely in the Dalmia's case, 1964-52 ITR 567 = (AIR 1964 SC 1464) and every method of calculation was considered there. We were invited to depart from the decision in the Dalmia's case, 1964-52 ITR 567 = (AIR 1964 SC 1464) and to take the view which appeared to have been taken in the Emerald's case, 1959-36 ITR 257 (SC). We have considered the matter once again and are of opinion that the method followed in the Dalmia's case, 1964-52 ITR 567 = (AIR 1964 SC 1464) is the correct method and there seems to be some error in stating that the method of the Tribunal in Emerald's case, 1959-36 ITR 257 (SC) was finally accepted. Perhaps the Court intended saying that the method of the Income-tax Officer was preferable but by error put down the name of the Income-tax Appellate Tribunal. In any case that case did not decide the matter fully because as the Court itself observed the difference in the two methods only resulted in Rs. 18 being either added to or deducted from the ultimate result.

9. We accordingly accept the third method. The answers recorded by the High Court are discharged and we answer the question in the negative. The cases will be disposed of in the light of our observations by the Income-tax Appellate Tribunal by calculating the profit and loss by spreading the cost over the original and the bonus shares and finding out the average cost per share. The appeals are allowed with costs.

MVJ/D.V.C. Appeals allowed.

AIR 1969 SUPREME COURT 1187

(V 56 C 218)

(From Calcutta: 70 Cal WN 37)

M. HIDAYATULLAH, C. J., V. RAMA-SWAMI AND G. K. MITTER, JJ.

Ranjit Chandra Chowdhury, (dead) by his legal representatives, Appellants v. Mohitosh Mukherjee (dead) by his legal representative, Respondent.

Civil Appeal No. 299 of 1966, D/- 17-3-1969.

(A) Houses and Rents — West Bengal Premises Rent Control (Temporary Provisions) Act (17 of 1950), Ss. 12 (1) (i) and 14 — Acceptance of rent after default by landlord and continuance of old tenancy — Default under old tenancy also conti-

nues — Landlord is entitled to use S. 12 (1) (i) and proviso to sub-sec. (3) of S. 14 — Transfer of Property Act (1882), S. 113.

In respect of a tenancy of a premises the monthly rent for 8 months between September, 1954 and April, 1955 was admittedly paid by the tenant beyond the period limited by the agreement. On 11th August, 1955 the landlord served a notice determining the tenancy and asking the tenant to quit on the expiry of August, 1955. In October, 1955 the landlord accepted rent upto September, 1955 and thus waived the notice to quit and subsequently accepted rent from November, 1955 to February, 1956. On 9-2-1956 the landlord gave a second notice determining the tenancy and calling upon the tenant to deliver possession on the expiry of February, 1956.

Held that in the case the landlord by accepting rent did not assent to a new tenancy but continued the old tenancy. AIR 1961 SC 1067 & AIR 1965 SC 414 & AIR 1968 SC 471, Ref. to. (Para 8)

Under S. 113 of the Transfer of Property Act a notice is waived, by an act on the part of the person giving it showing an intention to treat the lease as subsisting, provided there is the express or implied consent of the person to whom it is given. According to the tenant, in this case, the landlord acquiesced in having the old tenancy continued. If that were so, the old tenancy with the default continued and the landlord was thus able to use the provisions of S. 12 (1) (i) against the tenant as also the proviso to sub-s. (3) of Section 14 of the Act. There were two consecutive defaults and in the period of 18 months there were more than three defaults. The benefit of Section 14, sub-sec. (1) of the Act was not available to the tenant because of the operation of the proviso to sub-sec. (3). (Para 8)

(B) Houses and Rents — West Bengal Premises Tenancy Act (12 of 1956), S. 24 — Section is not retrospective but operates from the date when it came into force as it impinges on substantive rights of landlords and tenants and there is nothing in its language from which retrospectivity can be gathered. (Para 8)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 471 (V 55) =
1968-2 SCR 20, Calcutta Credit Corporation Ltd. v. Happy Homes (P) Ltd. 8
(1965) AIR 1965 SC 414 (V 52) =
(1964) 4 SCR 892, Anand Nivas Private Ltd. v. Anandji Kalyanji's Pedhi 8

(1961) AIR 1961 SC 1067 (V 48)=
 (1961) 3 SCR 813, Ganga Dutt
 Murarka v Kartik Chandra Das 8
 Mr. B. K. Bhattacharjee, Senior Advocate (M/s S. C. Majumder and S. P. Mitra, Advocates with him), for Appellants, Mr. J. P. Mitter, Senior Advocate (Mr. Sukumar Ghose, Advocate, with him), for Respondent

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J. In this appeal, by special leave, the appellant is the tenant of house No 120B, Manoharpukur Road, District 24 Parganas, Calcutta 29 and the respondent is the landlord. Both the tenant and the landlord died after the institution of the suit and are represented by their legal representatives. The suit was for ejectment of the tenant for default in payment of rent as agreed to between the parties.

2. The suit was dismissed by the Munsif, 1st Court, Alipur, but on appeal the judgment was reversed by the Subordinate Judge, 8th Court, Alipur whose decree was confirmed on appeal by the learned single Judge in the High Court at Calcutta. This appeal is against the judgment dated August 14, 1965 of the Calcutta High Court.

3. The premises were rented out to the original tenant as far back as May 1944 on monthly rent of Rs 130. The tenancy was from month to month. According to the landlord the rent of the premises had to be paid on or before the 7th day of each calendar month. According to the tenant the rent was to be paid as and when the 'sarkars' came to collect it on behalf of the landlord who employed such agents as he had many other houses rented out to other tenants. The High Court and the appellate Court below have accepted the case of the landlord and that is a finding with which we must start. The monthly rent for eight months between September 1954 to April 1955 was admittedly collected and paid beyond the period limited by the agreement. On August 11, 1955 a notice determining the tenancy was served on the original tenant and he was asked to quit on the expiry of the month of August, 1955 on pain of being held liable in damages at Rs. 5 per day for wrongful occupation from the 1st September, 1955. On October 2, 1955, the original landlord accepted rent upto September, 1955 and thus waived the notice which was given. It appears also that the landlord accepted rent from November 1, 1955 to

February 1, 1956 and granted receipts for the rent. On February 9, 1956 a second notice determining the tenancy was served calling upon the original tenant to deliver possession of the premises on the expiry of February, 1956. The notice this time also added a condition that in case the original tenant overstayed in the premises beyond February, he would be liable to damages. The present suit was filed on March 1, 1956 with the result already stated.

4. In the written statement filed by the original tenant it was stated that the original landlord had waived the right of forfeiture for default upto August, 1955 when he accepted rent for September, 1955 and acquiesced in the continuance of the tenancy by receiving rent upto January, 1956. Thus, according to the original landlord resulted in 'the revival of the dead tenancy'. The High Court has held that the old tenancy continued between the parties with all its advantages and weaknesses and that the original landlord was, therefore, able to take advantage of the old defaults and base the notice on them.

5. In this appeal it is contended that after the landlord accepted the rent for September a new tenancy came into existence and the old defaults could not therefore be made the foundation of the second notice to quit. This is opposed by the answering respondent, the legal representative of the original landlord.

6. The matter is governed by the West Bengal Premises Rent Control (Temporary Provisions) Act, 1950. It came into force on March 30, 1950. This temporary Act remained in force till March 31, 1955 when it was repealed by the West Bengal Premises Tenancy Act, 1956 which came into force from March 31, 1956. However, as the suit had already been filed it continued to be governed by the repealed Act in view of Section 4 of the new Act which states

"that notwithstanding the repeal of the old Act any proceedings pending on the 31st day of March, 1956 would continue as if the said Act had been in force". Under the old Act there was a protection to tenants against eviction and that was enacted in Section 12 of the old Act. We are concerned with Section 12 (1) (i) and it reads as follows

"12 (1) Notwithstanding anything to the contrary in any other Act or law, no order or decree for the recovery of possession of any premises shall be made by any Court in favour of the landlord against

a tenant, including a tenant whose lease has expired:

Provided that nothing in the sub-section shall apply to any suit for decree for such recovery of possession:

* * * * *

(i) Subject to the provisions of Sec. 14, where the amount of two months' rent legally payable by the tenant and due from him is in arrears by not having been paid within the time fixed by contract, or in the absence of such contract by the fifteenth day of the month next following that for which the rent is payable or by not having been validly deposited in accordance with section 19."

Section 14 which is referred to here provided as follows:

"14 (i) If in a suit for recovery of possession of any premises from the tenant the landlord would not get a decree for possession but for clause (i) of the proviso to sub-section (1) of Section 12, the Court shall determine the amount of rent legally payable by the tenant and which is in arrears taking into consideration any order made under sub-section (4) and effect thereof up to the date of the order mentioned hereafter as also the amount of interest on such arrears of rent calculated at the rate of nine and three-eighths per centum per annum from the day when the rents became arrears up to such date, together with the amount of such cost of the suit as is fairly allowable to the plaintiff-landlord and shall make an order on the tenant for paying the aggregate of the amounts (specifying in the order such aggregate sum) on or before a date fixed in the order.

(2) Such date fixed for payment shall be the fifteenth day from the date of the order excluding the day of the order.

(3) If within the time fixed in the order under sub-section (1), the tenant deposits in the court the sum specified in the said order, the suit, so far as it is a suit for recovery of possession of the premises, shall be dismissed by the court. In default of such payment the court shall proceed with the hearing of the suit:

Provided that the tenant shall not be entitled to the benefit of protection against eviction under this section if he makes default in payment of the rent referred to in clause (i) of the proviso to sub-section (1) of Section 12 on three occasions within a period of eighteen months."

7. The tenant claims the benefit of Section 14 but the landlord relies upon the proviso to sub-section (3) quoted above. Further the tenant also relies upon Section 24 of the repealing Act which is to the following effect:

"24. When there is no proceeding pending in Court for the recovery of possession of the premises the acceptance of rent in respect of the period of default in payment of rent by the landlord from the tenant shall operate as a waiver of such default."

Therefore it is contended that the acceptance of rent in respect of the period of default in payment of rent under Section 12 (1) (i) in September operates as a waiver of the default under Section 24.

8. Mr. Bhattacharji on behalf of the tenant contends that the old tenancy was dead after the notice and on acceptance of rent a new tenancy came into existence. The other side contends that by the acceptance of rent, the old tenancy on the old terms continued. Each side has cited a number of rulings. We do not consider it necessary to refer to these rulings or to discuss the question. In *Ganga Dutt Murarka v. Kartik Chandra Das*, AIR 1961 SC 1067 and in *Anand Nivas Private Ltd. v. Anandji Kalyanji's Pedhi*, AIR 1965 SC 414 (particularly the first at page 1069) it was held in connection with a statutory tenancy that a landlord accepting rent does not assent to a new contractual tenancy but continues the old tenancy. In the *Calcutta Credit Corporation Ltd. v. Happy Homes (P) Ltd.*, 1968-2 SCR 20 = (AIR 1968 SC 471) the subject has been discussed in detail. Under Section 113 of the Transfer of Property Act a notice is waived, by an act on the part of the person giving it showing an intention to treat the lease as subsisting, provided there is the express or implied consent of the person to whom it is given. Here the difficulty is solved by the attitude the tenant took in this case. His case was that the old tenancy revived and continued. According to him the landlord acquiesced in having the old tenancy continued. If we go by the tenant's own case it is obvious that the old tenancy with the default continued and the landlord was thus able to use the provisions of Section 12 (1) (i) against the tenant as also the proviso to sub-section (3) of Section 14 of the repealed Act. There were two consecutive defaults and in the period of 18 months there were more than three defaults. The benefit of Section 14 sub-section (1) of

the repealed Act is not available to the tenant because of the operation of the proviso to sub-section (3). Further Section 24 of the new Act can hardly assist the tenant. That section is not retrospective and will operate from the date on which it came into force. Mr Bhattacharya claimed that it may be taken as a rule of decision or laying down a rule of evidence but we think it impinges upon the substantive rights of landlord and tenants which can only be claimed after the commencement of the Act and not before. The section puts an embargo on any claim based on default in payment of rent when the landlord accepts rent after default and therefore it affects the substantive right of the landlords. According to the accepted canons of interpretation of statutes, a substantive right cannot be taken away retrospectively unless the law expressly so states or there is a clear intent. There are no express words in the statute making S 24 retrospective and we fail to see any intent in it to apply to cases pending on March 31, 1956 when the new Act came into force, and this suit was then pending. If it had been merely a matter of procedure or creating a rule of decision we might have held that the provisions applied to the suit, but that is not the case here. As we said the section creates a change in the substantive rights and therefore must be held to be prospective in operation and not retrospective unless we can gather retrospectivity from the language of the statute or by clear implication in it.

9. There is no question in this case that the tenant was in default according to Section 12 (1) (i) because he had been paying rents beyond the period limited by the agreement or by the section. These defaults were also more than three and therefore the proviso to Section 14 (3) deprived the tenant of the benefit of Section 14 (1). On the whole, therefore, the decision of the High Court was correct and we see no reason to differ from it.

10. The appeal therefore fails and is dismissed but in view of the fact that the rent of the premises has been paid upto the date of hearing and the previous defaults were only so far that the rent was not paid before the date fixed for payment, we are of opinion that the parties in this case should be left to bear their own costs throughout. The tenant is further granted six months' time from the date of this judgment to vacate the pre-

mises. The tenant further undertakes to deposit the rent as and when it falls due.
MKS/D V C. Appeal dismissed.

AIR 1969 SUPREME COURT 1190 (V 56 C 219)

(From Gujarat)*

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Vallabbhai Nathabhai, Appellant v. Bai Jivi and others, Respondents

Civil Appeal No. 104 of 1966, D/- 10-1-1969

Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (57 of 1948), Ss. 29, 84, 15 and 37 — Scope and object — Surrender invalid for want of writing and registration under S. 15 — Tenant is entitled to restoration of possession — His remedy is to apply under S. 29 and not under S. 84 — S. 29 (1) and S. 84 do not provide alternative remedies.

Under Sec. 15 (1) a tenant, as defined by Sec. 2 (18) of the Act, can terminate the tenancy in respect of the land held by him as a tenant by surrendering his interest in favour of his landlord and as provided by sub-sec. (2) on such surrender of the tenancy the landlord becomes entitled to retain the land so surrendered by the tenant in the same manner as when the tenancy is terminated under Secs. 31 and 31A of the Act. The tenancy on such surrender comes to an end, and thereupon the relationship between them of a landlord and a tenant and the rights arising out of that relationship terminate. But a surrender by a tenant can only be valid and binding on him if it was in writing and was verified by the Mamlatdar, whose duty it is to ascertain whether the surrender was voluntary and was not under pressure or undue influence of the landlord. But once the surrender satisfies these two conditions it has the same effect as the termination of tenancy, and the landlord becomes entitled to retain the land of which possession is delivered to him by the tenant. In cases, however, where the surrender has not satisfied the two conditions, even if it is voluntary, it is no surrender and therefore there is no termination of relationship of a landlord and tenant, and the tenancy still continues and the tenant is entitled to retain possession and therefore to its res-

* (Spl. Civil Appln. No. 330 of 1962, D/- 8-7-1964 — Guj).

toration, though Sec. 15 does not in so many words provide it. (Para 3)

Whereas sub-sec. (2) of Sec. 29 is confined to an application by a landlord for possession from his tenant, sub-sec. (1) is not so confined and therefore a tenant can apply for possession against any one including the landlord. But for such an application the condition is that he must be one who is "entitled to possession" of the land in question "under any of the provisions of this Act." Thus, in all cases where a tenant is entitled to possession of land under any of the provisions of the Act, he has a right under Sec. 29 (1) to apply to the Mamlatdar for restoration of possession against any one including the landlord and it is the duty of the Mamlatdar, if satisfied that the tenant is entitled to such possession under any of the provisions of the Act, to restore possession to him. (Para 4)

In the case of a surrender which is not valid and binding the tenant may apply under S. 29 (1) and when an application under Sec. 29 (1) is made it becomes the duty of the Mamlatdar under Sec. 70, Cl. (n) read with Sec. 29 (1) to put the tenant in possession of the land in question "under this Act". In such a case the tenant is claiming possession under the provisions of the Act and not on the strength of his own title, as when he applies for possession against a trespasser. (Para 5)

The words "any person unauthorisedly occupying or wrongfully in possession of any land" in Sec. 84, no doubt, are words of wide import and would include a landlord who is in unauthorised occupation or is wrongfully in possession. A landlord who under an invalid surrender is in possession of the land is, no doubt, a person in unauthorised occupation or is wrongfully in possession. But then Sec. 84 in express terms limits its application to three types of cases only, namely, where (a) the transfer or acquisition of the land etc. is invalid under the Act, or (b) the management of which has been assumed under the Act, or (c) to the use and occupation of which he is not entitled under the provisions of the Act and the said provisions do not provide for the eviction of such person. The case where the surrender of lease is invalid for want of writing and verification under Sec. 15 would fall only under Cl. (c). This condition shows that while giving drastic powers of summary eviction to an administrative officer the legislature was careful to restrict his power firstly because the result

otherwise would be to deprive the person evicted under Sec. 84 of his remedy of appeal before the Collector which he would have if the order were to be passed under Sec. 29 (1) and secondly, because it would enable a tenant to by-pass a judicial inquiry by the Mamlatdar under S. 29 (1) by directly applying to the Collector under S. 84. Such a result could not have been intended by the legislature. Therefore, the contention that Ss. 29 (1) and 84 provide alternative remedies and a choice to the tenant cannot possibly be correct. Case Law Ref. (Paras 6, 7)

Quaere: The question whether the condition of there being no other provision in the Act providing for eviction of a person in unauthorised occupation or wrongful possession (contained in Sec. 84) applies only to cases falling under clause (c) or to all cases under clauses (a), (b) and (c) of Sec. 84 left open. (Para 7)

Cases Referred: Chronological Paras

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| (1961) Spl. Civil Appeal No. 8 of 1961, D/- 22-8-1961, (Guj), Shanker Lal v. Haria Vagha | 9 |
| (1960) 62 Bom LR 261=ILR (1960) Bom 735, Trambaklal v. Shankerbhai | 8 |
| (1956) AIR 1956 Bom 706 (V 43)= 58 Bom LR 451, Durgaben v. Moria Bavla | 8 |
| (1956) Spl. Civil Appeal No. 207 of 1956, D/- 19-6-1956 (Bom), Krishna Mahar v. Hussain Miya | 9 |
| (1955) 57 Bom LR 65=ILR (1955) Bom 187, Shanker Raoji v. Mahadu Govind | 8 |

Mr. M. C. Bhandare and Mrs. Anjali K. Verma, Advocates and M/s. J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co., for Appellant; Mr. S. T. Desai, Senior Advocate, (Mr. M. N. Shroff, Advocate for Mr. I. N. Shroff, Advocate, with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

SHELAT, J.: The facts relevant to this appeal are short and no longer in dispute. Respondent 1 is the owner of Survey Nos. 974/2 and 975/4 situate in the village Delol in district Panmahals and the appellant at the material time was the tenant thereof. On May 15, 1956 the appellant voluntarily handed over possession of the said lands to respondent 1. It is, however, an admitted fact that the said surrender was not in writing and the procedure of inquiry and verification required by Section 15 of the Bombay Tenancy

and Agricultural Lands Act, 57 of 1948 (hereinafter called the Act) was not gone through. The surrender though voluntary thus was not in accordance with Sec. 15 and therefore was not valid and binding on the appellant. It is not in dispute that respondent 1 thereafter personally cultivated the said lands. On January 16, 1961 the appellant applied to the Deputy Collector under Sec. 84 of the Act for summary eviction of respondent 1. The Deputy Collector dismissed the application holding that the tenant's remedy lay under Section 29 (1) of the Act. The Gujarat Revenue Tribunal, however, in a revision by the tenant set aside that order holding that Section 84 and not S. 29 (1) applied. Respondent 1 thereupon filed a writ petition under Article 227 in the High Court of Gujarat and the High Court held, on interpretation of Ss. 29 (1) and 84, that Section 84 did not apply in such cases and set aside the Tribunal's order. What is the scope of Section 84 of the Act is the question, therefore, arising in this appeal which is filed by the tenant after obtaining special leave from this Court.

2 On behalf of the appellant Mr. Bhaxdare raised the following contentions

1 that a surrender of tenancy contrary to Section 15 is an invalid surrender and does not terminate the tenancy,

2 that on such invalid surrender, if the landlord takes possession such possession is wrongful and unauthorised and therefore the land must be said to be in unauthorised occupation and wrongful possession of the landlord,

3 that when the tenant on such dis-possession files an application his right does not arise under any of the provisions of the Act as he has given up possession in breach of his right and title,

4 that in such a situation the tenant does not seek to enforce a right arising under the provisions of the Act but claims possession relying on his title as a tenant.

5 that such an application therefore falls under Section 84 and not under Section 29 (1), and

6 that Section 84 is directed against a person who is in unauthorised occupation and wrongful possession and therefore there is no warrant for any distinction between unauthorised occupation or wrongful possession arising under an invalid surrender and that arising under an invalid sale or transfer.

Mr. Desai for the respondents supported on the other hand, the High Court's judg-

ment and relied on certain decisions of the High Courts of Bombay and Gujarat on the interpretation of Sections 29 (1) and 84 of the Act. Before we proceed to examine these contentions it is necessary first to read the relevant sections.

Section 15 reads as under:

"A tenant may terminate the tenancy in respect of any land at any time by surrendering his interest therein in favour of the landlord;

Provided that such surrender shall be in writing and verified before the Mamlatdar in the prescribed manner."

The relevant part of Section 29 (1) reads as under

"A tenant—entitled to possession of any land—under any of the provisions of this Act may apply in writing for such possession to the Mamlatdar."

Sub-section (2) of Section 29 provides that no landlord shall obtain possession of any land held by a tenant except under an order of the Mamlatdar. Section 84 reads as under:

"Any person unauthorisedly occupying or wrongfully in possession of any land—

(a) the transfer or acquisition of which either by the act of parties or by the operation of law is invalid under the provisions of this Act,

(b) the management of which has been assumed under the said provisions, or

(c) to the use and occupation of which he is not entitled under the said provisions and the said provisions do not provide for the eviction of such persons, may be summarily evicted by the Collector." Section 15 (1) was inserted in the Act by Section 11 of Bombay Act 13 of 1956. Even before 1956 there was in the Act Section 5 (3) the proviso of which required a surrender of tenancy by a tenant to be in writing and verified by the Mamlatdar. There is, however, no dispute before us that the proviso to Section 15 (1) applies to the present case and that the surrender under which respondent 1 obtained possession of the land in question was neither in writing nor was verified in an inquiry before the Mamlatdar.

3 Under Section 15 (1) a tenant, as defined by Section 2 (18) of the Act, can terminate the tenancy in respect of the land held by him as a tenant by surrendering his interest in favour of his landlord and as provided by sub-section (2) on such surrender of the tenancy the landlord becomes entitled to retain the land so surrendered by the tenant in the same manner as when the tenancy is termi-

nated under Sections 31 and 31A of the Act. The tenancy on such surrender comes to an end and thereupon the relationship between them of a landlord and a tenant and the rights arising out of that relationship terminate. The Legislature, however, was aware of the possibility of landlords taking advantage over the tenants and therefore to safeguard the tenants against such a possibility, it laid down through the proviso that a surrender by a tenant could only be valid and binding on him if it was in writing and was verified by the Mamlatdar. Before the Mamlatdar would verify such surrender it would be his duty to ascertain whether the surrender was voluntary and was not under pressure or undue influence of the landlord. But once the surrender satisfies these two conditions it has the same effect as the termination of tenancy: the tenancy comes to an end and the landlord becomes entitled to retain the land of which possession is delivered to him by the tenant surrendering his interest as a tenant therein. In cases, however, where the surrender has not satisfied the two conditions, even if it is voluntary, it is no surrender and therefore there is no termination of relationship of a landlord and tenant. Consequently even if the tenant has voluntarily surrendered possession and the landlord has taken it over, since the tenancy still continues the tenant obviously is entitled to retain possession and therefore to its restoration. Though, therefore, Section 15 does not in so many words provide that in such a case the tenant is entitled to restoration of possession, there being no valid surrender where the two conditions are not satisfied, the tenancy continues and the tenant can claim possession from the landlord as the tenant of the land in question such claim being based on his right as such tenant to be in possession of such land and the landlord's disability to terminate the tenancy under the provisions of the Act. It is true that Sec. 37 expressly provides for restoration of possession to the tenant in the eventuality provided therein while Section 15 does not so provide. But the right to restoration had to be provided for in Section 37 as there would be termination of tenancy which becomes revived and on revival thereof the tenant becomes entitled to restoration of possession. In a case under Section 15, however, if the surrender is not valid it is no surrender at all and there is no question of termination of tenancy. The tenant continues to be entitled to pos-

session and therefore there is no question of the section having to provide for restoration of possession. There is, therefore, no force in the contention that in the case of an invalid surrender the tenant is not entitled to possession under the provisions of the Act. He is in fact entitled to claim back possession under Section 15 itself for under sub-section (2) the landlord becomes entitled to retain the land only if the surrender is in accordance with the provisions of Section 15.

4. Section 29 (1) confers a right on a tenant to apply to the Mamlatdar for possession and Section 29 (2) gives a right to a landlord to apply to the Mamlatdar to obtain possession of land held by a tenant. In both the cases it is the duty of the Mamlatdar to restore possession to the tenant or to the landlord, as the case may be. It will be noticed that whereas sub-section (2) is confined to an application by a landlord for possession from his tenant, sub-section (1) is not so confined and therefore a tenant can apply for possession against anyone including the landlord. But for such an application the condition is that he must be one who is "entitled to possession" of the land in question "under any of the provisions of this Act." Thus in all cases where a tenant is entitled to possession of land under any of the provisions of the Act, he has a right under Section 29 (1) to apply to the Mamlatdar for restoration of possession against anyone including the landlord and it is the duty of the Mamlatdar, if satisfied that the tenant is entitled to such possession under any of the provisions of the Act, to restore possession to him. Clauses (b) and (n) of Section 70 lay down the duties and functions of the Mamlatdar in the following words:

"(b) to decide whether a person is a tenant or a protected tenant or a permanent tenant."

"(n) to take measures for putting the tenant or landlord—into the possession of the land—under this Act."

Section 74 provides for an appeal to the Collector against the orders of the Mamlatdar in cases therein set out and Cl. (m) provides such an appeal against an order passed by the Mamlatdar under S. 29.

5. In the case of a surrender which is not valid and binding on the tenant there is, as aforesaid, no termination of tenancy, and therefore, the landlord is not entitled to retain the land even though possession thereof has been handed over to him or has been voluntarily taken by

him. The position in such a case is that the tenant has a right to apply to the Mamlatdar for restoration of possession to him claiming that there has been no termination of tenancy, that his possession continues to be protected by the provisions of the Act and that, therefore, possession should be restored to him. Such an application lies under Sec 29 (1) and, when so made, it becomes the duty of the Mamlatdar under Sec 70, Cl (n) read with Sec 29 (1) to put the tenant in possession of the land in question "under this Act". In such a case the tenant is claiming possession under the provisions of the Act and not on the strength of his own title, as when he applies for possession against a trespasser. That clearly being the position, propositions 3, 4 and 5 of Mr Bhandare cannot be sustained.

6. The question then is whether a tenant who has a remedy under S 29 (1) can still apply to the Collector under Section 84. In other words, whether the Legislature has provided alternative remedies under both the sections to such a tenant? The words "any person unauthorisedly occupying or wrongfully in possession of any land" in Section 84, no doubt, are words of wide import and would include a landlord who is in unauthorised occupation or is wrongfully in possession. A landlord who under an invalid surrender is in possession of the land is, no doubt, a person in unauthorised occupation or is wrongfully in possession. But then Section 84 in express terms limits its application to three types of cases only, namely of a person unauthorisedly occupying or wrongfully in possession of the land (a) the transfer or acquisition of which etc is invalid under the Act, or (b) the management of which has been assumed under the Act, or (c) to the use and occupation of which he is not entitled under the provisions of the Act and the said provisions do not provide for the eviction of such person.

7. Mr Bhandare's argument, however, was that the present case falls under Clauses (a) and (c) of Section 84, that the condition of the other provisions of the Act providing for eviction of such a person applies only to cases falling under Clause (c) and not to those falling under Clause (a). We do not have to decide in the present case whether the said condition of there being no other provision in the Act providing for eviction of a person in unauthorised occupation or wrongful possession applies only to cases

falling under Clause (c) or to all cases under Clauses (a), (b) or (c), as in our opinion the present case is clearly one falling under Clause (c) and not Cl (a) or (b) of Section 84. Clause (b) obviously cannot apply as the land in question was not one, the management of which was assumed under the provisions of the Act, namely, Sections 44, 45 and 61. So far as Clause (a) is concerned, it applies to cases in respect of the land, the transfer or acquisition of which either by the act of parties or by operation of law is invalid under the provisions of the Act. Clause (a) clearly refers to Ch V of the Act which lays down certain restrictions on transfers of agricultural lands and acquisition of estates and Lands Sections 63, 64 and 65 in that chapter prohibit transfers of agricultural land to non-agriculturists and recognize only sales to persons and at prices specified therein. Clause (a) therefore, applies to transfers or acquisitions which are in breach of the provisions of Ch V and possession or occupation whereof has been obtained under such invalid transfers or acquisitions. That being the position, the instant case would fall only under Clause (c) and not under Clause (a) as contended by Mr Bhandare, and therefore, the condition that S 84 would only apply to cases for which there is no other remedy under any of the provisions of the Act must apply to the present case. This condition shows that while giving drastic powers of summary eviction to an administrative officer the legislature was careful to restrict this power firstly because the result otherwise would be to deprive the person evicted under Section 84 of his remedy of appeal before the Collector which he would have if the order were to be passed under Section 29 (1) and secondly, because it would enable a tenant to by-pass a judicial inquiry by the Mamlatdar under Sec. 29 (1) by directly applying to the Collector under Section 84. Such a result could not have been intended by the legislature. Therefore, the contention that Ss 29 (1) and 84 provide alternative remedies and a choice to the tenant cannot possibly be correct.

8. We now turn to the decisions to which our attention was drawn by counsel. In *Shankar Raoji v Mahadu Govind*, (1955) 57 Bom LR 65 the High Court of Bombay observed that Section 29 (1) gave a right to the tenant to obtain possession through the Mamlatdar in every case where he was entitled to possession under any of the provisions of the Act

and that the clear object of Section 29 (1) was that if the Mamlatdar was satisfied that the tenant was entitled to possession by reason of his tenancy it was his duty to protect that possession and order any one who had dispossessed him to restore possession to him. Section 29 (1) thus assumed that the tenant must claim possession as such under the provisions of the Act. In *Durgaben v. Moria Bavia*, 58 Bom LR 451 = (AIR 1956 Bom 706) the landlord obtained possession from the tenant under Section 29 (2) on the ground that the tenant had surrendered the lease. The tenant applied under Section 84 alleging that notwithstanding the order of the Mamlatdar under Section 29 (2), he had continued in possession and that the landlord had forcibly dispossessed him. It was held that the Collector had no jurisdiction under Section 84 and that the remedy if any, of the tenant was under Section 29 (1). In holding so, the High Court observed that it was only in the absence of a provision in the Act for eviction of an unauthorised person that the Collector had jurisdiction under S. 84 to order summary eviction. The High Court held that Sections 29 (1) and 84 did not provide for alternative remedies to the tenant, for, under Section 29 (1) he could claim possession on his title as a tenant under the provisions of the Act and not under Section 84. The High Court also further observed that if it were to construe the two sections as providing alternative remedies, such a construction would result in a curious consequence, viz., that in a case where a landlord has obtained possession after obtaining an order from the Mamlatdar such possession would obviously be under a title. If the tenant in such a case were to allege that the landlord's possession was unauthorised or wrongful and were to apply under Section 84, the Collector would have to decide the question whether the landlord's possession was wrongful or unauthorised or not. But in that case the Collector would decide it and set aside the Mamlatdar's order under his original jurisdiction under Section 84 and not under his appellate jurisdiction under Section 74 and Section 74 would thus be rendered superfluous. In *Trambakdal v. Shankerbhai*, (1960) 62 Bom LR 261 the High Court of Bombay held that in order that there may be a valid transfer or acquisition through surrender, such surrender must be a lawful one and made in accordance with the provisions of the Act. If such a surrender was not verified and

recognised under Section 15 there would be no cessation of tenancy rights and therefore if the landlord had obtained possession under such an invalid surrender the tenant retained the right to restoration of possession under the Act. It is clear that these decisions do not lay down anything contrary to what we have said above and therefore would not assist the appellant.

9. There are two unreported decisions, one by the High Court of Gujarat and the other by the High Court of Bombay to which also our attention was drawn. In *Shankeral v. Haria Vagha*, Spl. Civil Appeal No. 8 of 1961, D/- 22-8-1961 (Guj) the facts were as follows: One Chandrasingh and his brothers owned Survey Nos. 23/2, 23/3 and 26/5. In 1956-57 opponent 2 surrendered these lands to Chandrasingh who personally cultivated them. Until 1955-56 opponent 1 cultivated Survey No. 26/5. He thereafter surrendered that Survey number to Chandrasingh and his brothers who personally cultivated it thereafter. The Mamlatdar admittedly had held no inquiry in respect of these surrenders under Section 15. On January 28, 1959 Chandrasingh and his brothers sold these lands to the petitioners and the petitioners thereafter cultivated them in 1959-60. In 1959 opponents 1 and 2 applied to the Collector under Section 84 and the Collector ordered restoration of possession to opponents 1 and 2. The Gujarat Revenue Tribunal rejected a revision application filed by the petitioners against the said order. In a writ petition under Art. 227 the petitioners raised two contentions before the High Court: (1) that they were not in unauthorised occupation or wrongfully in possession as they derived title from the owners, their vendors, and (2) that in any event the opponents had a remedy under Section 29 (1) and therefore could not have recourse to Sec. 84. As regards the first contention the High Court held that the surrenders by opponents 1 and 2, not being in writing and unverified, were not binding on them, the relationship of tenant and landlord had not, therefore, terminated and opponents 1 and 2 were entitled to possession of the lands. That was the position which obtained on January 28, 1959 when Chandrasingh and his brothers purported to sell the lands to the petitioners. The petitioners, therefore, were in unauthorised possession as Chandrasingh and his brothers were not entitled to possession and could not transfer possession to

the petitioners. The High Court also held that the said sale was contrary to Section 64 and therefore invalid and did not create any rights as to ownership or possession in favour of the petitioners. The possession of the petitioners, therefore, was unauthorised and wrongful and Section 84 applied and the first contention failed. As to the second contention the High Court held that under Section 29 (1) a tenant could apply to the Mamlatdar for possession but that required that the right to possession must arise "under the provisions of the Act". If the tenant did not seek to enforce a right arising under any of the provisions of the Act but claimed possession on his own title as a tenant, Section 29 (1) would not apply and his remedy would be under Section 84 only. The High Court held that when a tenant claimed possession not relying upon any incident of his contract of tenancy nor on any provisions of the Act but on his own title to possession, that is, to protect his possession as a tenant against a trespasser Section 84 and not Section 29 (1) would apply even though the land the possession of which he claimed was the land of which he was a tenant and the trespasser was his landlord. What the tenant in such a case was seeking to do was not to enforce his right as a tenant under the provisions of the Act but he was enforcing his right against third parties, namely, the petitioners in that case who were in wrongful occupation. The tenant was claiming possession not under the provisions of the Act but on his own title, albeit as a tenant, against a person who had no title to ownership or possession in the land and therefore Section 29 (1) did not apply to such a case. Consequently, Section 29 (1) was not another provision providing for eviction which opponents 1 and 2 could avail of. In *Krishna Mahar v Hussain Miva*, Spl Civil Appeal No 207 of 1956 decided by Shah, and Vyas, JJ on 19-6-1956 (Bom) the respondent was the owner of the land in question. He applied under Sec 29 (2) to the Mamlatdar. The Mamlatdar passed an order directing the petitioner, the tenant, to hand over possession. The petitioner appealed to the Collector under Section 74 of the Act who set aside the Mamlatdar's order. But before the Collector passed his said order the respondent executed the Mamlatdar's order and obtained possession. The petitioner then obtained possession in pursuance of the Collector's said order but the respondent forcibly dispossessed him and thereupon

on January 10, 1952 the petitioner complained to the Mamlatdar. The Mamlatdar expressed his inability to assist him and thereupon the petitioner applied to the Collector under Section 84. The Collector held that the respondent was in wrongful possession and passed an order of eviction. The Revenue Tribunal however, set aside that order holding that the petitioner's application was barred by limitation. An application for condonation of delay was also rejected. The petitioner, thereupon filed a petition under Article 227. The High Court held that there was a clear distinction between an application under Section 29 (1) and one under Section 84, for, under Section 29 (1) whereas the tenant would be claiming the right to possession under the provisions of the Act, under Section 84 he would be claiming the right to possession not under any of the provisions of the Act but on his own title to possession as a tenant. Such an application could be even against a person who was his landlord qua the land in question if such landlord was in unauthorised occupation or wrongful possession. These two decisions again do not lay down anything inconsistent to what we have said above on the scope and interpretation of Sec. 29 (1) and Section 84. We do not therefore see how either of these two decisions can be availed of by Mr. Bhandare in support of his contentions.

10. In our view the High Court was correct in its interpretation of the two sections and the conclusion which it arrived at in holding on the facts of the present case that the Collector had no jurisdiction under Section 84 to entertain the tenant's application. The result is that the appeal fails and is dismissed with costs.

VGW/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 1196

(V 56 C 220)

(From Gujarat)*

M HIDAYATULLAH, C J. AND
G K. MITTER, J.

Patel Bhuder Mavji etc, Appellants v.
Jat Mamdaji Kalaji (Dead) by his legal
Representatives etc., Respondents

Civil Appeals Nos. 123 and 124 of 1966,
D/- 13-2-1969.

*(Civil Revn. Applns Nos 88 and 93 of
1961, D/- 28-4-1965—Guj)

IM/IM/A899/69/D

Debt Laws — Saurashtra Agricultural Debtors Relief Act (23 of 1954), S. 29 — Saurashtra Land Reforms Act (25 of 1951), Sections 6 and 20 — Mortgagee, not otherwise tenant under Section 6 of Land Reforms Act, in possession of land — Land, held by Mamlatdar to be Khalsa and full assessment ordered under Section 20 of Land Reforms Act — Occupancy rights not granted — Rights of mortgagor not extinguished under Land Reforms Act — Court can scale down debts under Debtors Relief Act.

Under the Land Reforms Act, the mortgagee in possession of land under mortgage, in order to get occupancy rights has to show that he has become tenant which obviously he cannot be under Section 6 of the Act. The fact that he had all along paid the revenue and other dues to the State, if any, would not clothe him with the right of the tenant. Even if he cannot meet the revenue and other State dues out of the income and pays the same out of his own pocket in order to save the security, the mortgagee is only entitled under Section 72 (b) of the Transfer of Property Act to add the amount to the mortgage money. He cannot by paying such rent or revenue acquire a title in derogation of the rights of the mortgagor and the payments, if any, are to be taken into account when the mortgagor seeks to redeem the property. So where all that the Special Mamlatdar decided and had jurisdiction to decide under the Act was, whether the debtor could be given occupancy certificate or allotted any land Charkhed and the Special Mamlatdar merely ordered that the lands under mortgage being Khalsa full assessment had to be taken in respect of them and there was no need to grant occupancy rights, then, in absence of anything showing that the debtor was awarded any compensation in respect of the Khalsa lands given in mortgage to the creditor, the rights of the debtor are not extinguished under the Land Reforms Act. The occupancy certificate, if any, given by the Special Mamlatdar to the creditor cannot, under the provisions of the Land Reforms Act, extinguish the title of the mortgagor. The object of the Land Reforms Act and the Debtors Relief Act being different where the rights of the mortgagor are not extinguished under the Land Reforms Act, it is open to the court exercising jurisdiction under the Debtors Relief Act to scale down the debt and provide for restoration of the land in possession of mortgagee to the

mortgagor on taking fresh accounts between the parties and directing payments by one party to the other.

(Paras 11 and 12)

Mr. P. B. Patwari, Senior Advocate (Mr. K. L. Hathi, Advocate of M/s. Hathi and Co., and M/s. S. K. Begga and Mrs. Shureshta Begga, Advocates with him), for Appellants; Mr. P. M. Rawal Advocate and Mr. P. C. Bhartari Advocate for M/s. J. B. Dadachanji and Co., for Respondents.

The following Judgment of the Court was delivered by

MITTER, J.: These are two appeals by special leave from judgments of the Gujarat High Court dated April 28, 1965 in Civil Revision Applications Nos. 88 and 93 of 1961. As the questions involved in both the applications were the same, the High Court delivered the main judgment in Civil Revision Application No. 88/1961 and referred to the same in its judgment in Civil Revision Application No. 93 of 1961. The two applications in the High Court arose out of certain proceedings under the Saurashtra Agricultural Debtors Relief Act. The applicants before the High Court and the appellants before this Court were mortgagees in possession of certain lands belonging to the debtors who are now represented by the respondents. The main question before the High Court was and before us is, whether the debtors had lost all their interest in the lands mortgaged by reason of the operation of the Saurashtra Land Reforms Act, XXV of 1951 and as such were not competent to make an application under the Saurashtra Agricultural Debtors Relief Act, 1954. Hereinafter the two Acts will be referred to as the Land Reforms Act and the Debtors Relief Act.

2. It is not necessary to deal separately with the facts in the two appeals as the course of proceedings in both cases were similar giving rise to common questions of law. We therefore propose to take note of the facts in Civil Revision Application No. 88 of 1961. The creditors, appellants before us, were in possession of the properties—the subject matter of litigation, under two mortgage deeds of Samvat years 1997 and 1999. The first mortgage was for Rs. 991 and the second for Rs. 1,011. The mortgages were with possession and the mortgagees have been appropriating the income of the usufruct thereof for the last 50 years. There is nothing to show whether they were under a liability under the docu-

ments of mortgage to pay the revenue and other dues to the State but there is no dispute that they have been doing so for many years past. The lands were situate in Bajana State with its own peculiar land tenure system known as the Girasdari system.

3. The Land Reforms Act which came into force on July 23, 1951 purported to effect important and far-reaching changes in the said system. The preamble to the Act shows that its object was "the improvement of land revenue administration and for ultimately putting an end to the Girasdari system" and the regulation of the relationship between the Girasdari and their tenants, to enable the latter to become occupants of the land held by them and to provide for the payment of compensation to the Girasdars for the extinguishment of their rights. It will be noted at once that the Act aimed at regulating the relationship of persons in the position of landholders and their tenants and to enable the tenants to become the real owners of the soil under direct tenancy from the State. It was not meant to extinguish or affect the rights of the landholders as mortgagors unless the persons in occupation had become tenants either by contract or by operation of law.

4. The Act came into force in the whole of Saurashtra area of the State of Gujarat. Under Section 2 (15) 'Girasdar' meant any talukdar, bhagdar, bhavat, cadet or mal-girasia etc. Under S 2 (13) 'estate' meant all land of whatever description held by a Girasdar including uncultivable waste whether used for the purpose of agriculture or not and 'Charkhed' meant any land reserved by or allotted to a Girasdar before the 20th May, 1950 or for being cultivated personally and in his personal cultivation. A tenant under Section 2 (30) meant an agriculturist who held land on lease from a Girasdar or a person claiming through him and included a person who was deemed to be a tenant under the provisions of the Act. Under Section 3 the provisions of the Act were to have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 4 provided that 'all land of whatever description held by a Girasdar is and shall continue to be liable to the payment of land revenue to the State of Gujarat'. Section 5 classified Girasdars according to the measure of their holding and under Clause (c) thereof a Girasdar was to belong to Class C

if the total area of agricultural land comprised in his estate did not exceed Ac. 120—00. Section 6 (1) of the Act laid down that any person who was lawfully cultivating any land belonging to a Girasdar was to be deemed for the purposes of the Act to be the tenant if he was not a member of the Girasdar's family or a servant on wages payable in cash or in kind etc. or a mortgagee in possession. The Explanation to the sub-section however shows that a person who was otherwise deemed to be a tenant was not to cease to be such only on the ground that he was a mortgagee in possession. Under Section 19 it was open to any Girasdar to apply to the Mamlatdar for the allotment to him of land for personal cultivation within a certain fixed time. Such application had to be made in a specified form giving the prescribed particulars. The applicant had to show inter alia, the area and location of the land in respect of which the allotment was prayed for, the right under which he claimed the land and full particulars of his estate as also the area of khalsa land, if any, in his possession. Under Section 20 of the Act it was for the Mamlatdar to issue notice to the tenant or tenants concerned on receipt of an application under Section 19 and make an enquiry in the prescribed manner after giving the parties an opportunity of being heard. After such enquiry the Mamlatdar was required to pass an order making an allotment to the Girasdar of such land as may be specified in the order and this was to be followed by the issue of an occupancy certificate to a Girasdar in respect of his Charkhed and the land, if any, allotted to him under the section. Under sub-section (4) no Girasdar was to obtain possession of any land held by a tenant except in accordance with the order under the section. Section 24 laid down the total area of the holding which a C class Girasdar could be allotted for personal cultivation. Sub-section (2) of the section provided that a C class Girasdar could not be allotted any khalsa land if it was held by a tenant. Chapter V containing Sections 31 to 41 provided for acquisition of occupancy rights by tenants and Section 31 laid down the consequences which were to issue in the wake of grant of occupancy certificates. A tenant who was granted such a certificate was to be free of all relations and obligations as tenant to the Girasdar. The Girasdar in his turn was to be entitled to receive and be paid compensation as provided in

the Act. Under Section 36 the right, title and interest of the Girasdar in respect of an occupancy holding were to be deemed to have been extinguished on the payment by the Government of the last instalment of compensation. The functions of a Mamlatdar are laid down in Sec. 46 of the Act. It was for him to decide inter alia what land should be allotted to a Girasdar for personal cultivation and to make such allotment, to decide whether a person was or was not a tenant, to determine whether a tenancy shall be terminated under Section 12 and many other matters. Under Section 51 an appeal lay to the Collector against any order of the Mamlatdar.

5. The above analysis of the relevant provisions of the Land Reforms Act amply demonstrates the manner in which a change was to be brought about in the relationship between the Girasdar and his tenants and the rights which they were respectively to acquire under the orders of the Special Mamlatdar. The said Officer had no jurisdiction to terminate any rights under mortgage.

6. The full text of the order of the Mamlatdar on the application of the Girasdar (the respondents to the appeal) is not before us. The copy of the order on the respondents' application marked Ex. 8/1 bearing date 16th January 1964 was handed over to us. It appears therefrom that the Girasdar was allowed to keep as Gharkhed certain lands by paying six times the assessment in the treasury but with regard to S. Nos. 684 and 685 (the lands given to the mortgagees) the same were held by the Mamlatdar to be Khalsa and full assessment thereof was ordered to be taken. The Mamlatdar further noted that there was no need to grant any occupancy rights.

7. On May 2, 1955 the respondents applied for adjustment of their debt to the Civil Judge exercising jurisdiction under the Debtors Relief Act. The creditors relied on the order of the Special Mamlatdar declaring the lands as Khalsa as fortified by the decision of the Bhayati Court of Bajana State. It was contended that the lands having been declared khalsa the debtors had lost their rights therein. Reliance was also placed on Forms 7 and 8 by counsel for the appellants to show that his clients had acquired proprietary rights in the said khalsa lands. According to the Civil Judge the judgment of the Bhayati Court had merely decided that the Bajana State had no title or in-

terest in the land in question and that the Jats Mul-Girasdars were independent proprietors thereof. The Judge however remarked that it was not for the Special Mamlatdar to decide any question as to title and he had merely ordered recovery of full assessment from the persons in actual possession and this in no way vested any title in the creditors. In the result the Civil Judge directed the restoration of the lands to the debtors subject to certain limitations and conditions.

8. The creditors went up in appeal to the Assistant Judge, Surendranagar. There it was contended on their behalf that the mortgages had been extinguished by the title of the paramount power and on the date of the application under the Debtors Relief Act there was no subsisting mortgage between them and the respondents. Reliance was placed on the decision of the Special Mamlatdar declaring the land to be khalsa land as extinguishing the mortgages by forfeiture of the land to the State. The Assistant Judge dealt with the question at some length and came to the conclusion that the mortgages had not been extinguished and not being tenants within the meaning of Section 6 the creditors could not have got an occupancy certificate in respect of the lands in their possession. He further stressed on the decision of the Special Mamlatdar to show that only the liability for the full assessment of the lands was indicated without any disturbance to the rights inter se between the mortgagors and the mortgagees. Dealing with the question of the advances made and the amounts still due to the creditors, it was ordered that the debtors should pay Rs. 1,698/- in twelve yearly instalments and the award was directed to be modified accordingly.

9. The matter was then taken up by way of Civil Revision to the High Court of Gujarat. The High Court arrived at the following conclusions:—

(a) The decision of the Bhayati Court merely declared that the State was entitled to recover taxes of various kinds from the lands in possession of tenants or mortgagees. There was no decision that the lands in possession of the mortgagees were confiscated to the State.

(b) The Special Mamlatdar rejected the application of the debtor and directed the lands in possession of the different creditors to be treated as Government lands as according to him the decision of the Bhayati Court amounted to a forfeiture of the lands by the Bajana State.

(c) It was not necessary to test the correctness of the decision of the Special Mamlatdar as in view of the provisions in the Debtors Relief Act which was an Act subsequent to the Land Reforms Act the provisions of the latter Act were to prevail.

10 In the result the High Court affirmed the order of the Assistant Judge in appeal directing possession to be handed over to the debtors.

11. Before us great stress was laid on the decision of the Special Mamlatdar and it was argued that subject to any appeal from his order his decision was binding on the parties and not having gone up in appeal from the order of the Special Mamlatdar the debtors could not be allowed to agitate their rights to the land ignoring the said order. We have not before us the full text of the order of the Special Mamlatdar relied on by the appellants nor are we satisfied from copies of form 7 prescribed under Rule 81 of the Rules promulgated under the Land Reforms Act that there was any adjudication of the rights of the debtors and the creditors inter se. In our view all that the Special Mamlatdar decided and had jurisdiction to decide under the Act was, whether the debtors could be given occupancy certificates or allotted any land. Gharhkhed and the Special Mamlatdar merely ordered that the lands being khalsa full assessment had to be taken in respect of them and there was no need to grant occupancy rights. In order to get such occupancy rights the creditors had to show that they had become tenants which obviously they could not be under the provisions of Section 6 of the Land Reforms Act. The fact that they had all along paid the revenue and other dues to the State, if any, would not clothe them with the right of the tenants. Under Sec 76 (c) of the Transfer of Property Act a mortgagee in possession must, in the absence of a contract to the contrary, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession. We do not know whether there was a contract in the contrary and whether the mortgagors had covenanted to pay the rent and the revenue. But even if they could not meet the revenue and other State dues out of the income and paid the same out of their own pockets in order to save the security, the mortgagees were only entitled under Section 72 (b) of the

Transfer of Property Act to add the amount to the mortgage money. They could not by paying such rent or revenue acquire a title in derogation of the rights of the mortgagors and the payments, if any, are to be taken into account when the mortgagors seek to redeem the property.

12. That apart, it has not been shown to us that the debtors were awarded any compensation in respect of the khalsa lands given in mortgage to the appellants. The occupancy certificates, if any, given by the Special Mamlatdar to the appellants cannot under the provisions of the Land Reforms Act extinguish the title of the mortgagors. Whether the mortgagors as C class Girasdars can be allowed to retain land in excess of the limits specified in the Act and whether as a result of the restoration of the lands to them by the award such limit will be exceeded in this case, are not questions for us to consider. The right of the mortgagors not being extinguished under any provision of law to which our attention was drawn, no fault can be found with the award as finally modified by the judgment of the Assistant Judge and effect must be given thereto. In our view, it is not necessary to consider the point canvassed at length before the High Court and dealt with in the judgment of the said Court as to whether the provisions of the Debtors Relief Act override those in the Land Reforms Act. The objects of the two Acts are different. The object of the Land Reforms Act, as already noted is the improvement of the land revenue administration and putting an end to the *Girasdari system* and granting of occupancy rights to the Girasdars and/or their tenants, whereas the Debtors Relief Act governs the rights of the debtors and creditors inter se inter alia by scaling down the debts and providing for restoration of their property to debtors. In our view, the rights of the debtors in this case were not extinguished under the Land Reforms Act and it was open to the Court exercising jurisdiction under the Debtors Relief Act to scale down the debt and provide for restoration of the land in possession of the mortgagees to the mortgagors on taking fresh accounts between the parties and directing payments by one party to the other as has been done in this case.

13. The appeals therefore fail, and are dismissed with costs.

BNP/D.V.C.

Appeals dismissed.

AIR 1969 SUPREME COURT 1201
(V 56 C 221)

(From: Bombay)*

M. HIDAYATULLAH, C. J. AND
G. K. MITTER, J.

Samant N. Balakrishna, etc., Appellants
v. George Fernandez and others etc., Res-
pondents.

Civil Appeals Nos. 895 and 896 of 1968,
D/- 12-2-1969.

(A) Representation of the People Act (1951), Secs. 100 (1) (b), 100 (1) (d), 123 (4) — Corrupt practice charged against an agent other than election agent — Petitioner must prove consent on the part of returned candidate to the commission of corrupt practice — Consent on the part of returned candidate if not proved, case will fall under Sec. 100 (1) (d) and not under Sec. 100 (1) (b) — Proof that the corrupt practice materially affected the poll must be adduced.

The petitioner may prove a corrupt practice by the candidate himself or his election agent or someone with the consent of the candidate or his election agent, in which case he need not establish what the result of the election would have been without the corrupt practice. If the petitioner does not prove a corrupt practice by the candidate or his election agent or another person with the consent of the returned candidate or his election agent but relies on a corrupt practice committed by an agent other than an election agent he must additionally prove how the corrupt practice affected the result of the poll. Unless he proves the consent to the commission of the corrupt practice on the part of the candidate or his election agent he must face this additional burden. (Para 25)

Thus, where a corrupt practice is charged under Sec. 123 (4), against an agent who is also an editor of a newspaper, the petitioner, to get the benefit of not having to prove the effect of the corrupt practice upon the election and to establish that the case falls under Sec. 100 (1) (b) and not under Sec. 100 (1) (d), must prove consent on the part of the returned candidate to the commission of the corrupt practice. There must be some reasonable evidence from which an inference can be made of the meeting of the minds as to the publications or at least a tacit

*(Ele. Petn. No. 6 of 1967, D/- 29-1-1968 — Bom).

approval of the general conduct of the agent. Section 100 (1) (b) makes no mention of an agent while Sec. 100 (1) (d) specifically does. The reason is this that an agent cannot make the candidate responsible unless the candidate has consented or the act of the agent has materially affected the election of the returned candidate. In the case of any person (and he may be an agent) if he does the act with the consent of the returned candidate there is no need to prove the effect on the election. If every act of an agent must be presumed to be with the consent of the candidate there would be no room for application of the extra condition laid down by Sec. 100 (1) (d), because whenever agency is proved either directly or circumstantially, the finding about consent under Section 100 (1) (b) will have to follow. (Para 45)

If the petitioner fails to prove consent on the part of the returned candidate then to establish corrupt practice avoiding the election, conditions required by Sec. 100 (1) (d) read with Sec. 123 (4) will have to be satisfied. Therefore it will have to be established not only (a) that the statement was made by an agent (b) that it was false etc. (c) that it related to the personal character and conduct of defeated candidate (d) that it was reasonably calculated to harm his chances but also (e) that it in fact materially affected the result of the election in so far as the returned candidate is concerned. AIR 1967 SC 808, Relied on. (Para 54)

(B) Representation of the People Act (1951), Sec. 83 — Section is mandatory — Distinction between material facts and particulars — The entire and complete cause of action must be stated in the petition in the shape of material facts — Function of particulars is to give necessary information to present full picture of the cause of action.

Section 83 is mandatory and requires the election petition to contain first a concise statement of material facts and then requires the fullest possible particulars. The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between

material facts and particulars but the two are quite distinct. The material facts will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action. In stating the material facts it will not do merely to quote the words of the section because then the efficacy of the words 'material facts' will be lost. The fact which constitutes the corrupt practice must be stated and the fact must be correlated to one of the heads of corrupt practice. An election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the making of a false statement. That statement must appear and the particulars must be full as to the person making the statement and the necessary information. (Para 29)

(C) Representation of the People Act (1951), Sec. 86 (5) — Power of amendment — Corrupt practice by an agent other than election agent alleged in the petition — Particulars alleging corrupt practice by returned candidate, cannot be supplied by way of amendment

In a petition the kind of corrupt practice which was perpetrated together with material facts on which a charge can be made out must be stated. If the material facts of the corrupt practice are stated, more or better particulars of the charge may be given later, but where the material facts themselves are missing it is impossible to think that the charge has been made or can be later amplified. The power of amendment is given in respect of particulars but there is a prohibition against an amendment "which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition." (Paras 29 and 37)

There is, however, a difference of approach between the several corrupt practices. If for example the charge is bribery of voters and the particulars give a few instances, other instances can be added; if the charge is use of vehicles for free carriage of voters, the particulars of the cars employed may be amplified. But if the charge is that an agent did something, it cannot be amplified by giving particulars of acts on the part of the candidate or vice versa. In the scheme of election law they are separate corrupt practices which cannot be said to grow out of the material facts related to another person.

Publication of false statements by an agent is one cause of action, publication of false statements by the candidate is quite a different cause of action. Such a cause of action must be alleged in the material facts before particulars may be given. One cannot under the cover of particulars of one corrupt practice give particulars of a new corrupt practice. They constitute different causes of action. Since a single corrupt practice committed by the candidate, by his election agent or by another person with the consent of the candidate or his election agent is fatal to the election, the case must be specifically pleaded and strictly proved. If it has not been pleaded as part of the material facts, particulars of such corrupt practice cannot be supplied later on. The bar of the latter part of the fifth sub-section to Section 86 then operates. AIR 1957 SC 444, Explained, AIR 1954 SC 210, Relied on, Case law discussed. (Paras 29, 30, 37)

(D) Evidence Act (1872), Ss 60, 63 — News items published by newspapers — Evidentiary value.

A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible. A fact has first to be alleged and proved and then newspaper reports can be taken in support of it but not independently. (Para 47)

(E) Representation of the People Act (1951), Sec 123 (4) — Corrupt practice by an agent other than election agent — Consent of returned candidate to the commission of — Direct or circumstantial evidence necessary to prove consent — Mere knowledge or connivance or similarities of ideas not enough to infer consent.

To establish corrupt practice, by an agent other than election agent, avoiding the election, the consent on the part of returned candidate to the commission of corrupt practice must be proved. There is no doubt that the consent need not be directly proved. The principle of law is settled that consent may be inferred from circumstantial evidence but the circumstances must point unerringly to the conclusion and must not admit of any other

explanation. Although the trial of an election petition is made in accordance with the Code of Civil Procedure, it has been laid down that a corrupt practice must be proved in the same way as a criminal charge is proved. In other words, the election petitioner must exclude every hypothesis except that of guilt on the part of the returned candidate or his election agent. A consistent course of conduct in the canvass of the candidate may raise a presumption of consent. But mere knowledge of or connivance at the corrupt practice is not enough to infer corrupt practice. Similarly the similarities of ideas or even of words cannot be pressed into service to show consent. (Paras 45, 47, 50)

(F) Representation of the People Act (1951), Sec. 100 (1) (d) (ii) — Election to be void under — That the election was materially affected, in so far as the returned candidate was concerned, requires proof, and cannot be considered on possibility. AIR 1954 SC 513 & AIR 1957 SC 242 & (1958) 15 Ele LR 219 (MP), Relied on. (Para 58)

(G) Civil P. C. (1908), Preamble — Precedents — Supreme Court cannot overlook the rulings of Supreme Court and follow the English rulings. (Para 58)

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 (1878) 4 QBD 127, Phillips v. Phillips 33
 (1871) 3 O'M & H 148, W. F. Spencer, John Blundell v. Charles Harrison 45
 (1870) 2 O' M & H Election Rep 77, Hackney Case 56
 (1869) LR 4 CP 145=38 LJPC 145, Beal v. Smith 33
 (1869) 1 O' M & H 218, Adams v. Hon. E. F. Leveson Gower 45
 (1869) 1 O' M & H 181, Taunton Case 50
 (1869) 1 O' M & H 251, Christie v. Grieve 45

In C A. No 895 of 1968

M/s R Jethamalani, N H Hingorani and Mrs K. Hingorani, Advocates, for Appellant.

In C A. No 896 of 1968

M/s C K. Daphtary and A K. Sen, Senior Advocates (Mr K. S Cooper and Mrs. K. Hingorani Advocates, with them), for Appellant, Mr A S R. Chari, Senior Advocate (M/s Porus A. Mehta, S B Naik, Kumar Mehta, R Nagaratnam and K. Rajendra Chaudhuri, Advocates, with him), for Respondent No. 1 (In both the appeals).

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J: In the last General Election to Parliament from the Bombay South Parliamentary Constituency eight candidates had offered themselves. The answering respondent Mr George Fernandez secured 1,47,841 votes as against his nearest rival Mr S K. Patil who secured 1,18,407 votes. The remaining candidates secured a few thousand votes between them. The result of the poll was declared on February 24, 1967 and Mr George Fernandez was returned. An election petition was filed by Mr. Samant N. Balakrishna, an elector in the constituency. It challenged the election of Mr Fernandez and was ostensibly in the interest of Mr. S K Patil. The election petition was keenly contested and Mr. S K. Patil gave his full support to the petition. The election petition failed and it was dismissed with an order for costs against the election petitioner and Mr. S K. Patil. Two appeals have now been filed against the judgment of the Bombay High Court, one by the election petitioner and the other by Mr. S K. Patil. They have been heard together and this judgment will dispose of both of them.

2. The petition was based on numerous grounds which were set out in paragraph 2 of the petition. These grounds were shown separately in sub-paragraph A to J. Sub-paragraph A to D dealt with the invalidity of the election for non-compliance with Section 62 of the Representation of the People Act and Articles 328 and 327 of the Constitution. These concerned the secrecy of ballot (A), registering of some voters in two constituencies (B), omission of qualified voters from electoral rolls (C) and impersonation by persons for dead or absent voters (D). These four grounds were given up in the High Court itself and we need not say

anything about them. Sub-paragraphs E to J contained allegations of corrupt practices. The petition was accompanied by four annexures Nos A to D which were extracts from newspapers on which the charge of corrupt practices was based. The grounds may now be noticed in detail.

3. Sub-paragraph E dealt with statements made at a meeting dated February 16, 1967 at Shivaji Park by Jagadguru Shankaracharya charging Mr. S K. Patil with complicity in arson of November 7, 1966, at New Delhi and attack on the residence of the Congress President with injuries caused to people. In these articles from the 'Maratha' and the 'Blitz' extracts of which were quoted and annexed as Annexure A, Mr. Patil was described as hypocrite, insincere and dishonest. Similar speeches by Mr. Madhu Limaye (another candidate of the S. S. P. by which party Mr Fernandez was sponsored), were relied upon. The statements of Jagadguru Shankaracharya and Mr Madhu Limaye were said to be "inspired by Mr. Fernandez" and "with his consent and for his benefit". It was said that they amounted to a corrupt practice under Sec. 123 (4) of the Representation of the People Act.

4. In Sub-paragraph F, a statement of Jagadguru Shankaracharya on cow slaughter was made the ground of attack. It was to the effect that Mr S K. Patil only pretended to support the anti-cow-slaughter movement but had done nothing in furtherance of it. It was contended that the cow was used as a religious symbol and the speeches offended against the Election Law as stated in Section 123 (3). These statements were also said to be inspired by Mr. Fernandez and were made with his consent and for his benefit.

5. Sub-paragraph G referred to speeches of Mr Fernandez and his workers with his knowledge and consent. In those speeches Mr. Fernandez is said to have described Mr. S. K. Patil as the enemy of Muslims and Christians who only professed to discourage slaughter of cows and he was charged with interfering with the articles of faith of the Muslims and Christians and seeking expulsion of Muslims to Pakistan. This was said to offend against Section 123 (3A) of the Representation of the People Act.

6. In sub-paragraph H it was alleged that the 'Maratha' published a false statement to the effect that Mr. S K. Patil had paid rupees 15 lacs to Mr. Jack

Sequeira to undo the efforts of Maharashtrians for incorporation of Goa in Maharashtra. The extract from the 'Maratha' of January 25, 1967, was annexed as Ex. B. The speech of Mr. H. R. Gokhale who published a similar statement, was also referred to. These were made the grounds of complaint under Section 123 (4) of the Representation of the People Act.

7. In Sub-paragraph I four issues of the 'Maratha' of the 5th and 31st January, 1967 and 5th and 8th of February, 1967 were exhibited as Ex. C. It was stated in the first two that the Shiv Sena supported the Maharashtra traitor Sadoba Patil and that the Shiv Sena was really Sadoba Sena. A cartoon showing Mr. S. K. Patil as Vishwamitra and the leader of Shiv Sena as Menka with the caption "Sadoba denies that he has no connection with Shiv Sena like Vishwamitra Menka episode", was the third. The last of these articles was headed "harassment from Gondas of Sadoba Patil Shiv Sena in the service of Sadhshiv (S. K. Patil)". These statements were said to be false and made by the 'Maratha' in favour of respondents other than respondent No. 2 (Mr. S. K. Patil) or at any rate on behalf of Mr. Fernandez. These were said to prejudice the minority communities and thus to offend Section 123 (4) of the Representation of the People Act. The statements were said to be made with the knowledge and consent of Mr. Fernandez and for his benefit.

8. In Sub-paragraph J three issues of 'Maratha' of the 24th, 28th and 31st December, 1966 were referred to. In the first it was stated that "Shri S. K. Patil will go to Sonapur in the ensuing election." Fernandez says in his Articles "Patil mortgaged India's Freedom with America by entering into P. L. 480 agreement and Mr. Patil had no devotion, love, respect for this country at all". In the second Mr. Patil was described as Nagibkhan of Maharashtra. The third was a cartoon in which Shankaracharya was depicted as saying "Cow is my mother. Do not kill her" and Patil S. K. as saying "Pig is my father". These extracts were annexed as Ex. D. Then followed a paragraph in which was said: "Similar false statements in relation to Respondent No. 2's character and conduct were published in several issues of Maratha Daily" from December 12, 1966 to February 21, 1967 and 33 issues were mentioned by date. These were also said to be Ex. D.

9. This was the original material on which the petition filed on April 7, 1967 was based. Mr. Fernandez filed his written statement on June 14, 1967 and Mr. S. K. Patil on 4-7-1967. Later five amendments were asked for. By the first amendment, which was orally asked and allowed, reference to the 33 articles was altered and they were said to be contained in Ex. E instead of Ex. D. Ex. E was then introduced and gave the list of 33 articles in the 'Maratha' and one article in the Blitz, and the extracts on which reliance was placed. On July 4, 1967 an application for amendment was made seeking to add two sub-paragraphs 2-K and 2-L. 2-K is not pressed now and need not be mentioned. By 2-L the petitioner asked for addition to the list of corrupt practices of a reference to an article dated November 5, 1966 in the Blitz. This article was written by Mr. Fernandez. On September 12, 1967, an application was made for seven additions to paragraph 2-J. Seven incidents were sought to be included. Of these four were ordered by the Court to be included in 2-J on September 15, 1967 as Sub-sub-paragraphs (i) to (iv) and three were rejected. In the first of the Sub-sub-paragraphs so included, a speech at a public meeting at Shivaji Park by Mr. Fernandez on January 31, 1967 was pleaded in which Mr. Fernandez is said to have made a statement that even God could not defeat the second respondent (Mr. S. K. Patil) because unlike the second respondent God was not dishonest. It was also alleged that Mr. S. K. Patil won elections by "tampering with the ballot boxes or substituting the same". These statements were said to be made by Mr. Fernandez deliberately and maliciously and that he believed them to be false or did not believe them to be true. The report of the speech was quoted from the 'Maratha' of February 1, 1967 and was included as part of Ex. E. In the second Sub-sub-paragraph a Press Conference at Bristol Grill Restaurant on February 9, 1967 addressed by Mr. Fernandez was referred to. At that Conference Mr. Fernandez charged Mr. S. K. Patil with "unfair and unethical electioneering practices" and as illustrations of his methods mentioned the release of 70 dangerous characters from jail on parole and the suspension of externment orders against some and the allowing of some other externed persons to return, were alleged. It was also said that these persons were being used by Mr. Patil in his campaign. Extracts from the issues of the 'Maratha' of the 10th and

11th February, 1967 were made part of Annexure E. In the third Sub-sub-paragraph a public meeting at Sabu Siddik Chawl, of February 10, 1967 was referred to. At that meeting, it was alleged, Mr Fernandez described Mr Patil as an "American Agent, Dada of Capitalists and Creator of Shiv Sena". All these statements were said to be false and to reflect upon personal character and conduct of Mr Patil and thus to be corrupt practices under Sec. 123 (4) of the Representation of the People Act. In the fourth paragraph a meeting of January 8, 1967 at Chowpati, presided over by Mr Fernandez was referred to. Mr Madhu Limaye was said to have addressed that meeting and referred to the incident of November 7, 1966. These statements were also said to be false and to materially affect the prospects of Mr Patil. In this Sub-sub-paragraph it was also alleged that Mr P K Atre, Editor and Proprietor of the 'Maratha', Jagadguru Shankaracharya and Mr Madhu Limaye were agents of Mr Fernandez and had made these statements in his interest and with his consent.

10. The petitioner also asked for addition of three other grounds of corrupt practices, which the Court did not allow to be included. Paragraph 2-L to which we have referred was an article by Mr Fernandez. It was captioned as a fight against "political thuggery" and included the following passage which was made the basis of the following charge:

"These men (including the 2nd Respondent) from the hard core of the coterie which control the destinies of the nation, even decide who should be the Prime Minister and who should not be, hounds out the few honest Congressmen from Public life, props up the Amranchand Pyarelal and Chamanlal and supports them in all their misdeeds and puts a premium on dishonest businessmen and industrialists."

This allegation was said to suggest dishonesty in Mr Patil. The other amendments which were disallowed referred to a speech at Dr. Vigas Street on February 27, 1967, a speech by Dr. Lohia at Chowpati on January 1, 1967 published in 'Andolan' of January 9, 1967 and a Press Conference by Mr. Madhu Limaye at Bristol Grill Restaurant on December 10, 1966.

11. Prior to the application for amendment certain events had happened to which it is necessary to refer. On April 7, 1967 the office objected that the ori-

ginals of Exs A, B, C and D had not been filed. The remark of the office is as follows—

"Exhibits A, B, C, D are mere repetitions of what is mentioned in the body of the petition. Is it not necessary to annex the original copies of the said newspaper?"

12. Mr Kanuga, one of the Advocates for the petitioner replied to the objection as follows—

"We undertake to file the original issues and official translations later as the same is (sic) with the Chief Translator, High Court, Bombay before the service of Writ of Summons."

13. Till July 3, 1967 no effort seems to have been made to file the originals. On that the 'Rozanama' read as follows—

"Mr Jethmalani applies for leave to amend the petition by pointing out that 'D' in last sentence of paragraph 2 on page 12 of the petition be corrected and read as 'E' and to annex reports in original P C Leave to amend granted."

14. The issues were settled on the same day and particulars were asked for. On July 7, 1967 the 'Rozanama' read as follows—

"Mr Gurushani tenders the original of the Exhibits A (Coll) to Exhibit E (Coll) mentioned in para 2-J of page 11 of the petition."

A chamber summons was taken out because the particulars were not supplied and on August 4, 1967 the particulars were furnished. It was then on September 12, 1967 that the application for seven amendments was made, four of which were allowed and three were rejected. This was by an order dated September 15, 1967.

15. Before dealing with this appeal it is necessary to clear the question of the amendments and whether they were properly allowed. This question consists of two parts, the first is one of fact as to what was exhibited with the petition as materials on which the petition was based. The case of the petitioner before us is that in support of 2-J, copies of relevant newspapers were filed with the petition. This is denied on behalf of the answering respondent.

16. Mr. Daphtary's contention is that if the originals of the 'Maratha' had not been filed an objection would have been taken in the Court and none was taken. Even witnesses were examined and cross-examined with reference to the statements and the originals must have been in Court. This, in our opinion, is not decisive. The first witness to be examined was the peti-

tioner himself. Evidence commenced on August 25, 1967. The petitioner proved the copies of the newspapers and they were marked as exhibits. By that date the copies of the 'Maratha' had already been filed and the petitioner in his evidence referred to all of them. The cross-examination, therefore, also referred to these documents. Nothing much turns upon the want of objection because (as is well known) objection is not taken to some fatal defect in the case of the other side since the party, which can take the objection, wants to keep it in reserve. It is true that if the objection had been taken earlier and had been decided the petitioner would have had no case to prove on the new allegations and might not have led some evidence. But we cannot hold from this that any prejudice was caused to him. Afterall it was his responsibility to complete his allegations in the petition by inclusion of the copies of the 'Maratha' and the other side cannot be held to have waived its objection since that objection was in fact raised and has been answered in the High Court. The Roznamas clearly show that the copies of the 'Maratha' were not filed with the election petition but much later and in fact beyond the period of limitation. Mr. Daph-tary characterises the Rozanamas as inaccurate but the internal evidence in the case shows that the Rozanamas were correctly recorded.

17. The petition quoted some of the offending statements in the newspapers and exhibited them as Exs. A to D. In the petition these 10 extracts are to be found in Sub-paragraphs 2-E, H, I and J. The change of Exs. D to E and the filing of E show that the extracts which were with the translator were referable to those extracts already mentioned in the petition and not those mentioned in the last paragraph of 2-J. It will be noticed that that paragraph refers to 33 numbers of the 'Maratha'. Extracts from those were furnished only on July 3, 1967 when Ex. E was separately filed and according to the Rozanama, the originals were filed on July 7, 1967. Mr. Kanuga could not have referred to all the 33 issues of the 'Maratha'. Only 10 extracts from the 'Maratha' were in Exs. A to D and of these eight are included in the list of 33 numbers of the 'Maratha' in the last paragraph of 2-J. If they were already filed, Mr. Kanuga would have said so and not promised to file them later. He mentions in his note that they were with the translation department and would be filed later. If all the

33 issues of the 'Maratha' were already filed there would be no occasion for the office objection and the reply of Mr. Kanuga could apply to two numbers only. They were the issues of 25th January and 5th February, 1967. The office noting shows that not a single original was filed with the petition. This appears to us to be correct. We are satisfied that 10 issues of the 'Maratha' from which extracts were included in the petition in Exs. A to D were the only numbers which were before the translator. Mr. Kanuga's remark applies to these 10 issues. The other issues which were mentioned in the last paragraph of 2-J numbering 33 less 8 were neither in the translator's office nor exhibited in the case. Hence the amendment of the second reference from D to E and the request to file original issues.

18. It seems that when the petition was filed a list was hurriedly made of all the issues of the 'Maratha' to which reference was likely and that list was included in the last portion of 2-J. But no attempt was made either to specify the offending portions of the newspapers or to file the extracts or the original issues. All this was done after the period of limitation. No incorporation of the contents of the articles by reference can be allowed because if a newspaper is not exhibited and only the date is mentioned, it is necessary to point out the exact portion of the offending newspaper to which the petition refers. This was not done. We have to reach this conclusion first because once we hold that the issues of the 'Maratha' or the extracts referred to in the petition were not filed, the plea as to what was the corrupt practice is limited to what was said in the body of the petition in paragraph 2-J and whether it could be amended after the period of limitation was over. The attempt today is to tag on the new pleas to the old pleas and in a sense to make them grow out of the old pleas. Whether such an amendment is allowable under the Election Law is therefore necessary to decide.

19. Mr. Daph-tary arguing for the appellant contends that he was entitled to the amendment since this was no more than an amplification of the ground of corrupt practice as defined in S. 123 (4) and that the citation of instances or giving of additional particulars of which sufficient notice already existed in 2-J as it originally stood, is permissible. According to him, under Section 100 the petition has to show grounds and under Sec. 83

there should be a concise statement of material facts in support of the ground and full particulars of any corrupt practice alleged. He submits that under Section 83 (5) particulars can be amended and amplified, new instances can be cited and it is an essence of the trial of an election petition that corrupt practices should be thoroughly investigated. He refers us to a large body of case law in support of his contention.

20 On the other hand, Mr Chari for Mr Fernandez contends that there was no reference to the speeches by Mr. Fernandez in the petition. The cause of action was in relation to the publication in the 'Maratha' and not in relation to any statement of Mr Fernandez himself and that the amendment amounts to making out a new petition after the period of limitation.

21. To decide between these rival contentions it is necessary to analyse the petition first. Paragraph 2-J as it originally stood read as follows—

"The Petitioner says that false statements in relation to character and conduct of the Respondent No. 2 were made by the 1st Respondent and at the instance and connivance of the 1st Respondent, 'Maratha' published the following articles, 'as set out hereinafter'. The Petitioner says that the said allegations are false and have been made with a view to impair and affect the prospects of Respondent No 2's election to Lok Sabha. Some of the extracts are etc."

(Emphasis (here into ' ') added).

Here three issues of the 'Maratha' of 24th, 28th and 31st December, 1966 were referred to. Of the extracts, the last two make no reference to Mr. Fernandez. The first spoke thus

"Maratha dated 24th December, 1966 Pages 1 and 4 "Shri S K. Patil will go to Sonapur in the ensuing election. Fernandez says in his Articles Patil mortgaged India's Freedom with America by entering into P.L. 480 agreement and Mr Patil had no devotion, love, respect for this country at all". Then followed this paragraph—

"Similar false statements in relation to Respondent No 2's character and conduct were published in 'Maratha Daily', dated 12th December, 1966, 17th December, 23rd December, 24th December, 28th, 29th and 31st December issues, January issues dated 4th, 5th, 7th, 10th, 18th, 20th, 21st, 28th, 30th and 31st, February issues, 1st, 2nd, 3rd, 6th, 7th, 8th, 10th,

11th, 14th, 15th, 16th, 17th, 18th, 19th, 20th, 21st . . . These reports in original are filed and true translations are marked Ex D to the petition."

We have already held that the newspapers mentioned in the last paragraph were not filed with the petition but on April 7, 1967 after the period of limitation was over. The allegations thus were that Mr. Fernandez made the false statements and they were published in the 'Maratha' at his instance and with his connivance. There is no mention of any speech at Shivaji Park, or at Sabu Siddik Chowk or at Dr Vigas Street or the press interview at Bristol Grill Restaurant. All these statements which are now referred to were said to be made by Mr Fernandez himself. By the amendment a charge of corrupt practice was sought to be made for the first time in this form. In the original petition (Sub-paragraph 2-J) there was no averment that Mr. Fernandez believed these statements to be false or that he did not believe them to be true and this was also sought to be introduced by an amendment. It may, however, be mentioned that in an affidavit which accompanied the election petition this averment was expressly made and the appellants desire us to read the affidavit as supplementing the petition. By another application for amendment the petitioner sought to add a paragraph that the 'Maratha', Jagadguru Shankaracharya and Mr. Madhu Limaye were agents of Mr. Fernandez within the Election Law. By yet another application reference to an article in the 'Blitz' was sought to be included as Sub-paragraph 2-L.

22 At the conclusion of the arguments on this part of the case we announced our decision that the amendment relating to the speeches of Mr. Fernandez at Shivaji Park, Sabu Siddik Chowk and Dr. Vigas Street and his Press Conferences at Bristol Grill Restaurant and the article in the 'Blitz' ought not to have been allowed but that the amendment relating to the agency of the 'Maratha', etc. and that seeking to incorporate the averment about the lack of belief of Mr. Fernandez were proper. We reserved our reasons which we now proceed to give.

23 The subject of the amendment of an election petition has been discussed from different angles in several cases of the High Courts and this Court. Each case, however, was decided on its own facts, that is to say, the kind of election petition that was filed, the kind of amendment that was sought, the stage at which

the application for amendment was made and the state of the law at the time and so on. These cases do furnish some guidance but it is not to be thought that a particular case is intended to cover all situations. It is always advisable to look at the statute first to see alike what it authorises and what it prohibits.

24. Section 81* of the Representation of the People Act, 1951 enables a petitioner to call in question any election on one or more of the grounds specified in Section 100 (1) and Section 101 of the Act. The petition must be made within 45 days from the date of election. Sections 100 and 101 enumerate the kind of charges which, if established, lead to the avoidance of the election of a returned candidate and the return of some other candidate. The first sub-section of Section 100** lays down the grounds for

*"81. Presentation of petitions.

(1) An election petition calling in question any election may be presented on one or more of the grounds specified in sub-section (1) of Section 100 and Section 101 to the High Court by any candidate at such election or any elector within forty-five days from, but not earlier than, the date of election of the returned candidate, or if there are more than one returned candidates at the election and the dates of their election are different, the later of those two dates.

Explanation. — In this Sub-section, "elector" means a person who was entitled to vote at the election to which the election petition relates, whether he has voted at such election or not.

(2) * * * * *

(3) Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

** "100. Grounds for declaring election to be void.

(1) Subject to the provisions of sub-section (2) if the High Court is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other per-

son with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

(2) If in the opinion of the High Court, a returned candidate has been guilty by an agent, other than his election agent, of any corrupt practice but the High Court is satisfied—

(a) that no such corrupt practice was committed at the election by the candidate or his election agent, and every such corrupt practice was committed contrary to the orders, and without consent, of the candidate or his election agent;

* * * * *

(c) that the candidate and his election agent took all reasonable means for preventing the commission of corrupt practices at the election; and

(d) that in all other respects the election was free from any corrupt practice on the part of the candidate or any of his agents.

then the High Court may decide that the election of the returned candidate is not void."

***"101. Grounds for which a candidate other than the returned candidate may be declared to have been elected.

(1) Subject to the provisions of sub-section (2) if the High Court is of opinion—

(a) that on the date of his election a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or this Act or the Government of Union Territories Act, 1963; or

(b) that any corrupt practice has been committed by a returned candidate or his election agent or by any other per-

son with the consent of a returned candidate or his election agent; or

(c) that any nomination has been improperly rejected; or

(d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected—

(i) by the improper acceptance of any nomination, or

(ii) by any corrupt practice committed in the interests of the returned candidate by an agent other than his election agent, or

(iii) by the improper reception, refusal or rejection of any vote or the reception of any vote which is void, or

(iv) by any non-compliance with the provisions of the Constitution or of this Act or of any rules or orders made under this Act,

the High Court shall declare the election of the returned candidate to be void.

***"101. Grounds for which a candidate other than the returned candidate may be declared to have been elected.

grounds on which a candidate other than the returned candidate may be declared to have been elected. Section 101 actually does not add to the grounds in Section 100 and its mention in Section 81 seems somewhat inappropriate. Sections 100 and 101 deal with the substantive law on the subject of elections. These two sections circumscribe the conditions which must be established before an election can be declared void or another candidate declared elected. The heads of substantive rights in Section 100(1) are laid down in two separate parts: the first dealing with situations in which the election must be declared void on proof of certain facts, and the second in which the election can only be declared void if the result of the election in so far as it concerns the returned candidate, can be held to be materially affected on proof of some other facts. Without attempting critically to sort out the two classes we may now see what the conditions are. In the first part they are that the candidate lacked the necessary qualification or had incurred disqualification, that a corrupt practice was committed by the returned candidate, his election agent or any other person with the consent of a returned candidate or his election agent or that any nomination paper was improperly rejected. These are grounds on proof of which by evidence, the election can be set aside without any further evidence. The second part is conditioned that the result of the election, in so far as it concerns a returned candidate, was materially affected by the improper acceptance of a nomination or by a corrupt practice committed in his interest by an agent other

If any person who has lodged a petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the High Court is of opinion—

- (a) that in fact the petitioner or such other candidate received a majority of the valid votes, or
- (b) that but for the votes obtained by the returned candidate by corrupt practices the petitioner or such other candidate would have obtained a majority of the valid votes,

the High Court shall after declaring the election of the returned candidate to be void declare the petitioner or such other candidate, as the case may be, to have been duly elected."

than an election agent or by the improper reception, refusal or rejection of votes or by any non-compliance with the provisions of the Constitution or of the Representation of the People Act or rules or orders made under it. This condition has to be established by some evidence direct or circumstantial. It is, therefore, clear that the substantive rights to make an election petition are defined in these sections and the exercise of the right to petition is limited to the grounds specifically mentioned.

25 Pausing here, we may view a little more closely the provisions bearing upon corrupt practices in Sec 100. There are many kinds of corrupt practices. They are defined later in Section 123 of the Act and we shall come to them later. But the corrupt practices are viewed separately according as to who commits them. The first class consists of corrupt practices committed by the candidate or his election agent or any other person with the consent of the candidate or his election agent. These, if established, avoid the election without any further condition being fulfilled. Then there is the corrupt practice committed by an agent other than an election agent. Here an additional fact has to be proved that the result of the election was materially affected. We may attempt to put the same matter in easily understandable language. The petitioner may prove a corrupt practice by the candidate himself or his election agent or someone with the consent of the candidate or his election agent, in which case he need not establish what the result of the election would have been without the corrupt practice. The expression "any other person" in this part will include an agent other than an election agent. This is clear from a special provision later in the section about an agent other than an election agent. The law then is this. If the petitioner does not prove a corrupt practice by the candidate or his election agent or another person with the consent of the returned candidate or his election agent but relies on a corrupt practice committed by an agent other than an election agent, he must additionally prove how the corrupt practice affected the result of the poll. Unless he proves the consent to the commission of the corrupt practice on the part of the candidate or his election agent he must face this additional burden. The definition of agent in this context is to be taken from Section 123 (Explanation).

where it is provided that an agent "includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate". In this explanation the mention of "an election agent" would appear to be unnecessary because an election agent is the alter ego of the candidate in the scheme of the Act and his acts are the acts of the candidate, consent or no consent on the part of the candidate.

26. Having now worked out the substantive rights to the making of the petition, we may now proceed to see what the corrupt practices are. Since we are concerned only with one such corrupt practice, we need not refer to all of them. For the purpose of these appeals it is sufficient if we refer to the fourth sub-section of Section 123. It reads:

"123. The following shall be deemed to be corrupt practice for the purposes of the Act:—

* * * * *

(4) The publication by a candidate or his agent or by any other person, with the consent of a candidate or his election agent, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election.

* * * * *

This corrupt practice may be committed by:

(a) the candidate

(b) his agent, that is to say—

(i) an election agent

(ii) a polling agent

(iii) any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(c) by any other person with the consent of the candidate or his election agent.

We are concerned in this appeal with (a) and (b) (iii) mentioned in our analysis. In the original petition the allegations were made on the basis of corrupt practices committed by a person alleged to have acted as an agent with Mr. Fernandez's consent. In the amendment application

the allegation is that the candidate himself committed the corrupt practice under this sub-section.

27. As we pointed out earlier the difference between the original petition and the amendments will lie in the degree of proof necessary to avoid the election. If the corrupt practice is charged against an agent other than the election agent, a further burden must be discharged, namely, that the result of the election was materially affected. If, however, the corrupt practice is charged against the candidate personally (there is no election agent involved here), this further proof is not required. Another difference arises in this way. In Section 100 (1) (b) the word 'agent' is not to be found. Therefore an agent other than an election agent will fall to be governed by the expression 'any other person'. To get the benefit of not having to prove the effect of the corrupt practice upon the election the consent of the candidate or his election agent to the alleged practice will have to be established.

28. Again for the establishment of the corrupt practice under Section 123 (4), from whatever quarter it may proceed, the election petitioner must establish —

(a) publication of a statement of fact, and

(b) the statement is false or the person making it believes it to be false or does not believe it to be true, and

(c) that the statement refers to the personal character and conduct of the candidate, and

(d) is reasonably calculated to prejudice the candidate's prospects.

It appears, therefore, that it is a question of different burdens of proof as to whether the offending statement was made by the candidate himself or by an agent other than an election agent.

29. Having dealt with the substantive law on the subject of election petitions we may now turn to the procedural provisions in the Representation of the People Act. Here we have to consider Ss. 81, 83 and 86 of the Act. The first provides the procedure for the presentation of election petitions. The proviso to sub-section alone is material here. It provides that an election petition may be presented on one or more of the grounds specified in sub-sec. (1) of S. 100 and S. 101. That as we have shown above creates the sub-

stantive right. Section 83* then provides that the election petition must contain a concise statement of the material facts on which the petitioner relies and further that he must also set forth full particulars of any corrupt practice that the petitioner alleges including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice. The section is mandatory and requires first a concise statement of material facts and then requires the fullest possible particulars. What is the difference between material facts and particulars? The word 'material' shows that the facts necessary to formulate a complete cause of action must be stated. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of particulars is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. There may be some overlapping between material facts and particulars but the two are quite distinct. Thus the material facts will mention that a statement of fact (which must be set out) was made and it must be alleged that it refers to the character and conduct of the candidate that it is false or which the returned candidate believes to be false or does not believe to

*Section 83 (1) An election petition—

- (a) shall contain a concise statement of the material facts on which the petitioner relies,
- (b) shall set forth full particulars of any corrupt practice that the petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of the commission of each such practice, and
- (c) shall be signed by the petitioner and verified in the manner laid down in the Code of Civil Procedure, 1908 for the verification of pleadings.

[Provided that where the petitioner alleges any corrupt practice, the petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof.]

- (2) Any schedule or annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition.]

be true and that it is calculated to prejudice the chances of the petitioner. In the particulars the name of the person making the statement, with the date, time and place will be mentioned. The material facts thus will show the ground of corrupt practice and the complete cause of action and the particulars will give the necessary information to present a full picture of the cause of action. In stating the material facts it will not do merely to quote the words of the section because then the efficacy of the words 'material facts' will be lost. The fact which constitutes the corrupt practice must be stated and the fact must be correlated to one of the heads of corrupt practice. Just as a plaint without disclosing a proper cause of action cannot be said to be a good plaint, so also an election petition without the material facts relating to a corrupt practice is no election petition at all. A petition which merely cites the sections cannot be said to disclose a cause of action where the allegation is the making of a false statement. That statement must appear and the particulars must be full as to the person making the statement and the necessary information. Formerly the petition used to be in two parts. The material facts had to be included in the petition and the particulars in a schedule. It is inconceivable that a petition could be filed without the material facts and the schedule by merely citing the corrupt practice from the statute. Indeed the penalty of dismissal summarily was enjoined for petitions which did not comply with the requirement. Today the particulars need not be separately included in a schedule but the distinction remains. The entire and complete cause of action must be in the petition in the shape of material facts, the particulars being the further information to complete the picture. This distinction is brought out by the provisions of Section 86 although the penalty of dismissal is taken away. Subsection (5) of that section provides:

(5) "The High Court may, upon such terms as to costs and otherwise as it may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition, but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition."

The power of amendment is given in respect of particulars but there is a prohibition against an amendment "which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition". One alleges the corrupt practice in the material facts and they must show a complete cause of action. If a petitioner has omitted to allege a corrupt practice, he cannot be permitted to give particulars of the corrupt practice. The argument that the latter part of the fifth sub-section is directory only cannot stand in view of the contrast in the language of the two parts. The first part is enabling and the second part creates a positive bar. Therefore, if a corrupt practice is not alleged, the particulars cannot be supplied. There is however a difference of approach between the several corrupt practices. If for example the charge is bribery of voters and the particulars give a few instances, other instances can be added; if the charge is use of vehicles for free carriage of voters, the particulars of the cars employed may be amplified. But if the charge is that an agent did something, it cannot be amplified by giving particulars of acts on the part of the candidate or vice versa. In the scheme of election law they are separate corrupt practices which cannot be said to grow out of the material facts related to another person. Publication of false statements by an agent is one cause of action, publication of false statements by the candidate is quite a different cause of action. Such a cause of action must be alleged in the material facts before particulars may be given. One cannot under the cover of particulars of one corrupt practice give particulars of a new corrupt practice. They constitute different causes of action.

30. Since a single corrupt practice committed by the candidate, by his election agent or by another person with the consent of the candidate or his election agent is fatal to the election, the case must be specifically pleaded and strictly proved. If it has not been pleaded as part of the material facts, particulars of such corrupt practice cannot be supplied later on. The bar of the latter part of the fifth sub-section to Section 86 then operates. In the petition as originally filed the agency of Jagadguru Shankaracharya, Mr. Madhu Limaye and the Maratha (or Mr. Atrey) was the basis of the charge and the candidate Mr. Fernandez was left out. No allegation was personally made

against him. The only allegations against him personally were contained in paragraph 2-G. There it was said that Mr. Fernandez had made certain speeches to the effect that Mr. Patil was against the Muslims and Christians. No evidence was led and they were not even referred to at the hearing before us. The next reference in 2-J is to statements of Mr. Fernandez and published by the Maratha. These were specified and only three such statements were included. Since the gist of the election offence is the publication of false statements, the charge is brought home to the candidate through the publication by the Maratha. It is to be remembered that even the allegation that in doing so the Maratha acted as the agent of Mr. Fernandez, itself came by way of an amendment which we allowed as it completed the cause of action and is permissible. The bar of Section 86 (5) (latter part) does not apply to it and under Order VI, Rule 17 of the Code of Civil Procedure which is applicable as far as may be, such an amendment can be made. Similarly the allegations that such statements were false or were believed to be false or were not believed to be true by the Maratha (i.e., Mr. Atrey) and that they were calculated to prejudice Mr. Patil's chances and did so, were allowed by us to be added as completing the cause of action relating to a corrupt practice already alleged. But we declined to allow to stand the amendments which had the effect of introducing new corrupt practices relating to the candidate himself which had not been earlier pleaded. This kind of amendment is prohibited under the law when the amendment is sought after the period of limitation.

31. The learned Judge in the High Court did not keep the distinction between material facts and particulars in mind although the language of the statute is quite clear and makes a clear-cut division between the two. He seems to have been persuaded to such a course by a reading of the rulings of this Court and the High Courts. These same rulings were presented before us and we may now say a few words about them.

32. The learned Judge in the High Court has relied upon *Harish Chandra Bajpai v. Triloki Singh*, 1957 SCR 370= (AIR 1957 SC 444) and deduced the proposition that where the petition sets out the corrupt practice as a ground, instances of the corrupt practices may be ad-

ded subsequently and even after the period of limitation of filing the petition is over. Following that case the learned Judge has allowed the amendments as corrupt practice under Section 123 (4) was alleged in the original petition. We shall come to that case last of all. It seems to have played a great part in moulding opinion in India on the subject of amendment of pleadings in the Election Law.

33. To begin with it must be realised that as is stated in *Jagan Nath v Jaswant Singh*, 1954 SCR 892 (895)=(AIR 1954 SC 210 at p 212) the statutory requirements of the law of Election in India must be strictly observed. It is pointed out in that case that an election contest is not an action at law or a suit in equity but a purely statutory proceeding unknown to common law and that the Court possesses no common law power. Although the power of amendment given in the Code of Civil Procedure can be invoked because Section 87 makes the procedure applicable, as nearly as may be to the trial of election petitions, the Representation of the People Act itself enacts some rules which override the Civil Procedure Code. General power of amendment or the power derived from the Code of Civil Procedure must be taken to be overborne in so far as the election law provides. In a large number of cases it has been laid down by the High Courts in India that the material facts, must make out a charge and it is only then that an amendment to amplify the charge can be allowed or new instances of commission of corrupt practice charged can be given. If no charge is made out in the petition at all the addition of particulars cannot be allowed to include indirectly a new charge. This was laid down in *Din Dayal v. Beni Prasad*, (1958) 15 Ele LR 131 (All), *Balwan Singh v. Election Tribunal, Kanpur*, (1958) 15 Ele LR 199 (All) by the Allahabad High Court, in *T. L. Sasivarna Thevar v V. Arunagiri*, (1958) 17 Ele LR 313 (Mad) by the Madras High Court and in *Hari Vishnu Kamath v. Election Tribunal, Jaipur*, (1958) 14 Ele LR 147 (MP) by the Madhya Pradesh High Court. All these cases rely upon *Harish Chandra Bappa's case*, 1957 SCR 370=(AIR 1957 SC 444) to which we have referred. *Harish Chandra Bappa's case*, 1957 SCR 370=(AIR 1957 SC 444) was based on an English case *Beal v Smith*, (1869) LR 4 CP 115. In that case it was held that under the Parliamentary Election Act of 1868 it was enough to

allege generally in the petition that "the respondent by himself and other persons on his behalf was guilty of bribery, treating and undue influence before, during and after the election". A summons was taken out calling upon the petitioner to deliver better particulars of "other persons". Willes, J., after consulting Martin, B and Blackburn, J., ordered better particulars. It was contended that the petition should be taken of the files since the particulars were lacking. Section 20 of that Act only provided that an election petition should be in such form and should state such matters as may be prescribed. Rule 2 prescribed that the petition should state (i) the right of the petitioner to petition, and (ii) should state the holding and result of the election and then should briefly state such facts and grounds relied on to sustain the prayer. Rule 5 prescribed the form which required facts to be stated. *Bovill, C J*, said that the form of the petition was proper and it was quite useless to state anything further. But in *Bruce v. Odhams Press Ltd*, 1936-1 KB 697 the Court of Appeal distinguished 'material facts' from 'particulars' as they occurred in Order XIX of the Rules of the Supreme Court of England. The words there were material facts and particulars and the distinction made by Scott, L J, bears out the distinction we have made between 'material facts' and 'particulars' as used in Sec 83 of our statute. The same view was also expressed in *Phillips v. Phillips*, (1878) 4 QB 127. The observations of Brett, L J, in that case also bear out the distinction which we have made.

34. It appears that this distinction was not brought to the notice of this Court in *Harish Chandra Bappa's case*. The rules on the subject of pleadings in the English statute considered in *Beal's case* were different. We have in our statute an insistence on a concise statement of material facts and the particulars of corrupt practice alleged. These expressions we have explained. However, it is not necessary to go into this question because even on the law as stated in *Harish Chandra Bappa's case*, 1957 SCR 370=(AIR 1957 SC 444) the amendment allowed in this case cannot be upheld. We shall now notice *Harish Chandra Bappa's case*, 1957 SCR 370=(AIR 1957 SC 444) a little more fully.

35. In that case the material allegation was that the appellants "could in the furtherance of their election enlist the

support of certain government servants" and that the appellant No. 1 had employed two persons in excess of the prescribed number for his election purposes. No list of corrupt practices was attached. Thereafter names were sought to be added. The amendment was allowed by the Tribunal after the period of limitation and the addition was treated as mere particulars. It was held by this Court that an election petition must specify "grounds or charges" and if that was done then the particulars of the grounds or charges could be amended and new instances given but no new ground or charge could be added after the period of limitation. The reason given was that the amendment "introducing a new charge" altered the character of the petition. Venkataraman Iyyar, J., emphasised over and over again that new instances could be given provided they related to a 'charge' contained in the petition. The result of the discussion in the case was summarised by the learned Judge at page 392 (of SCR)=(at p. 455 of AIR) as follows:—

"(1) Under Section 83 (3) the Tribunal has power to allow particulars in respect of illegal or corrupt practices to be amended, provided the petition itself specifies the grounds or charges, and this power extends to permitting new instances to be given.

(2) The Tribunal has power under Order VI, Rule 17 to order amendment of a petition, but that power cannot be exercised so as to permit new grounds or charges to be raised or to so alter its character as to make it in substance a new petition, if a fresh petition on those allegations will then be barred."

What is meant by 'ground or charge' was not stated. By "ground" may be meant the kind of corrupt practice which the petitioner alleges but the word "charge" means inclusion of some material facts to make out the ground. Applying the same test (although without stating it) the learned Judge pointed out that the charge made in the petition was that the appellants 'could' in furtherance of their election enlist the support of certain government servants and it meant only an ability to enlist support but the 'charge' which was sought to be levelled against the candidate later was that he had in fact enlisted the said support. The learned Judge observed at page 393 (of SCR)=(at p. 456 of AIR) as follows:—

"the charge which the respondent sought to level against the appellants was

that they moved in public so closely with high dignitaries as to create in the minds of the voters the impression that they were favoured by them. We are unable to read into the allegations in para 7 (c) as originally framed any clear and categorical statement of a charge under Sec. 123 (8), or indeed under any of the provisions of the Election law."

The allegation in the statement was described as worthless and further it was observed at page 395 (of SCR)=(at p. 456 of AIR) as follows:—

"But even if we are to read "could" in para 7 (c) as meaning "did", it is difficult to extract out of it a charge under Section 123 (8). The allegation is not clear whether the Government servants were asked by the appellants to support their candidature, or whether they were asked to assist them in furtherance of their election prospects, and there is no allegation at all that the Government servants did, in fact, assist the appellants in the election. On these allegations, it is difficult to hold that the petition in fact raised a charge under Section 123 (8). It is a long jump from the petition as originally laid to the present amendment, wherein for the first time it is asserted that certain Mukhias — no Mukhias are mentioned in the petition — assisted the appellants in furtherance of their election prospects, and that thereby the corrupt practice mentioned in Section 123 (8) had been committed. The new matters introduced by the amendment so radically alter the character of the petition as originally framed as to make it practically a new petition, and it was not within the power of the Tribunal to allow an amendment of that kind."

It would appear from this that to make out a complete charge the facts necessary must be included in relation to a 'ground' as stated in the Act. Merely repeating the words of the statute is not sufficient. The petitioner must specify the ground i.e., to say the nature of the corrupt practice and the facts necessary to make out a charge. Although it has been said that the charge of corrupt practice is in the nature of quasi criminal charge, the trial of an election petition follows the procedure for the trial of a civil suit. The charge which is included in the petition must, therefore, specify the material facts of which the truth must be established. This is how the case was understood in numerous other cases, some of which we have already referred. In

particular see *J Devaiah v Nagappa*, AIR 1965 Mys 102 and *Babulal Sharma v Brijnaram Brajesh*, AIR 1958 Madh Pra 175 (FB).

36. Three other cases of this Court were also cited. In *Chandi Prasad Chokhani v. State of Bihar*, 1962-2 SCR 276 (289)=(AIR 1961 SC 1708) it was held that the powers of amendment were extensive but they were controlled by the law laid down in the Representation of the People Act. It was again emphasised that a new ground or charge could not be made the ground of attack as that made a new petition. In *Bhum Sen v. Gopal*, (1961) 22 Ele LR 288 (Mad) the scope of *Harish Chandra Bajpai's* case, 1957 SCR 370=(AIR 1957 SC 444) was considered and its narrow application was pointed out. Indeed in that case the observations in *Harish Chandra Bajpai's* case, 1957 SCR 370=(AIR 1957 SC 444) were not followed to the uttermost limit. In *Sheopat Singh v. Ram Pratap*, 1965-1 SCR 175=(AIR 1965 SC 677) the only allegation was that the appellant (*Hanram*) got published through him and others a statement but there was no allegation that *Hanram* believed the statement to be false or did not believe it to be true. It was held that in the absence of such averment it could not be held that there was an allegation of corrupt practice against *Hanram*. The publication with guilty knowledge was equated to a kind of mens rea and this was considered a necessary ingredient to be alleged in the petition.

37. From our examination of all the cases that were cited before us we are satisfied that an election petition must set out a ground or charge. In other words, the kind of corrupt practice which was perpetrated together with material facts on which a charge can be made out must be stated. It is obvious that merely repeating the words of the statute does not amount to a proper statement of facts and the section requires that material facts of corrupt practices must be stated. If the material facts of the corrupt practice are stated more or better particulars of the charge may be given later, but where the material facts themselves are missing it is impossible to think that the charge has been made or can be later amplified. This is tantamount to the making of a fresh petition.

38. Reverting therefore to our own case we find that the allegation in paragraph 2-J was that Mr. Fernandez made

some statements and the 'Maratha' published them. Extracts from the 'Maratha' were filed as Exhibits. Since publication of a false statement is the gist of an election offence the charge was against the 'Maratha'. If it was intended that Mr. Fernandez should be held responsible for what he said then the allegation should have been what statement Mr. Fernandez made and how it offended the election law. In 2-J itself only three statements were specified and two of them had nothing to do with Mr. Fernandez and the third was merely a news item which the 'Maratha' had published. There was no reference to any statement by Mr. Fernandez himself throughout the petition as it was originally filed. In fact there was no charge against Mr. Fernandez which could have brought the case within Section 101 (b) (Section 100 (1) (b)?) of the Act. The attempt was only to make out the case under Section 101 (d) (Section 100 (1) (d)?) against the 'Maratha' (or Mr. Atrey) pleading Mr. Atrey as agent of Mr. Fernandez. That too was pleaded in the amendments.

39. The result is that the case gets confined to that of a candidate responsible for the acts of his agent. In the argument before us Mr. Chari for Mr. Fernandez conceded the position that Mr. Atrey could be treated as the agent of Mr. Fernandez. We are therefore relieved of the trouble of determining whether Mr. Atrey could be held to be an agent or not. The Trial Judge was also satisfied that Mr. Atrey could be held to have acted as the agent of Mr. Fernandez. The case as originally pleaded fell within Section 101 (d) (Section 100 (1) (d)?) with the additional burden. Although Mr. Daphthary was content to prove that the consent of Mr. Fernandez was immaterial as the corrupt practice of his agent was equally fatal to the election and attempted to prove his case under Section 100 (1) (d) of the Act, Mr. Jethamalani who took over the argument from him contended that the case fell to be governed by Section 101 (b) (Section 100 (1) (b)?) i.e., to say of any person who did the act with the consent of Mr. Fernandez. It is therefore necessary to pause here to decide whether Mr. Atrey had the consent of Mr. Fernandez to the publications in his newspaper.

40. The difference between Mr. Daphthary's argument and that of Mr. Jethamalani lies in this. In the latter the consent of the candidate must be proved to each corrupt practice alleged, in the former

there is only need to prove that a person can be held to have acted as an agent with the consent of the candidate. An agent in this connection is not one who is an intermeddler but one acting with the consent, express or implied, of the candidate. According to Mr. Jethamalani when an agent works regularly for a candidate the consent to all his acts must be presumed and he contends that the Court was wrong in requiring proof of prior consent to each publication. On the other hand, Mr. Chari's case is that when Mr. Atrey acted as an agent and when he did not act as an agent, is a question to be considered in respect of each publication in the 'Maratha'. According to him it is not sufficient merely to say that Mr. Atrey was an agent because Mr. Atrey was also editor of the newspaper and in running his newspaper his activities were his own and not on behalf of Mr. Fernandez. Mr. Jethamalani relies strongly upon the case of Rama Krishna, (C. A. No. 1949 of 1967 decided on April 23, 1968 (SC) and Inder Lal Yugal Kishore v. Lal Singh, AIR 1961 Raj 122). Rama Krishna's case, (C. A. No. 1949 of 1967, D/- 23-4-1968 (SC) was decided on its special facts. There the agent was one who had been employed regularly by Rama Krishna not only in the last election but also in two previous elections. Rama Krishna stated that the arrangements for his election were completely left in that agent's hands. The agent had got printed some posters which had defamed the candidate and these posters were exposed on the walls. Rama Krishna admitted that he had seen these posters and also that he had paid for the posters when the bill was presented to him. In fact he included the amount in his return of election expenses. It was from these combined facts that the consent of Rama Krishna to the corrupt practice of making false and defamatory statements was held proved. The case therefore is not one in which the person while acting in a different capacity makes a defamatory statement.

41. In the case from Rajasthan the rule laid down was that the association of persons or a society or a political party or its permanent members, who set up a candidate, sponsor his cause, and work to promote his election, may be aptly called the agent for election purposes. In such cases where these persons commit corrupt practice unless the exception in S. 100 (2) apply, the returned candidate should be

held guilty. We shall consider this question later.

42. Before we deal with the matter further we wish to draw attention to yet another case of this Court reported in Kumara Nand v. Brijmohan Lal Sharma, 1967-2 SCR 127=(AIR 1967 SC 808). In that case Section 123 (4) was analysed. It was held that the belief must be that of the candidate himself. The word "he" in the sub-section where it occurs for the first time was held to mean the candidate. This Court observed as follows:—

"The sub-section requires: (i) publication of any statement of fact by a candidate, (ii) that fact is false, (iii) the candidate believes it to be false or does not believe it to be true, (iv) the statement is in relation to the personal character or conduct of another candidate, and (v) the said statement is one being reasonably calculated to prejudice the prospects of the other candidate's election: (See 1965-1 SCR 175=(AIR 1965 SC 677). This case thus lays down that the person with whose belief the provision is concerned is ordinarily the candidate who, if we may say so, is responsible for the publication. The responsibility of the candidate for the publication arises if he publishes the thing himself. He is equally responsible for the publication if it is published by his agent. Thirdly he is also responsible where the thing is published by any other person but with the consent of the candidate or his election agent. In all three cases the responsibility is of the candidate and it is ordinarily the candidate's belief that matters for this purpose. If the candidate either believes the statement to be false or does not believe it to be true he would be responsible under Section 123 (4). In the present case the poem was not actually read by the appellant, but it was read in his presence at a meeting at which he was presiding by Avinash Chander. In these circumstances the High Court was right in coming to the conclusion that the recitation of the poem by Avinash Chander at the meeting amounted to the publication of the false statement of fact contained in it by another person with the consent of the candidate, and in this case, even of his election agent who was also present at the meeting. But the responsibility for such publication in the circumstance of this case is of the candidate and it is the candidate's belief that matters and not the belief of the person who actually read it with the consent of the candidate. What would be the position in a case where

the candidate had no knowledge at all of the publication before it was made need not be considered for that is not so here. It is not disputed in this case that the statement that the respondent was the greatest of all thieves, was false. It is also not seriously challenged that the appellant did not believe it to be true. The contention that Avinash Chander's belief should have been proved must therefore fail."

43 From this case it follows that to prove a corrupt practice in an agent is not enough, the belief of the candidate himself must be investigated with a view to finding out whether he made a statement which he knew to be false or did not believe it to be true. When we come to the facts of the case in hand we shall find that most of the statements were made by a newspaper editor in the normal course of running a newspaper. Some of the passages which are criticised before us were made as news items and some others were put in the editorial. It is to be remembered that the newspaper ran a special column called "George Fernandez's Election Front". No article or comment in that column has been brought before us as an illustration of the corrupt practice. A newspaper publishes news and expresses views and these are functions normal to a newspaper. If the same news appeared in more than one paper, it cannot be said that each editor acted as agent for Mr Fernandez and by parity of reasoning a line must be drawn to separate the acts of Mr Atrey in running his newspaper and in acting as an agent. Mr. Atrey was not a wholetime agent of Mr Fernandez so that anything that he said or did would be treated as bearing upon the belief of Mr Fernandez as to the truth of the statements made by Mr Atrey. Therefore, every act of Mr Atrey could not be attributed to Mr Fernandez so as to make the latter liable. We have therefore to analyse these articles to find out which of them answers the test which we have propounded here. But the fact remains that the case was pleaded on the basis of corrupt practices on the part of an agent but by the amendment the candidate was sought to be charged with the corrupt practices personally. As there was no such charge or ground in the original petition and as the application for amendment was made long after the period of limitation was over the amendment could not be allowed. Accordingly we ruled out the amendments concerning

the personal speeches of Mr. Fernandez and the article in the 'Blitz.'

44 After we announced our conclusion about the amendments Mr Daphtary with the permission of the Court left the case in the hands of Mr. Jethmalani and the argument to which we have already referred in brief was advanced by him. As pointed out already Mr Jethmalani attempted to prove that the case would be governed by S 100 (1) (b) i.e., to say that the statements in the 'Maratha' were published with the consent of Mr Fernandez. Mr. Jethmalani deduced this from the course of events and argued that on proof of the corrupt practices committed by the 'Maratha', Mr Fernandez would be personally liable. He based himself on the following facts. He pointed out that Mr. Fernandez had admitted that he desired that the newspapers should support his candidature and therefore must have been glad that the 'Maratha' was supporting him, and the articles in the 'Maratha' were uniformly for the benefit of Mr Fernandez. Sampurna Maharashtra Samiti was also supporting the candidature of Mr. Fernandez and the 'Maratha' had made common cause with the Sampurna Maharashtra Samiti, the offices of both being situated in the same building which was also Mr. Atrey's residence. Mr Atrey was the editor of the 'Maratha' and Chairman of the Sampurna Maharashtra Samiti. Mr Atrey was also a candidate supported by the Sampurna Maharashtra Samiti. Mr Fernandez and Mr. Atrey had a common platform and they supported each other in their respective constituencies. The 'Maratha' carried a column "George Fernandez's Election Front" which was intended to be a propaganda column in favour of Mr. Fernandez. He contended that Mr. Fernandez could not be unaware of what Mr. Atrey was doing. He pointed out several statements of Mr. Fernandez in which he sometimes unsuccessfully denied the knowledge of various facts. He contended lastly that Mr Fernandez had social contacts with Mr Atrey and could not possibly be unaware that Mr Atrey was vociferously attacking Mr. Patil's character and conduct. Mr. Jethmalani therefore argued that there was knowledge and acquiescence on the part of Mr. Fernandez and as there was no repudiation of what the 'Maratha' published against Mr. Patil, Mr. Fernandez must be held responsible. The learned trial Judge in his judgment has given a

summary of all these things at page 695 and it reads:

"To sum up, it is clear from the above discussion that respondent No. 1 is a prominent member of the SSP, that the SSP is a constituent unit of the SMS, that both Acharya Atrey and respondent No. 1 participated in the formation of the SMS campaign by the SMS, that the SMS, carried on election that they both participated in the inauguration of the election propaganda for candidates supported by it including respondent No. 1, that Acharya Atrey was the President of the Bombay Unit of the SMS and was a prominent and a leading member thereof, that each of them addressed a meeting of the constituency of the other to carry on election propaganda for the other, that Acharya Atrey through the columns of his newspaper Maratha carried on intensive and vigorous campaign for success of candidates supported by the SMS including respondent No. 1, that Acharya Atrey started a special feature in Maratha under the heading "George Fernandez Election Front". These factors amongst others show that Acharya Atrey had authority to canvass for respondent No. 1, that he made a common cause with respondent No. 1 for promoting his election, that to the knowledge of respondent No. 1 and for the purpose of promoting his election, he (Atrey) canvassed and did various things as tended to promote his election. This in law is sufficient to make Acharya Atrey an agent of respondent No. 1 as that term is understood under the election law."

45. Mr. Jethamalani contended in further support that there was a clear similarity in the statements and utterances of Mr. Fernandez and Mr. Atrey. He inferred a high probability of concert between them. In this connection he referred in particular to the speech of Mr. Fernandez at Shivaji Park and the conduct of Shanbhag, one of his workers, in following up what Mr. Fernandez had said. We shall refer to this last part later on which a considerable part of the time of the Court was spent, although we had ruled out the amendment with regard to the speech at Shivaji Park. Mr. Jethamalani referred to the following cases among others in support of his contention that consent in such circumstances may be assumed: Nani Gopal Swami v. Abdul Hamid, AIR 1959 Assam 200, Adams v. Hon. E. F. Leveson Gower, (1869) 1 O' M & H 218, Christie v. Grieve, (1869) 1 O' M & H 251 and W. F. Spencer, John Blun-

dell v. Charles Harrison, (1871) 3 O' M & H 148. There is no doubt that consent need not be directly proved and a consistent course of conduct in the canvass of the candidate may raise a presumption of consent. But there are cases and cases. Even if all this is accepted we are of opinion that consent cannot be inferred. The evidence proves only that Mr. Atrey was a supporter and that perhaps established agency of Mr. Atrey. It may be that evidence is to be found supporting the fact, that Mr. Atrey acted as agent of Mr. Fernandez with his consent. That however does not trouble us because Mr. Chari admitted that Mr. Atrey can be treated as an agent of Mr. Fernandez. It is however a very wide jump from this to say that Mr. Fernandez had consented to each publication as it came or even generally consented to the publication of items defaming the character and conduct of Mr. Patil. That consent must be specific. If the matter was left entirely in the hands of Mr. Atrey who acted solely as agent of Mr. Fernandez, something might be said as was done in Rama Krishna's case, C. A. No. 1949 of 1967, D/- 23-4-1968 (SC) (supra) by this Court. Otherwise there must be some reasonable evidence from which an inference can be made of the meeting of the minds as to these publications or at least a tacit approval of the general conduct of the agent. If we were not to keep this distinction in mind there would be no difference between Sections 100 (1) (b) and 100 (1) (d) in so far as an agent is concerned. We have shown above that a corrupt act per se is enough under Section 100 (1) (b) while under Section 100 (1) (d) the act must directly affect the result of the election in so far as the returned candidate is concerned. Section 100 (1) (b) makes no mention of an agent while Section 100 (1) (d) specifically does. There must be some reason why this is so. The reason is this that an agent cannot make the candidate responsible unless the candidate has consented or the act of the agent has materially affected the election of the returned candidate. In the case of any person (and he may be an agent) if he does the act with the consent of the returned candidate there is no need to prove the effect on the election. Therefore, either Mr. Jethamalani must prove that there was consent and that would mean a reasonable inference from facts that Mr. Fernandez consented to the acts of Mr. Atrey or he must prove that the result of the election was seriously affect-

ed. If every act of an agent must be presumed to be with the consent of the candidate, there would be no room for application of the extra condition laid down by Section 100 (1) (d), because whenever agency is proved either directly or circumstantially, the finding about consent under Section 100 (1) (b) will have to follow. We are clearly of opinion that Mr. Jethamalani's argument that Section 100 (1) (b) applies can only succeed if he establishes consent on the part of Mr. Fernandez.

46. We have already pointed out that Mr. Atrey was also the editor of a newspaper which, as Mr. Patil has himself admitted, was always attacking him. Mr. Atrey had opened a column in his newspaper to support Mr. Fernandez's candidature. Although nine articles appeared in the column between December 3, 1966 to February 2, 1967, not a single false statement from this column has been brought to our notice. There was not even a suggestion that Mr. Fernandez wrote any article for the 'Maratha' or communicated any fact. It is also significant that although Mr. Atrey addressed meetings in the constituency of Mr. Fernandez, not a single false statement of Mr. Atrey was proved from his speeches on those occasions. The petitioner himself attended one such meeting on February 4, 1967, but he does not allege that there was any attack on his personal character or conduct. The learned trial Judge has also commented on this fact. We think that regard being had to the activities of Mr. Atrey as editor and his own personal hostility to Mr. Patil on the issue of Sampurna Maharashtra Samiti, we cannot attribute every act of Mr. Atrey to Mr. Fernandez. Mr. Chari is right in his contention that Mr. Atrey's field of agency was limited to what he said as the agent of Mr. Fernandez and did not embrace the field in which he was acting as editor of his newspaper. It is also to be noticed that Mr. Atrey did not publish any article of Mr. Fernandez, nor did he publish any propaganda material.

47. The meeting at Shivaji Park about which we shall say something presently, was not held in Mr. Fernandez's constituency. The similarity of ideas or even of words cannot be pressed into service to show consent. There was a stated policy of Sampurna Maharashtra Samiti which wanted to join in Maharashtra all the areas which had not so far been joined and statements in that behalf must

have been made not only by Mr. Atrey but by several other persons. Since Mr. Atrey was not appointed as agent we cannot go by the similarity of language alone. It is also very significant that not a single speech of Mr. Fernandez was relied upon and only one speech of Mr. Fernandez, namely, that at Shivaji Park was brought into arguments before us came by an amendment which we disallowed. The best proof would have been his own speech or some propaganda material such as leaflets or pamphlets, etc., but none was produced. The 'Maratha' was an independent newspaper not under the control of the Sampurna Maharashtra Samiti or the S. S. P. which was sponsoring Mr. Fernandez or Mr. Fernandez himself. Further we have ruled out news items which it is the function of the newspaper to publish. A news item without any further proof of what had actually happened through witnesses is of no value. It is at best a second-hand secondary evidence. It is well known that reporters collect information and pass it on to the editor who edits the news item and then publishes it. In this process the truth might get perverted or garbled. Such news items cannot be said to prove themselves although they may be taken into account with other evidence if the other evidence is forcible. In the present case the only attempt to prove a speech of Mr. Fernandez was made in connection with the Shivaji Park meeting. Similarly the editorials state the policy of the newspaper and its comment upon the events. Many of the news items were published in other papers also. For example Free Press Journal, the Blitz and writers like Welles Hengens had also published similar statements. If they could not be regarded as agents of Mr. Fernandez we do not see any reason to hold that the 'Maratha' or Mr. Atrey can safely be regarded as agent of Mr. Fernandez when acting for the newspaper so as to prove his consent to the publication of the defamatory matter. We are therefore of opinion that consent cannot reasonably be inferred to the publications in the 'Maratha'. We are supported in our approach to the problem by a large body of case law to which our attention was drawn by Mr. Chari. We may refer to a few cases here. *Biswanath Upadhyaya v. Haralal Das*, AIR 1958 Assam 97, *Abdul Majeed v. Bhargavan*, AIR 1963 Ker 18, *Rustom Satin v. Dr. Sampurnanand*, (1959) 20 Ele LR 221 (All), *Sarla Devi v. Barendra Singh*, 20 Ele LR 275=(AIR 1961 Madh Pra 127).

Krishna Kumar v. Krishna. Gopal, AIR 1964 Raj 21, Lalsingh Keshriving v. Valabhdas Shankerlal, AIR 1967 Guj 62, Badri Narain Singh v. Kamdeo Prasad Singh, AIR 1961 Pat 41 and Sarat Chandra v. Khagendranath Nath, AIR 1961 SC 834. It is not necessary to refer to these cases in detail except to point out that the Rajasthan case dissents from the case from Assam on which Mr. Jethamalani relied. The principle of law is settled that consent may be inferred from circumstantial evidence but the circumstances must point unerringly to the conclusion and must not admit of any other explanation. Although the trial of an election petition is made in accordance with the Code of Civil Procedure, it has been laid down that a corrupt practice must be proved in the same way as a criminal charge is proved. In other words, the election petitioner must exclude every hypothesis except that of guilt on the part of the returned candidate or his election agent. Since we have held that Mr. Atrey's activities must be viewed in two compartments, one connected with Mr. Fernandez and the other connected with the newspaper we have to find out whether there is an irresistible inference of guilt on the part of Mr. Fernandez. Some of the English cases cited by Mr. Jethamalani are not a safe guide because in England a distinction is made between "illegal practices" and "corrupt practices". Cases dealing with "illegal practices" in which the candidate is held responsible for the acts of his agent are not a proper guide. It is to be noticed that making of a false statement is regarded as "illegal practice" and not a "corrupt practice" and the tests are different for a corrupt practice. In India all corrupt practices stand on the same footing. The only difference made is that when consent is proved on the part of the candidate or his election agent to the commission of corrupt practice, that itself is sufficient. When a corrupt practice is committed by an agent and there is no such consent then the petitioner must go further and prove that the result of the election in so far as the returned candidate is concerned was materially affected. In *Bayley v. Edmunds Byron*, (1895) 11 TLR 537 strongly relied upon by Mr. Daphtary the publication in the newspaper was not held to be a corrupt practice but the paragraph taken from a newspaper and printed as a leaflet was held to be a corrupt practice. That is not the case here. Mr. Patil's own attitude during the election and after is significant.

During the election he did not once protest that Mr. Fernandez was spreading false propaganda, not even when Mr. Fernandez charged his workers with hooliganism. Even after the election Mr. Patil did not attribute anything to Mr. Fernandez. He even said that the Bombay election was conducted with propriety. Even at the filing of the election petition he did not think of Mr. Fernandez but concentrated on the 'Maratha'.

48. Mr. Daphtary sought to strengthen the inference about consent from the inter-connection of events with the comments in the 'Maratha'. He refers to the news item appearing in the 'Times of India' of February 10, 1967 in which the letting loose of bad characters was alleged to be commented upon by Mr. Fernandez. He connected this with the activities of Shanbhag who wrote to the Election Commission and then pointed out that the 'Maratha' came out with it. But if the 'Times of India' cannot be regarded as the agent no more can the 'Maratha'. A newspaper reporting a meeting does so as part of its own activity and there cannot be inference of consent. What was necessary was to plead and prove that Mr. Fernandez said this and this. Then the newspaper reports could be taken in support but not independently. Here the plea was not taken at all and the evidence was not direct but indirect.

49. Mr. Jethamalani referred to some similarity in the reaction of the 'Maratha' and Mr. Fernandez to the events. The Babubhai Chinai incident was said to be a fake by both the 'Maratha' and Mr. Fernandez, the Gayawadi meeting (not pleaded) was said to be followed by similar statements in the 'Maratha', the Bristol Grill Conference was reported in the 'Maratha'. All this shows that the rival party believed in certain facts but it does not show that the 'Maratha' was publishing these articles with Mr. Fernandez's consent. In fact this argument has been designed to get over our finding that the Amendments were wrongly allowed. Before this there was not so much insistence upon consent as thereafter.

50. Now it may be stated that mere knowledge is not enough. Consent cannot be inferred from knowledge alone. Mr. Jethamalani relied upon the Taunton case, (1869) 1 O' M & H 181 at p. 185 where Blackburn, J., said that that one must see how much was being done for the candidate and the candidate then must take the good with the bad. There is

difficulty in accepting this contention. Formerly the Indian Election Law mentioned 'knowledge and connivance' but now it insists on consent. Since reference to the earlier phrase has been dropped it is reasonable to think that the law requires some concrete proof, direct or circumstantial of consent, and not merely of knowledge and connivance. It is significant that the drafters of the election petition use the phrase 'knowledge and connivance' and it is reasonable to think that they consulted the old Act and moulded the case round 'knowledge and connivance' and thought that was sufficient.

51. We cannot infer from an appraisal of the evidence of Mr Fernandez that he had consented. His denial is there and may be not accurate but the burden was to be discharged by the election petitioner to establish consent. If Mr. Fernandez suppressed some other facts or denied them, there can be no inference that his denial about knowledge of the articles in the 'Maratha' was also false. Mr Fernandez denied flatly that he saw the articles explaining that there was no time to read newspapers, a fact which has the support of Mr Patil who also said that he had no time to read even cuttings placed by his secretary for his perusal. We may say here that we are not impressed by the testimony of Mr Fernandez and we are constrained to say the same about Mr. Patil. We cannot on an appraisal of all the materials and the arguments of Mr. Daphary reach the conclusion that Mr. Fernandez was responsible for all that Mr. Atrey did in his newspaper or that his consent can be inferred in each case.

52. The most important argument was based on the meeting at Shivaji Park on January 31, 1967 where Mr Fernandez spoke. As the subject of the charge in the original petition did not refer to this speech and we disallowed the amendment, Mr Jethamalani attempted to reach the same result by using the speech as evidence of consent to the publication of the report in the 'Maratha'. Here we may say at once that the speech could not be proved because it was not pleaded. Much time was consumed to take us through the evidence of witnesses who gave the exact words of Mr. Fernandez. Mr. Fernandez was alleged to have said that Mr. Patil was not honest and won elections by changing ballot boxes. Mr Fernandez did not admit having made the speech. Four witnesses Tanksale, Bhide, Khambata and Bendre who alleged that they were present at the meeting depo-

sed to this fact. We have looked into their evidence and are thoroughly dissatisfied with it. Ramkumar, a reporter was also cited. He covered the meeting for the 'Indian Express' but his newspaper had not published this part and Ramkumar was examined to prove that it was deleted by Rao, the Chief Reporter. The evidence of Ramkumar was so discrepant with that of Rao that the trial judge could not rely on it and we are of the same opinion. The fact that in Ex. 56 Mr. Fernandez had spoken of the 'ways and means' of winning elections of Mr. Patil cannot be held to be proof nor the activities of Shanbagh in arranging for a watch of the ballot boxes. Every candidate is afraid that the ballot boxes may be tampered with and there is no inference possible that because Mr Fernandez or Shanbagh his worker took precautions, Mr. Fernandez must have made a particular speech. It was said that Randive in his evidence admitted that Mr. Fernandez made such comments. We do not agree. His version was different. There is reason to think that there was an attempt to suborn witnesses and make them support this part of the case or to keep away from the witness box. One such attempt was made on Randive. We are not impressed by the witnesses who came to disprove the petitioner's case but that does not improve it either. It seems that attempts were being made to enlist support for such a contention and the evidence shows that the witnesses were not free from influence. It is not necessary to go into the evidence on the other side such as that of Dattu Pradhan and Prafull Baxi. They do not impress us either. We are accordingly not satisfied that Mr Fernandez made any such comment. If he did that would be a ground of the very first importance to an election petition. It is a little surprising that it was alleged so late and appears to be an afterthought and intended to put into the mouth of Mr. Fernandez one of the statements of the 'Maratha'. Consent to the making of the statement in the 'Maratha' had, therefore, to be proved and there is no such proof.

53. For the same reasons we cannot regard Jagadguru Shankaracharya or Mr. Madhu Limaye as the agents of Mr. Fernandez. The evidence regarding their agency itself is non-existent and there is no material on which consent can be presumed or inferred.

54. The result of the foregoing discussion is that this case will have to be

judged of under Section 100 (1) (d) and not under Section 100 (1) (b). In the arguments before us Mr. Chari conceded that some of the articles contain false statements regarding the character and conduct of Mr. Patil. He mentioned in this connection five articles. It is, not, therefore, necessary to examine each of the 16 articles separately. If the conditions required by Section 100 (1) (d) read with Section 123 (4) are satisfied, a corrupt practice avoiding the election will be established. The first condition is that the candidate's belief in the falsity of the statements must be established. That was laid down by this Court in 1967-2 SCR 127 = (AIR 1967 SC 808) (supra). The second condition is that the result of the election in so far as Mr. Fernandez is concerned must be shown to be materially affected. Thus we have not only to see (a) that the statement was made by an agent (b) that it was false, etc., (c) that it related to the personal character and conduct of Mr. Patil, (d) that it was reasonably calculated to harm his chances but also (e) that it in fact materially affected the result of the election in so far as Mr. Fernandez was concerned. Of these (a) and (c) are admitted and (d) ((b)?) is admitted by Mr. Fernandez because he said that he did not believe that there was any truth in these statements. The question next is whether they were calculated to affect the prospects of Mr. Patil. Here there can be no two opinions. These articles cast violent aspersions and were false as admitted by Mr. Fernandez himself. The course of conduct shows a deliberate attempt to lower his character and so they must be held to be calculated to harm him in his election. So far the appellants are on firm ground. Even if all these findings are in favour of the appellants we cannot declare the election to be void under Section 100 (1) (d) (iii) unless we reach the further conclusion that the result of the election in so far as Mr. Fernandez was concerned had been materially affected. The section speaks of the returned candidate when it should have really spoken of the candidate who was defamed or generally about the result. However it be worded, the intention is clear. The condition is a pre-requisite.

55. Mr. Jethamalani argued that the words "materially affected" refer to the general result and not how the voting would have gone in the absence of the corrupt practice. According to him Section 94 of the Act bars disclosure of votes

and to attempt to prove how the voting pattern would have changed, would involve a violation of Section 94. According to him the Court can give a finding by looking to the nature of the attacks made, the frequency and extent of publicity, the medium of circulation and the kind of issue that was raised before the voters. He contends that to tell the Maharashtrians that Mr. Patil paid a bribe to the voters of Goa to keep it centrally administered, to call Mr. Patil a Najibkhan of Maharashtra i. e. a traitor, to dub him as the creator of Shiv Sena which terrorised the minorities, to describe him as a goonda and leader of goondas who organised attacks on voters, to charge him with the responsibility of attack on Parliament and the Congress President's residence and to describe him as dishonest to the extent of switching ballot boxes is to materially affect the result of the voting. According to him these circumstances furnish a good basis for the finding that the result of the election was positively affected and nothing more is needed. According to Mr. Jethamalani the capacity of Mr. Atrey when making these violent attacks was irrelevant as he was acting in support of the canvass of Mr. Fernandez.

56. Mr. Jethamalani further submits that different false statements were intended to reach different kind of voters. The Maharashtrians were affected by the Goa and border issues, the minorities by the Shiv Sena allegations, the law-abiding citizens by the allegations about goodaism. Thus there must have been a landslide in so far as Mr. Patil was concerned and there must have been corresponding gain to Mr. Fernandez. He relies upon Hackney Case, (1870) 2 O' M and H Election Rep. 77 where Grove, J. made the following observations at pages 81 and 82:—

"I have turned the matter over in my mind, and I cannot see, assuming that argument to express the meaning of that section, how the tribunal can by possibility say what would or might have taken place under different circumstances. It seems to me to be a problem which the human mind has not yet been able to solve, namely, if things had been different at a certain period, what would have been the result of the concatenation of events upon that supposed change of circumstances. I am unable at all events to express an opinion upon what would have been the result, that is to say, who

would have been elected provided certain matters had been complied with here which were not complied with. It was contended that I might hear evidence on both sides as to how an elector thought he would have voted at such election. That might possibly induce a person not sitting judicially to form some sort of vague guess, but that would be far short of evidence which ought to satisfy the mind of a Judge of what any individual who might express that opinion would really do under what might have been entirely changed circumstances. But, besides that, one of the principles of the Ballot Act is that voting should be secret, and voters are not to be compelled to disclose how they voted except upon a scrutiny after a vote has been declared invalid. Notwithstanding that, I am asked here, assuming the construction for which Mr. Bowen contends to be correct, to ascertain how either the 41,000 electors of this Borough, or any number of them, might have wished to vote had they had the opportunity of doing so, and what in that event would have been the result of the election. It seems to me that such an inquiry would not only have been entirely contrary to the spirit of the Act, but also that it would be a simple impossibility. I should therefore, say that even if the wording of the Act, taking it literally and grammatically, required me to put such a construction upon it, it would lead to such a manifest absurdity (using now the judicial term which has generally been used with reference to the construction of statutes) that unless I were in some way imperatively obliged, and unless the Act could by no possibility admit of any other construction, I should not put a construction upon it which really reduced the matter to a practical impossibility. Such a construction would practically render it necessary, in the case of any miscarriage at an election, however great the miscarriage might be (if, that is to say, only a very small number of persons had voted, and all the rest of the Borough had been entirely unable to vote) that the judge should then enquire as to how the election would have gone. As I ventured to remark in the course of the argument, where a miscarriage of this sort took place it would be virtually placing the election not in the hands of the constituency, but in the hands of the election judge, who is not to exercise a judgment as to who is to be the member, but who is only

to see whether the election has been properly conducted according to law." Justice Grove then gave the meaning of the provision at page 85 as follows—

"If I look to the whole, and to the sense of it as a whole, it seems to me that the object of the Legislature in this provision is to say this—an election is not to be upset for an informality or for a triviality, it is not to be upset because the clerk of one of the polling stations was five minutes too late, or because some of the polling papers were not delivered in a proper manner, or were not marked in a proper way. The objection must be something substantial, something calculated really to affect the result of the election. I think that that is a way of viewing it which is consistent with the terms of the section. So far as it seems to me, the reasonable and fair meaning of the section is to prevent an election from becoming void by trifling objections on the ground of an informality, because the judge has to look to the substance of the case to see whether the informality is of such a nature as to be fairly calculated in a reasonable mind to produce a substantial effect upon the election." Mr. Jethamalani invites us to apply the same test and in the light of his facts to say that the result of the election in so far as Mr. Fernandez is concerned was materially affected.

57. On the other hand, Mr. Chari relies upon the facts that there was a difference of 30,000 votes between the two rivals and as many as 38,565 votes were cast in favour of the remaining candidates. He says that Mr. Patil had contested the earlier elections from the same constituency and the votes then obtained by him were not more in fact less. He says it is impossible to say how much Mr. Patil lost or Mr. Fernandez gained by reason of the false statements and whether the affected voters did not give their votes to the other candidates. He argues that the best test would be to see what Mr. Patil's reactions were on hearing of his defeat. In this connection he referred to Ex. 120 in which Mr. Patil commented on the elections in Bombay being orderly. In Ex. 123 he said that the voters of Bombay had rejected him and that he has disappointed his supporters and they must pardon him, and that he must have been punished for some sin committed by him. Mr. Chari says that never for a moment did Mr. Patil attribute his defeat to false propaganda by Mr. Fernandez or his supporters, which

if it had been a fact Mr. Patil would have lost no time in mentioning. All this shows that Mr. Patil maintained his position in this constituency. Mr. Fernandez had earlier announced that he would organise support for himself from those who had voted in the past for his rivals or had refrained from voting and this Mr. Fernandez was successful in achieving. Mr. Chari relies upon the rulings of this Court where it has been laid down how the burden of proving the effect on the election must be discharged. He referred to the case reported in *Vashist Narain Sharma v. Dev Chandra*, 1955-1 SCR 509 = (AIR 1954 SC 513) and *Surendra Nath v. Dalip Singh*, 1957 SCR 179 = (AIR 1957 SC 242) and the later rulings of this Court in which *Vashist Narain's* case has been followed and applied.

58. In our opinion the matter cannot be considered on possibility. *Vashist Narain's* case insists on proof. If the margin of votes were small something might be made of the points mentioned by Mr. Jethamalani. But the margin is large and the number of votes earned by the remaining candidates also sufficiently huge. There is no room, therefore, for a reasonable judicial guess. The law requires proof. How far that proof should go or what it should contain is not provided by the legislature. In *Vashist's* case, 1955-1 SCR 509 = (AIR 1954 SC 513) and in *Inayatullah v. Diwanchand Mahajan*, (1958) 15 Ele LR 219 at pp. 235-236 (MP) the provision was held to prescribe an impossible burden. The law has however remained as before. We are bound by the rulings of this Court and must say that the burden has not been successfully discharged. We cannot overlook the rulings of this Court and follow the English rulings cited to us.

59. To conclude and summarise our findings: We are satisfied that Mr. Atrey as the Editor of the 'Maratha' published false statements relating to the character and conduct of Mr. Patil, calculated to harm the prospects of Mr. Patil's election that Mr. Atrey was the agent of Mr. Fernandez under the election law, but there is nothing to prove that he did so with the consent of Mr. Fernandez, nor can such consent be implied because in making the statements Mr. Atrey was acting as the editor of his own newspaper the 'Maratha' and not acting for Mr. Fernandez. We are further satisfied that the petitioner has failed to establish in the manner laid

down in this Court, that the result of the election was materially affected in so far as Mr. Fernandez was concerned. We are also satisfied that if the petitioner had pleaded corrupt practices against Mr. Fernandez personally (which he did not) the result might have been different. The election petition was ill-considered and left out the most vital charges but for that the petitioner must thank himself.

60. In the result the appeals fail and as already announced earlier they are dismissed with costs.

CWM/D.V.C.

Appeals dismissed.

AIR 1969 SUPREME COURT 1225

(V 56 C 222)

(From Gujarat)*

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

1. Jindas Oil Mill and another (In C. A. No. 15 of 1969)*2. Somalal Nathji Shiroya and others (In C. A. No. 16 of 1969), Appellants v. Godhra Electricity Co. Ltd., (In both the Appeals), Respondent.

Civil Appeals Nos. 15 and 16 of 1969, D/- 26-2-1969.

Electricity (Supply) Act (1948), Sec. 57 (as amended in 1956) and Schedule VI — License granted prior to amendment — Charges fixed by Government can be enhanced unilaterally by licensee by virtue of amendment of Section 57 — Right to pay charges fixed previously is not vested right — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Repeal of Act and its replacement by new Act — Effect on rights vested under repealed Act) — (General Clauses Act (1897), Section 6).

The charges fixed by the Government for supply of power to consumers under Section 57 of the Act before its amendment in 1956 can be enhanced unilaterally by the Licensee by virtue of the amendment in accordance with the provisions contained in Schedule VI of the Act. AIR 1964 SC 1598, Rel. on; AIR 1955 SC 84 and AIR 1959 SC 648, Dist. (Para 10)

Under the Electricity (Supply) Act prior to its amendment in 1956, the charges fixed by the Government under Section 57 (2) (c) remained in force unless reduced by the licensee in the meantime

* (L. P. As. Nos. 43 and 42 of 1966, D/- 3-12-1968 respectively—Guj.)

IM/IM/B141/69/D

till the same were altered by a subsequent order made by the Government after getting a fresh recommendation from the rating committee but under the law as it now stands the rate fixed by the Government under Section 57 (A) (1) (d) would be in operation only for such period not exceeding three years as the State Government may specify in the order. Thereafter it can be enhanced by the licensee in accordance with the provisions contained in Schedule VI. There is inconsistency between the present scheme relating to the enhancement of charges vis-a-vis the scheme provided under the Electricity (Supply) Act prior to its amendment in 1956. The two schemes are substantially different. Under the former scheme once the Government fixed the charges the licensee could not alter them but at present at the end of the period fixed in the Government order the licensee has a unilateral right to enhance the charges in accordance with the conditions prescribed in the VIth Schedule. Therefore in view of Section 57 the provisions contained in that scheme have an overriding effect. (Paras 7, 10)

Section 57 of the Electricity (Supply) Act as it stands now lays down that the provisions of Schedule VI shall be deemed to be incorporated in the licence of every licensee not being a local authority, in the case of a licence granted before the commencement of the Act from the date of the commencement of the licensee's next succeeding year of account. Where the licence is governed by Sec. 57 the provisions of Sch. VI have to be read into that licence. If any of the earlier provisions in the licence either as they stood when the licence was originally granted or as they stood modified as per the provisions of the Electricity (Supply) Act prior to its amendment in 1956 are inconsistent with the provisions of Schedule VI or Sec. 57 (A) as they are now, they must be held to be void and of no effect. (Para 9)

It is true that when an existing Statute or Regulation is repealed and the same is replaced by fresh Statute or Regulation unless the new Statute or Regulation specifically or by necessary implication affects rights created under the old law those rights must be held to continue in force even after the new Statute or Regulation comes into force. But when it is held that the charges fixed can be altered and the controversy relates to the procedure to be adopted in altering them the controversy does not touch any vested right. The procedure in question must necessarily be regulated by the law in force at the time of the alteration of the charges. (Para 8)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1598 (V 51) =
1964-7 SCR 503, Amalgamated
Electricity Co. Ltd. v. N. S.
Bhathena 11
(1959) AIR 1959 SC 648 (V 46) =
(1959) Supp (2) SCR 8, Deep
Chand v. State of U P 7, 8
(1955) AIR 1955 SC 84 (V 42) =
1955-1 SCR 893 = 1955 Cri LJ
254, State of Punjab v. Mohan
Singh 7, 8

Mr M C Chagla, Senior Advocate,
M/s P C Bhartari and P N Tiwari,
Advocates, and Mr J B Dadachanji,
Advocate of M/s J B Dadachanji and
Co with him, for Appellants

Mr I N Shroff, Advocate, for Res-
pondent (In both the appeals)

The following Judgment of the Court
was delivered by

HEGDE, J: Common questions of law
arise for decision in these appeals, by
certificate. The suits from which these
appeals arise have been considered to-
gether and decided by common judg-
ments both in the High Court as well as
in the courts below. It is convenient to
do so in this court as well

2 The suits in questions are repre-
sentative suits. The plaintiffs-appellants
who are consumers of electricity in the
Godhra area sued the respondent-com-
pany on behalf of all the consumers in
that area seeking to restrain the respon-
dent from enforcing the enhanced charges
sought to be collected from the consu-
mers of powers used for lights and fans
as well as of motive power.

3. The facts leading to these appeals
may now be stated. On November 19,
1922, the then Government of Bombay
granted a licence under the Indian Elec-
tricity Act, 1910 to a concern called Lady
Sulochana Chubhai and Co authorising
it to generate and supply electricity to
the consumers in Godhra area. Clause 10
of the licence prescribed the maximum
charges that the licensee could levy for
the power supplied. The respondent is
the successor of the said licensee. After
the Electricity (Supply) Act, 1948 (to be
hereinafter referred to as the Supply Act)
came into force, a rating committee was
constituted under Section 57 (2) of the
Supply Act at the request of the respon-
dent on January 19, 1950. On the re-

commendation of that committee, the Government fixed with effect from February 1, 1952, the following charges for the power supplied:

(i) O-7-9 pies per unit for the electricity supplied for lights and fans with a minimum of Rs. 3 per month per installation and

(ii) for motive power at 4 annas per unit with a minimum of Rs. 4-8-0 per month per installation.

The Supply Act was amended in 1956. The respondent increased the charges for motive power from January 1, 1963 to 35 nP. per unit with a minimum of Rs. 7 per month for every installation. On June 22, 1963, the rates for lights and fans were increased with effect from July 1, 1963 to 70 nP. per unit with a minimum of Rs. 5 per month for every installation. The contention of the appellants is that the respondent was not competent to enhance the charges in question without the matter having been considered by a rating committee. Their suits to restrain the respondent from levying the proposed increased charges were decreed by the trial court. Those decrees were affirmed by the first appellate court as well as by a single judge of the Gujarat High Court in second appeals but the appellate bench of the Gujarat High Court reversed those decrees and dismissed the suits holding that under the Supply Act as amended in 1956 the respondent has a unilateral right to enhance the charges subject to the conditions prescribed in the VIth Schedule to that Act. It is as against those decisions these appeals have been brought. Civil Appeal No. 15 of 1969 relates to the enhancement of charges for electricity power for lights and fans and Civil Appeal No. 16 of 1969 relates to the enhancement of charges for the motive power.

4. The only question that arises for decision in these appeals is whether under the provisions of the Supply Act as amended in 1956, the respondent was competent to unilaterally enhance the charges.

The Supply Act as it stood 'before' 1956.

S. 57. Licensee's charges to consumers.—

(1) The provisions of the Sixth Schedule and the Table appended to the Seventh Schedule shall be deemed to be incorporated in the licence of every licensee, not being a local authority, from the date of the com-

5. In these appeals we are not concerned with the provisions of the Electricity Act, 1910. There is no dispute as regards the charges fixed by the Government with effect from February 1, 1952, under Section 57 (2) (c) of the Supply Act on the basis of the recommendation made by the rating committee. The appellants admit their liability to pay enhanced charges that may be fixed by the Government on the basis of any recommendation by a freshly appointed rating committee. They merely challenge the respondent's right to unilaterally enhance the charges. According to the appellants they have a vested right to be governed by the charges fixed in 1952 until the same is revised by the Government on the basis of the recommendation of a rating committee. It was urged on their behalf that the amendments made in 1956 do not affect the charges fixed in 1952 and they continue to rule till altered by the Government in accordance with law. The respondent repudiates those contentions. It denies that the appellants have any vested right in the charges fixed. It was urged on its behalf that the amendments made to the Supply Act in 1956 have substantially altered the scheme as regards levying charges; it is now open to a licensee to alter the charges fixed by the Government unilaterally subject to the conditions prescribed in Sec. 57 (A) and in Schedule VI of the Supply Act. We may mention at this stage that even according to the appellants the charges that may be fixed by the Government now on the basis of the recommendation of a rating committee can be unilaterally altered by the licensee after the period fixed in the Government order in accordance with Clause (e) of Section 57 (A) (1) expires.

6. In order to decide the point in controversy, we have to take into consideration the relevant provisions of the Supply Act as it stands now and as it stood prior to its amendment in 1956. For the sake of convenience we shall set out side by side the relevant provisions.

The Supply Act as amended in 1956.

S. 57. The provisions of the Sixth Schedule and the Seventh Schedule shall be deemed to be incorporated in the licence of every licensee not being a local authority—

(a) in the case of a licence granted before the commencement of this Act, from the date of the commence-

commencement of the licensee's next succeeding year of account, and from such date the licensee shall comply therewith accordingly and any provisions of such licence or of the Indian Electricity Act, 1910 (LX of 1910), or any other law, agreement or instrument applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of this section and the said Schedule and Table.

(2) Where the provisions of the Sixth Schedule and the Table appended to the Seventh Schedule are under sub-section (1) deemed to be incorporated in the licence of any licensee, the following provisions shall have effect in relation to the said licensee, namely:—

(a) the Board, or where no Board is constituted under this Act, the Provincial Government, may, if it is satisfied that the licensee has failed to comply with any provisions of the Sixth Schedule and shall when requested so to do by the licensee, constitute a rating committee to examine the licensee's charges for the supply of electricity and to recommend thereon to the Provincial Government.

Provided that no rating committee shall be constituted in respect of a licensee within three years from the date on which such a committee has reported in respect of that licensee, unless the Provincial Government declares that in its opinion circumstances have arisen rendering the orders passed on the recommendations of the previous rating committee unfair to the licensee or any of his consumers.

(b) The rating committee shall, after giving the licensee a reasonable opportunity of being heard and after taking into consideration the efficiency of operation and management and the potentialities of his undertaking, report to the Provincial Government making recommendations (and giving reasons therefor) regarding the charges for electricity which the licensee may make to any class or classes of consumers so however that the recommendations are not likely to prevent the licensee from earning clear profits sufficient when taken with the sums available in the Tariffs and Dividends Control

ment of the licensee's next succeeding year of account; and

(b) in the case of a licence granted after the commencement of this Act from the date of the commencement of supply.

and as from the said date, the licensee shall comply with the provisions of the said Schedules accordingly, and any provisions of the Indian Electricity Act, 1910, and the licence granted to him thereunder and of any other law, agreement or instrument applicable to the licensee shall, in relation to the licensee, be void and of no effect in so far as they are inconsistent with the provisions of section 57A and the said Schedules.

S 57 (A) (1) Where the provisions of the Sixth Schedule and the Seventh Schedule are under Section 57 deemed to be incorporated in the licence of any licensee, the following provisions shall have effect in relation to the said licensee namely:—

(a) the Board or where no Board is constituted under this Act, the State Government—

(i) may, if satisfied that the licensee has failed to comply with any of the provisions of the Sixth Schedule; and

(ii) shall, when so requested by the licensee in writing constitute a rating committee to examine the licensee's charges for the supply of electricity and to make recommendations in that behalf to the State Government;

Provided that where it is proposed to constitute a rating committee under this section on account of the failure of the licensee to comply with any provisions of the Sixth Schedule, such committee shall not be constituted unless the licensee has been given a notice in writing of thirty clear days (which period if the circumstances so warrant may be extended from time to time) to show cause against the action proposed to be taken.

Provided further that no such rating committee shall be constituted if the alleged failure of the licensee to comply with any provisions of the Sixth Schedule raises any dispute or difference as to the interpretation of the said provisions or any matter arising therefrom and such difference or dispute has been referred by the

Reserve to afford him a reasonable return during next succeeding three years of account if the potentialities of the undertaking of the licensee, with efficient operation and management, so permit.

(c) Within one month after the receipt of the report under clause (b) the Provincial Government shall cause the report to be published in the Official Gazette, and may at the same time make an order in accordance therewith fixing the licensee's charges for the supply of electricity with effect from such date, not earlier than two months after the date of publication of the report, as may be specified in the order; and the licensee shall forthwith give effect to such order:

Provided that nothing in this clause shall be deemed to prevent a licensee from reducing at any time any charges, so fixed.

THE SIXTH SCHEDULE.

I. The Licensee shall so adjust his rates for the sale of electricity by periodical revision that his clear profit in any year shall not as far as possible exceed the amount of reasonable return:

Provided that the licensee shall not be considered to have failed so to adjust his rates if the clear profit in any year of account has not exceeded the amount of the reasonable return by more than thirty per centum of the amount of the reasonable return.

II. (1) If the clear profit of a licensee in any year of account is in excess of the amount of reasonable return, one-third of such excess, not exceeding $7\frac{1}{2}$ per cent of the amount of reasonable return shall be at the disposal of the undertaking. Of the balance of the excess, one half shall be appropriated to a reserve which shall be called the Tariffs and Dividends Control Reserve and the remaining half shall either be distributed in the form of a proportionable rebate on the amounts collected from the sale of electricity and meter rentals or carried forward in the accounts of the licensee for distribution to the consumers in future, in such manner as the Provincial Government may direct.

(2) The Tariffs and Dividends Control Reserve shall be available for disposal by the licensee only to the extent by which the clear profit is

licensee to the arbitration of the Authority under paragraph XVI of that Schedule before the notice referred to in the preceding proviso was given or is so referred within the period of the said notice:

Provided further that no rating committee shall be constituted in respect of a licensee within three years from the date on which such a committee has reported in respect of that licensee, unless the State Government declares that in its opinion circumstances have arisen rendering the orders passed on the recommendations of the previous rating committee unfair to the licensee or any of his consumers;

(b) a rating Committee under Clause (a) shall,—

(i) where such committee is to be constituted under sub-clause (i) of that clause, be constituted not later than three months after the expiry of the notice referred to in the first proviso to that clause;

(ii) where such committee is to be constituted at the request of the licensee, be constituted within three months of the date of such request;

(c) a rating committee shall, after giving the licensee a reasonable opportunity of being heard and after taking into consideration the efficiency of operation and management and the potentialities of his undertaking, report to the State Government within three months from the date of its constitution, making recommendations with reasons therefor, regarding the charges for electricity which the licensee may make to any class or classes of consumers so, however, that the recommendations are not likely to prevent the licensee from earning clear profit, sufficient when taken with the sums available in the Tariffs and Dividends Control Reserve to afford him a reasonable return as defined in the Sixth Schedule during his next succeeding three years of account:

Provided that the State Government may, if it so deems necessary extend the said period of three months by a further period not exceeding three months within which the report of the rating committee may be submitted to it;

(d) within one month after the receipt of the report under clause (c), the State Government shall cause

less than the reasonable return in any year of account

(3) On the purchase of the undertaking under the terms of its licence any balance remaining in the Tariffs and Dividends Control Reserve shall be handed over to the purchaser and maintained as such Tariffs and Dividends Control Reserve.

the report to be published in the Official Gazette, and may at the same time make an order in accordance therewith fixing the licensee's charges for the supply of electricity with effect from such date, not earlier than two months or later than three months after the date of publication of the report as may be specified in the order and the licensee shall forthwith give effect to such order,

(e) the charges for the supply of electricity fixed under clause (d) shall be in operation for such period not exceeding three years as the State Government may specify in the order.

Provided that nothing in this clause shall be deemed to prevent a licensee from reducing at any time any charges so fixed

THE SIXTH SCHEDULE.

1 Notwithstanding anything contained in the Indian Electricity Act, 1910 (except sub-section (2) of Section 22A) and the provisions in the licence of a licensee, the licensee shall so adjust his (charges) for the sale of electricity whether by enhancing or reducing them that his clear profit in any year of account shall not, as far as possible, exceed the amount of reasonable return:

Provided that such (charges) shall not be enhanced more than once in any year of account

Provided further that the licensee shall not be deemed to have failed so to adjust his (charges) if the clear profit in any year of account has not exceeded the amount of reasonable return by (twenty) per centum of the amount of reasonable return

Provided further that the licensee shall not enhance the (charges) for the supply of electricity until after the expiry of a notice in writing of not less than sixty clear days of his intention to so enhance the (charges) given by him to the State Government and to the Board.

Provided further that if the (charges) of supply fixed in pursuance of the recommendations of a rating committee constituted under Sec 57A are lower than those notified by the licensee under and in accordance with the preceding proviso, the licensee shall refund to the consumers the excess amount recovered by him from them:

Provided also that nothing in this Schedule shall be deemed to prevent a licensee from levying, with the previous approval of the State Government minimum charges for supply of electricity for any purpose.

IA. The notice referred to in the third proviso to paragraph I shall be accompanied by such financial and technical data in support of the proposed enhancement of charges as the State Government may, by general or special order, specify.

II. (1) If the clear profit of a licensee in any year of account is in excess of the amount of reasonable return, one-third of such excess, not exceeding (five per cent) of the amount of reasonable return shall be at the disposal of the undertaking. Of the balance of the excess, one-half shall be appropriated to a reserve which shall be called the Tariffs and Dividends Control Reserve and the remaining half shall either be distributed in the form of a proportional rebate on the amounts collected from the sale of electricity and meter rentals or carried forward in the accounts of the licensee for distribution to the consumers in future, in such manner as the State Government may direct.

(2) The Tariffs and Dividends Control Reserve shall be available for disposal by the licensee only to the extent by which the clear profit is less than the reasonable return in any year of account.

(3) On the purchase of the undertaking under the terms of its licence any balance remaining in the Tariffs and Dividends Control Reserve shall be handed over to the purchaser and maintained as such Tariffs and Dividends Control Reserve:

Provided that where the undertaking is purchased by the Board or the State Government the amount of the Reserve may be deducted from the price payable to the licensee.

7. From an examination of these provisions it would be seen that under the Supply Act prior to its amendment in 1956, the charges fixed by the Government under Section 57 (2) (c) remained in force unless reduced by the licensee in the meantime till the same were altered by a subsequent order made by the Government after getting a fresh recommendation from the rating committee but

under the law as it now stands the rate fixed by the Government under Sec. 57 (A) (1) (d) would be in operation only for such period not exceeding three years as the State Government may specify in the order. Thereafter it can be enhanced by the licensee in accordance with the provisions contained in Schedule VI. It was urged on behalf of the appellants that the present Section 57 (A) (1) (e) can

only govern the charges fixed under Section 57 (A) (1) (d) and it has no impact on an order made under the old Section 57 (2) (c). According to the appellants the charges so fixed can only be modified by the Government after getting a report from the rating committee. Mr. Chagla, learned Counsel for the appellants contended that the consumers who get power from the respondent have a vested right in the charges fixed in 1952 and that vested right cannot be considered to have taken away by the provisions of the Amending Act. He argued that the provisions of the Amending Act are not retrospective in character nor is there any inconsistency between those provisions and the present provisions as the two operate on different fields, hence in view of Section 6 of the General Clauses Act, 1897, we must hold that the charges fixed by the Government in 1952 continue to be in operation. In this connection he relied on certain observations made by this Court in *State of Punjab v. Mohar Singh*, 1955-1 SCR 893=(AIR 1955 SC 84) and *Deep Chand v. State of U P*, (1959) Supp (2) SCR 8=(AIR 1959 SC 643). On the other hand it was contended by the learned Counsel for the respondent that the rights and liabilities of the respondents at present are exclusively regulated by the provisions of the Supply Act as it stands now, the terms of licence as they originally stood or as they stood on the coming into force of the Supply Act in 1948 are of no consequence now; they cannot be looked into for finding out the rights or duties of the licensee as at present, for that purpose we must look into these terms as modified by the provisions of the Supply Act as it is now. It was also urged on its behalf that there is no question of vested rights in these cases; herein we are only concerned with the procedure to be adopted in modifying the charges fixed in 1952.

8 In *Mohar Singh's case*, 1955-1 SCR 893=(AIR 1955 SC 84) this Court laid down that the provisions of Section 6 (c), (d) and (e) of the General Clauses Act, 1897 relating to the consequences of the repeal of a law are applicable not only when an Act or Regulation is repealed simpliciter but also to a case of repeal and simultaneous enactment re-enacting all the provisions of the repealed law. In the course of its judgment this Court observed that when the repeal is followed by a fresh legislation on the same subject, the Court has undoubtedly to look into the provisions of the new Act

but that only for the purpose of determining whether they indicate a different intention. The line of inquiry would be, not whether the new Act keeps alive the old rights and liabilities but whether it manifests any intention to destroy them. In *Deep Chand's case*, (1959) Supp (2) SCR 8 = (AIR 1959 SC 648) this Court was considering the effect of repugnancy between a State Act and a Central Act. The observations made in that context we think, have no bearing on the point in issue in this case. It is true that when an existing Statute or Regulation is repealed and the same is replaced by fresh Statute or Regulation unless the new Statute or Regulation specifically or by necessary implication affects rights created under the old law those rights must be held to continue in force even after the new Statute or Regulation comes into force. But in the cases before us there is no question of affecting any vested right. There is no dispute that the charges fixed can be altered. The controversy relates to the procedure to be adopted in altering them. That controversy does not touch any vested right. The procedure in question must necessarily be regulated by the law in force at the time of the alteration of the charges.

9. Section 57 of the Supply Act as it stands now lays down that the provisions of Schedule VI shall be deemed to be incorporated in the licence of every licensee not being a local authority, in the case of a licence granted before the commencement of the Act from the date of the commencement of the licensee's next succeeding year of account. Admittedly the licence with which we are concerned in these cases was granted even before the Supply Act was enacted. Therefore quite clearly the licence in question is governed by the present Section 57. Hence we have to read into that licence the provisions contained in Schedule VI. If any of the earlier provisions in the licence either as they stood when the licence was originally granted or as they stood modified as per the provisions of the Supply Act prior to its amendment in 1956 are inconsistent with the provisions of Schedule VI or Section 57 (A) as they are now they must be held to be void and of no effect. In other words we must read into the licence the provisions of Schedule VI and strike out therefrom such terms as are inconsistent with those provisions and thereafter give effect to the same. For determining the rights and

duties of the licensee as at present we have only to look into the terms of the licence as modified by Schedule VI. We cannot go behind them. That much is clear from the language of the Supply Act. The intention of the legislature is clear and unambiguous. Therefore there is no need to call into aid any rule of statutory construction or any legal presumption. Further no reason was advanced before us, nor can we conceive of any why those who obtained licences prior to the amendment of Supply Act in 1956 should be in a more disadvantageous position than those who got their licenses thereafter. Correspondingly we fail to see why those who are served by licensees who obtained their licences prior to the amendment of the Supply Act in 1956 should be placed in a better position than those served by licensees who obtained their licenses thereafter. After all, every law has some reason behind it. Section 57 (A) (2) (c) was intended to meet the changing economic circumstances. The purpose behind the new provisions appears to be to permit the licensees to so adjust their charges as to get reasonable profits. But at the same time a machinery has been provided to see whether any excess charges have been levied and if levied, get the same refunded to the consumers.

10. The law declared by the Amending Act does not affect any right or privilege, accrued under the repealed provision. It merely prescribes as to what could or should be done in future. Therefore there is no basis for saying that it affects vested rights. For finding out the power of the licensee to alter the charges one has to look to the terms of the licence in the light of the law as it stands, the past history of that law being wholly irrelevant. If the terms of the licence, including the deemed terms permit him to unilaterally alter the charges then he has that right. If we merely look at those terms, as we think we ought to, then there is no dispute that the respondent was within its rights in enhancing the charges as admittedly it had followed the procedure prescribed by law. We also do not agree with Mr. Chagla in his contention that there is no inconsistency between the present scheme relating to the enhancement of charges vis-a-vis the scheme provided under the Supply Act prior to its amendment in 1956. The two schemes are substantially different. Under the former scheme once the Government fixes the charges the licensee cannot alter it but at

present at the end of the period fixed in the Government order the licensee has a unilateral right to enhance the charges in accordance with the conditions prescribed in VIth Schedule. Therefore in view of Section 57 the provisions contained in that schedule have an overriding effect.

11. In *Amalgamated Electricity Co. Ltd. v. N. S. Bhathena*, 1964-7 SCR 503= (AIR 1964 SC 1598) this Court was called upon to consider the scope of Section 57 (A) and the Schedule VI as it stands now. Therein the controversy was whether the appellant therein was entitled to levy charges more than the maximum charges prescribed in its licence issued in 1932. It may be noted that in that case the notice of enhancement of the charges was given on September 25, 1958. This Court held that the maximum stipulated in the licence no longer governed the right of the licensee to enhance the charges; his rights were exclusively governed by the provisions contained in paragraph I of Schedule VI of the Supply Act. It is true that in that case this Court was considering the right of the licensee under the Supply Act vis-a-vis his right under the licence granted under the Indian Electricity Act, 1910 but that difference is not material. What this Court in fact considered was the right of the licensee under the existing law to enhance the charges. Dealing with the scope of paragraph I of Schedule VI, Ayyangar, J., who spoke for the majority observed thus:

"Para I of Schedule VI both as it originally stood and as amended, as seen already, empowered the licensee 'to adjust his rates, so that his clear profit in any year shall not, as far as possible, exceed the amount of reasonable return'. We shall reserve for later consideration the meaning of the expression 'so adjust his rates'. But one thing is clear and that is that the adjustment is unilateral and that the licensee has a statutory right to adjust his rates provided he conforms to the requirements of that paragraph viz., the rate charged does not yield a profit exceeding the amount of reasonable return. The conclusion is therefore irresistible that the maxima prescribed by the State Government which bound the licensee under the Electricity Act of 1910 no longer limited the amount which a licensee could charge after the Supply Act, 1948 came into force since the 'clear profit' and 'reasonable return' which determined the rate to be charged was to be computed on the basis of very different criteria and factors than what obtained under the Electricity Act."

12. For the reasons mentioned above, these appeals fail and they are dismissed with costs. One hearing fee
MVJ/DVC. Appeals dismissed.

AIR 1969 SUPREME COURT 1234

(V 56 C 223)

(From Allahabad)*

J C SHAH AND A N GROVER, JJ.

State of U P and others, Appellants v. Shah Mohammad and another, Respondents

Civil Appeal No 347 of 1966, D/- 13-3-1969

(A) Citizenship Act (1955), Section 9 — Retrospective operation — Pending suit involving questions falling within Sub-section (2) — Civil Court's jurisdiction is ousted by section read with Rule 30, Citizenship Rules, 1956 — AIR 1963 All 260, Overruled, S A No. 3809 of 1958, D/- 11-12-1963 (All), Reversed — (Citizenship Rules (1956), Rule 30) — (Constitution of India, Articles 11, 21 and Sch. 7, List 1, Entry 17).

The plaintiff who had gone to Pakistan after 26-1-1950 and before the commencement of the Act returned to India on a visa issued by the Indian High Commission in Pakistan. He instituted a suit before the commencement of the Act for a declaration that in the circumstances of the case his nationality never changed even though he had gone to Pakistan and that he continued to remain a citizen of India and for a permanent injunction restraining the authorities from deporting him. In the High Court in appeal against the decision of the lower appellate Court in favour of the plaintiff the Government contended that the Civil Court had no jurisdiction to decide the question arising in the suit in view of Section 9 of the Citizenship Act, which had been passed during the pendency of the proceedings, read with Rule 30 of the Citizenship Rules, 1956. The High Court rejecting the objection framed an issue on the question whether the plaintiff had or not acquired the citizenship of Pakistan during his stay there and remitted the case to the Lower Appellate Court for a finding on that issue.

Held that the High Court should not have called for a decision on that issue

*(Second Appeal No. 3809 of 1958, D/- 11-12-1963—All)

IM/IM/B77/69/D

by the lower appellate court but should have ordered the determination of the question by the Central Government. S. A No 3809 of 1958, D/- 11-12-1963 (All), Reversed. (Para 9)

Questions falling within Section 9 (2) have to be determined to the extent indicated therein by the Central Government and not by the Courts. AIR 1962 SC 70 and AIR 1962 SC 1778 and AIR 1962 SC 1052, Rel on (Para 8)

It is clear from the language of Section 9 (1) that it cannot be given a prospective operation only and that it would cover all cases where an Indian citizen has acquired foreign nationality between January 26, 1950 and its commencement or where he acquires such nationality after its commencement. AIR 1963 All 260, Overruled (Para 4)

The Act has been enacted under the powers of the Parliament preserved by Article 11, Constitution of India in express terms. The Parliament had also legislative competence under Entry 17, List I of Seventh Schedule. It could thus make a provision about the forum where the question as to whether a person had acquired citizenship of another country could be determined and that is what has been done by Rule 30. Cases that would ordinarily arise about loss of Indian citizenship by acquisition of foreign citizenship would be of three kinds: (1) Indian citizens who voluntarily acquired citizenship of a foreign State prior to the commencement of the Constitution, (2) Indian citizen who voluntarily acquired the citizenship of another State or country between January 26, 1950 and December 30, 1955 i. e. the date of commencement of the Act, and (3) Indian citizens who voluntarily acquired foreign citizenship after the date of commencement of the Act i. e. December 30, 1955. As regards the first category they were dealt with by Article 9 of the Constitution. The second and the third categories would be covered by the provisions of Section 9 of the Act. If a question arises as to whether, when or how an Indian citizen has acquired the citizenship of another country that has to be determined by the Central Government by virtue of the provisions of sub-section (2) of Section 9 read with Rule 30 of the Citizenship Rules (Para 5)

Even on the assumption that loss of Indian citizenship with consequent deportation may involve loss of personal liberty

within the meaning of Article 21, it is not possible to hold that by applying Section 9 of the Act and Rule 30 of the Rules to a case in which a suit had been instituted prior to the commencement of the Act there would be any contravention or violation of that Article. The Parliament was competent under Article 11, which is a constitutional provision read with the relevant Entry in List I, to legislate about cases of persons belonging to categories 2 and 3 referred to and it could certainly enact a legislation in exercise of its sovereign power which laid down procedure different from the one which obtained before. The new procedure would itself become the "procedure established by law" within the meaning of Article 21. (Para 7)

(B) Constitution of India, Arts. 9, 5, 6 and 8 — Article 9 deals with cases where citizenship of foreign State had been acquired by Indian citizen prior to Constitution and means that he cannot claim citizenship of India by virtue of Articles 5 and 6 or 8. AIR 1962 SC 1052, Rel. on. (Para 5)

Cases Referred: Chronological Paras
(1963) AIR 1963 All 260 (V 50) =

1963 (1) Cri LJ 724, Abida Khatoon v. State of U. P. 6

(1962) AIR 1962 SC 70 (V 49) = 6

1962 (1) SCR 779, Akbar Khan Alam Khan v. Union of India 8

(1962) AIR 1962 SC 1052 (V 49) =

(1962) Supp (3) SCR 235, Izhar Ahmad Khan v. Union of India 5, 8

(1962) AIR 1962 SC 1778 (V 49) =

(1962) Supp (3) SCR 288, Govt. of Andhra Pradesh v. Syed Mohd. Khan 8

Mr. C. B. Agarwala, Senior Advocate (M/s. O. P. Rana and Ravindra Bana, Advocates with him), for Appellants; Mr. Danial Latifi, Senior Advocate (Mr. M. I. Khowaja, Advocate with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Allahabad High Court in which the principal question for determination is whether Section 9 of the Indian Citizenship Act, 1955, hereinafter called the "Act", which came into force on December 30, 1955, would be applicable to a suit which was pending on that date.

2. Respondent No. 1 was born on July 8, 1934. He went to Pakistan in October 1950. In March 1953 he obtained a visa

from the Indian High Commission in Pakistan for coming to India. He came to India on July 22, 1953. On July 20, 1954 the period of authorised stay expired and respondent No. 1 applied for permanent settlement in India. He, however, filed a writ petition in the High Court on July 15, 1954 but the same was dismissed on February 10, 1955 and respondent No. 1 was directed to file a suit. He instituted a suit on May 6, 1955. He claimed that he was born in India of parents who were residing here and that he was a minor when he was persuaded by two Muslim youths to accompany them on a trip to Pakistan. He went there without any intention to settle there permanently. Later on he made efforts to return but due to certain restrictions he was unsuccessful. He had no alternative but to obtain a passport from the Pakistan authorities in order to come to India. He had thus never changed his nationality and continued to remain a citizen of India. He sought a permanent injunction restraining the Union of India, the State of U. P., District Magistrate, Kanpur and the Superintendent of Police, Kanpur, who were impleaded as defendants from deporting him.

3. The suit was contested and on the pleadings of the parties the appropriate issues were framed. The learned Munsif held that respondent No. 1 had gone to Pakistan for settling there permanently and had ceased to be an Indian citizen. The suit was dismissed. Respondent No. 1 appealed to the First Additional Civil Judge, Kanpur. The learned Judge was of the view that respondent No. 1 had gone to Pakistan when he was a minor and when his father, who was his guardian, was in India. By his departure to Pakistan, respondent No. 1 could not change his nationality. Even on a consideration of the evidence it could not be held that he had shifted to Pakistan with the intention of settling there permanently. His appeal was allowed and a permanent injunction as prayed was issued. The Union of India and other appellants preferred an appeal to the High Court. Before the High Court a preliminary objection was taken that the Civil Court had no jurisdiction to try the question whether respondent No. 1 had acquired the citizenship of Pakistan which matter had to be referred to the Central Government under Rule 30 of the Citizenship Rules framed under the Act. This objection was repelled in view of another decision of the High Court according to

which Section 9 of the Act and Rule 30 could not operate retrospectively and affect pending litigation Before the High Court the finding that respondent No 1 did not go to Pakistan with the intention of settling there permanently was not challenged by the appellants. The High Court was inclined to agree with the lower appellate Court that so long as respondent No. 1 was a minor he could not change his Indian domicile because his parents were domiciled in this country. The High Court proceeded to say that since respondent No. 1 had spent one year in Pakistan after he had obtained majority it was necessary to investigate whether he had acquired, during that period, the citizenship of Pakistan. An appropriate issue was framed and remitted to the lower Appellate Court for its determination. The appellate court held that respondent No. 1 had not acquired the citizenship of Pakistan since it was not legally possible for him to do so for the reason that according to laws of Pakistan he could become a major only on attaining the age of twenty-one. On December 11, 1963, the High Court disposed of the appeal of the present appellants by dismissing it in view of the findings which were in favour of respondent No. 1.

4. Learned Counsel for the appellants has contended before us that the Civil Court had no jurisdiction to decide the question of citizenship after the enforcement of the Act towards the end of the year 1955 in view of the provisions of Rule 30 of the Citizenship Rules, 1956 promulgated in exercise of the power conferred by Section 18 (2) (h) of the Act. Section 9 is in the following terms.

"Section 9 (1). Any citizen of India who by naturalisation, registration or otherwise voluntarily acquires, or has at any time between the 26th January, 1950 and the commencement of this Act, voluntarily acquired the citizenship of another country, shall upon such acquisition or, as the case may be, such commencement, cease to be a citizen of India.

Provided that nothing in this sub-section shall apply to a citizen of India who during any war in which India may be engaged, voluntarily acquires the citizenship of another country, until the Central Government otherwise directs.

(2) If any question arises as to whether, when or how any person has acquired the citizenship of another country, it shall be determined by such authority in such manner and having regard to such rules of

evidence, as may be prescribed in this behalf."

Rule 30 provides-

"Authority to determine acquisition of citizenship of another country.—(1) If any question arises as to whether, when or how any person has acquired the citizenship of another country, the authority to determine such question shall, for the purpose of Section 9 (2), be the Central Government.

(2) The Central Government shall in determining any such question have due regard to the rules of evidence specified in Schedule III"

The validity of the provisions of the Act and the Rules is no longer open to challenge. It has not been disputed by learned counsel for respondent No 1 that after the enforcement of the Act and promulgation of Rule 30 the only authority which is competent to determine whether citizenship of Pakistan has been acquired by him is the Central Government. But it has been strenuously urged that the suit in the present case had been instituted prior to the date of enforcement of the Act and therefore respondent No 1 was entitled to get this question determined by the Courts and not by the Central Government. In other words Section 9 of the Act cannot be given retrospective operation so as to be made applicable to pending proceedings. Thus the first point which has to be decided is whether Section 9 either expressly or by necessary implication has been made applicable to or would govern pending proceedings. The language of sub-s (1) is clear and unequivocal and leaves no room for doubt that it would cover all cases where an Indian citizen has acquired foreign nationality between January 26, 1950 and its commencement or where he acquires such nationality after its commencement. The words "or has at any time between the 26th January, 1950 and the commencement of this Act, voluntarily acquired the citizenship of another country" would become almost redundant if only prospective operation is given to S 9 (1) of the Act. This according to the settled rules of interpretation cannot be done.

5. It must be remembered that Art. 9 of the Constitution provides that no person shall be a citizen of India by virtue of Article 5 or be deemed to be a citizen of India by virtue of Article 6 or Article 8 if he has voluntarily acquired the citizenship of any foreign State. This means that if prior to the commencement

of the Constitution a person had voluntarily acquired the citizenship of any foreign State he was not entitled to claim the citizenship of India by virtue of Articles 5 and 6 or 8. This article thus deals with cases where the citizenship of a foreign State had been acquired by an Indian citizen prior to the commencement of the Constitution (vide *Izhar Ahmad Khan v. Union of India*, (1962) Supp (3) SCR 235 at pp. 244, 245=(AIR 1962 SC 1052 at p. 1057)). Article 11, however, makes it clear that Parliament has the power to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship. The Parliament could thus regulate the right of citizenship by law. As pointed out in the above decision of this Court it would be open to the Parliament to affect the rights of citizens and the provisions made by the Parliamentary statute cannot be impeached on the ground that they are inconsistent with the provisions contained in other Articles in Part II of the Constitution. The Act has been enacted under the powers of the Parliament preserved by Article 11 in express terms. The Parliament had also legislative competence under Entry 17, List I of Seventh Schedule. It could thus make a provision about the forum where the question as to whether a person had acquired citizenship of another country could be determined and this is what has been done by Rule 30. The cases that would ordinarily arise about loss of Indian citizenship by acquisition of foreign citizenship would be of three kinds: (1) Indian citizens who voluntarily acquired citizenship of a foreign State prior to the commencement of the Constitution; (2) Indian citizens who voluntarily acquired the citizenship of another State or country between January 26, 1950 and December 30, 1955 i.e., the date of commencement of the Act; and (3) Indian citizens who voluntarily acquired foreign citizenship after the date of commencement of the Act i.e., December 30, 1955. As regards the first category they were dealt with by Article 9 of the Constitution. The second and the third categories would be covered by the provisions of Section 9 of the Act. If a question arises as to whether, when or how an Indian citizen has acquired the citizenship of another country that has to be determined by the Central Government by virtue of the provisions of sub-section (2) of Section 9 read with Rule 30 of the Citizenship Rules.

6. Counsel for respondent No. 1 has relied on a decision of a learned Single Judge of the Allahabad High Court in *Abida Khatoon v. State of U. P.*, AIR 1963 All 260 which was followed in the present case. There it was observed that a litigant, after filing a suit, acquired a vested right to have all questions determined by the Court in which the suit was filed and that the institution of the suit carried with it all the rights of appeal then in force. Referring to the normal principle that an Act is ordinarily not retrospective, that vested rights are not disturbed and that the jurisdiction of the civil courts in pending cases is not taken away by the creation of a new tribunal for the determination of a particular question, the learned Judge held that there was nothing in the language or the scheme of the Act to suggest that Parliament wanted to depart from these principles. We are unable to agree. In our judgment from the amplitude of the language employed in Section 9 which takes in persons in category (2) mentioned above, the intention has been made clear that all cases which come up for determination where an Indian citizen has voluntarily acquired the citizenship of a foreign country after the commencement of the Constitution have to be dealt with and decided in accordance with its provisions. In this view of the matter the entire argument which prevailed with the Allahabad Court can have no substance.

7. It has next been contended that retrospective operation should not be given to Section 9 of the Act because loss of citizenship is a serious and grave matter and it involves loss of personal liberty. Under Article 21 no person can be deprived of his life or personal liberty except according to procedure established by law. The procedure established by law before the commencement of the Act was the ordinary procedure of determination by Civil Courts whenever a question arose about loss of Indian citizenship by acquisition of citizenship of a foreign country or State. It is suggested by learned Counsel for respondent No. 1 that by giving retrospective operation to Section 9 so as to make it applicable to pending proceedings the provisions of Article 21 will be contravened or violated. This would render Section 9 of the Act unconstitutional. It is somewhat difficult to appreciate the argument, much less to accede to it. If the Parliament was competent under Article 11, which is

a constitutional provision read with the relevant Entry in List I to legislate about cases of persons belonging to categories 2 and 3 referred to at a previous stage it could certainly enact a legislation in exercise of its sovereign power which laid down procedure different from the one which obtained before. The new procedure would itself become the "procedure established by law" within the meaning of Article 21 of the Constitution. Therefore even on the assumption that loss of Indian citizenship with consequent deportation may involve loss of personal liberty within the meaning of Art. 21, it is not possible to hold that by applying Section 9 of the Act and Rule 30 of the Rules to a case in which a suit had been instituted prior to the commencement of the Act there would be any contravention or violation of that Article.

8 In conclusion it may be mentioned that this Court, in several cases, has consistently held that questions falling within Section 9 (2) have to be determined to the extent indicated therein by the Central Government and not by the Courts. Such matters as are not covered by that provision have, however, to be determined by the Courts, (see *Akbar Khan Alam Khan v Union of India*, 1962 (1) SCR 779 = (AIR 1962 SC 70) and (1962) Supp (3) SCR 235 = (AIR 1962 SC 1052) and *Government of Andhra Pradesh v Sved Mohd Khan*, (1962) Supp (3) SCR 288 = (AIR 1962 SC 1778)).

9. In the present case the High Court ought not to have called for a decision of the lower appellate Court on the issue of the plaintiff having acquired or not acquired the citizenship of Pakistan between July 3, 1952 and the date of his return to India. The appeal is, consequently, allowed and the order of the High Court is hereby set aside. It will be for the High Court now to make appropriate orders for determination of the aforesaid question by the Central Government after which alone the High Court will be in a position to dispose of the appeal finally. Costs will abide the result.

MKS/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 1238
(V 56 C 224)

(From Madhya Pradesh)*

J. C SHAH, V RAMASWAMI AND
A. N GROVER, JJHindustan Steel Ltd., Appellant v.
M/s Dilip Construction Co., Respondent.

Civil Appeal No. 2425 of 1968, D/- 18-2-1969

(A) Stamp Act (1899), Sections 35 and 36 — Provisions of Section 36 do not create any bar against an instrument not duly stamped being acted upon — AIR 1952 All 996, Overruled. (Para 4)

(B) Stamp Act (1899), Section 1 — Scope — Provisions are not meant to arm a litigant with technicalities to defeat the claim of the opponent.

The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments. It is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponents. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. (Para 5)

Cases Referred- Chronological Paras
(1952) AIR 1952 All 996 (V 39) =

ILR (1952) 2 All 984, Mst Bittan

Bibi v. Kuntu Lal

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Mr. C K Daphtary, Senior Advocate, (Mr. I. N Shroff, Advocate with him), for Appellant, M/s Rameshwar Nath and Mahinder Narain, Advocates of M/s. Rajinder Narain and Co. for Respondent.

The following Judgment of the Court was delivered by

SHAH, J.: The respondents entered into a contract with Hindustan Steel Ltd for "raising, stacking, carting and loading into wagons limestone at Nandini Mines". Dispute which arose between the parties was referred to arbitration, pursuant to Cl 61 of the agreement. The arbitrators differed, and the dispute was referred to an umpire who made and published his award on April 19, 1967. The umpire filed the award in the Court of the District Judge, Rajnandgaon in the State of Madhya Pradesh and gave notice of the filing of the award to the parties to the dispute. On July 14, 1967, the appellant

* (Civil Revn. No 764 of 1967, D/- 30-8-1968—M P)

IM/IM/A915/69/P

filed an application for setting aside the award under Sections 30 and 33 of the Indian Arbitration Act, 1940. One of the contentions raised by the appellants was that the award was unstamped and on that account "invalid and illegal and liable to be set aside". The respondents then applied to the District Court that the award be impounded and validated by levy of stamp duty and penalty. By order dated September 29, 1967, the District Judge directed that the award be impounded. He then called upon the respondents to pay the appropriate stamp duty on the award and penalty and directed that an authenticated copy of the instrument be sent to the Collector, Durg, together with a certificate in writing stating the receipt of the amount of duty and penalty. Against that order the appellant moved the High Court of Madhya Pradesh in exercise of its revisional jurisdiction. The High Court rejected the petition and the appellant appeals to this Court with special leave.

2. It is urged by Counsel for the appellant that an instrument which is not stamped as required by the Indian Stamp Act, may, on payment of stamp duty and penalty, be admitted in evidence, but cannot be acted upon, for, "the instrument has no existence in the eye of law". Therefore, counsel urged, in proceeding to entertain the application for filing the award, the District Judge, Rajnandagaon, acted without jurisdiction.

3. The relevant provisions of the Stamp Act may be summarised. Section 3 of the Act provides:

"Subject to the provisions of this Act * * * the following instruments shall be chargeable with duty of the amount indicated in that Schedule as the proper duty therefor, respectively, that is to say—

(a) every instrument mentioned in that Schedule which, not having been previously executed by any person, is executed in India on or after the first day of July, 1899;

"Instrument" is defined in Section 2 (14) as including "every document by which any right or liability is, or purports to be, created, transferred, limited, extended, extinguished or recorded". An instrument is said to be "duly stamped" within the meaning of the Stamp Act when the instrument bears an adhesive or impressed stamp of not less than the proper amount and that such stamp has been affixed or used in accordance with the law for the

time being in force in India: Section 2(11). Item 12 of Sch. I prescribes the stamp duty payable in respect of an award. Section 33 (1) provides, insofar as it is relevant:

"(1) Every person having by law or consent of parties authority to receive evidence * * * before whom any instrument, chargeable * * * with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same."

Section 35 of the Stamp Act provides, insofar as it is relevant:

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that * * *

Section 36 provides:

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

Section 38 deals with the impounding of the instruments: it provides:

"(1) When the person impounding an instrument under Section 33 has * * * authority to receive evidence and admits such instrument in evidence upon payment of a penalty as provided by Sec. 35 or * * * he shall send to the Collector an authenticated copy of such instrument, together with a certificate in writing, stating the amount of duty and penalty levied in respect thereof, * * *

By Section 39 the Collector is authorised to adjudge proper penalty and to refund any portion of the penalty which has been paid in respect of the instrument, sent to him. Section 40 prescribes the procedure to be followed by the Collector in respect of an instrument impounded by him or sent to him under Section 38. If the Collector is of the opinion that the instrument is chargeable with duty and is not duly stamped, he shall require the payment of proper duty or the amount required to make up the same together with a penalty of five rupees; or, if he thinks fit, an amount not exceeding ten times the amount of the proper duty or

of the deficient portion thereof, Sec. 42 provides

"(1) When the duty and penalty (if any), leviable in respect of any instrument have been paid under Section 35, Section 40 or * * *, the person admitting such instrument in evidence or the Collector, as the case may be, shall certify by endorsement "thereon that the proper duty or, as the case may be, the proper duty and penalty (stating the amount of each) have been levied in respect thereof, * * *

(2) Every instrument so endorsed shall thereupon be admissible in evidence and may be registered and acted upon and authenticated as if it had been duly stamped, and shall be delivered on his application in this behalf to the person from whose possession it came into the hands of the officer impounding it, or as such person may direct:

Provided that—

The award, which is an "instrument" within the meaning of the Stamp Act was required to be stamped. Being unstamped, the award could not be received in evidence by the Court, nor could it be acted upon. But the Court was competent to impound it and to send it to the Collector with a certificate in writing stating the amount of duty and penalty levied thereon. On the instrument so received the Collector may adjudge whether it is duly stamped and he may require penalty to be paid thereon, if in his view it has not been duly stamped. If the duty and penalty are paid, the Collector will certify by endorsement on the instrument that the proper duty and penalty have been paid.

4. An instrument which is not duly stamped cannot be received in evidence by any person who has authority to receive evidence, and it cannot be acted upon by that person or by any public officer. Section 35 provides that the admissibility of an instrument once admitted in evidence shall not, except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped. Relying upon the difference in the phraseology between Sections 35 and 36 it was urged that an instrument which is not duly stamped may be admitted in evidence on payment of duty and penalty, but it cannot be acted upon because Section 35 operates as a bar to the admission in evidence of the instrument not duly stamped as well as to its being acted upon, and the Legis-

lature has by Section 36 in the conditions set out therein removed the bar only against admission in evidence of the instrument. The argument ignores the true import of Section 36. By that section an instrument once admitted in evidence shall not be called in question at any stage of the same suit or proceeding on the ground that it has not been duly stamped. Section 38 does not prohibit a challenge against an instrument that it shall not be acted upon because it is not only duly stamped, but on that account there is no bar against an instrument not duly stamped being acted upon after payment of the stamp duty and penalty according to the procedure prescribed by the Act. The doubt, if any, is removed by the terms of Section 42 (2) which enact, in terms unmistakable, that every instrument endorsed by the Collector under Section 42 (1) shall be admissible in evidence and may be acted upon as if it had been duly stamped.

5. The Stamp Act is a fiscal measure enacted to secure revenue for the State on certain classes of instruments it is not enacted to arm a litigant with a weapon of technicality to meet the case of his opponent. The stringent provisions of the Act are conceived in the interest of the revenue. Once that object is secured according to law, the party staking his claim on the instrument will not be defeated on the ground of the initial defect in the instrument. Viewed in that light the scheme is clear. Section 35 of the Stamp Act operates as a bar to an unstamped instrument being admitted in evidence or being acted upon, section 40 provides the procedure for instruments being impounded, sub-section (1) of Section 42 provides for certifying that an instrument is duly stamped, and sub-section (2) of Section 42 enacts the consequences resulting from such certification.

6. Our attention was invited to the statement of law by M C Desai, J, in *Mst Bittan Bibi v Kuntu Lal* ILR (1952) 2 All 984 = (AIR 1952 All 990) that.

"A court is prohibited from admitting an instrument in evidence and a Court and a public officer both are prohibited from acting upon it. Thus a Court is prohibited from both admitting it in evidence and acting upon it. It follows that the acting upon is not included in the admission and that a document can be admitted in evidence but not be acted upon. Of course it cannot be acted upon without its being admitted, but it can be ad-

mitted and yet be not acted upon. If every document, upon admission, became automatically liable to be acted upon, the provision in Section 35 that an instrument chargeable with duty but not duly stamped, shall not be acted upon by the Court, would be rendered redundant by the provision that it shall not be admitted in evidence for any purpose. To act upon an instrument is to give effect to it or to enforce it."

In our judgment, the learned Judge attributed to Section 36 a meaning which the Legislature did not intend. Attention of the learned Judge was apparently not invited to Section 42 (2) of the Act which expressly renders an instrument, when certified by endorsement that proper duty and penalty have been levied in respect thereof, capable of being acted upon as if it had been duly stamped

7. The appeal fails and is dismissed with costs.
GGM/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 1241
(V 56 C 225)

(From: Calcutta)*

**J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.**

M/s. Karam Chand Thapar and Bros. Private Ltd. (In both the Appeals), Appellant v. Commissioner of Income-tax, (Central), Calcutta (In both the Appeals), Respondent.

Civil Appeals Nos. 1594 and 1595 of 1968, D/- 20-2-1969.

(A) Income-tax Act (1922), Ss. 4, 6 — Disposal of part or whole of assets — Nature of realisation — Test — Sale of Colliery after prospecting and developing — Income held taxable as business income.

Where a person disposes of a part or the whole of his assets, the general rule is that the mere change or realisation of an investment does not attract liability to income-tax, but where such a realisation is an act which in itself is a trading transaction, profit earned by sale or conversion is taxable. (1914 AC 1001, Rel. on.

(Para 6)

The test is — "Is the sum of gain that has been made a mere enhancement of

*I. T. Ref. No. 38 of 1960, D/- 29-8-1963 — Cal).

value by realising a security, or is it a gain made in an operation of business in carrying out a scheme for profit-making. (1905) 5 Tax Cas 159, Rel. on. (Para 6)

In determining whether the gain is realisation of mere enhancement of value or is a gain made in an operation of business in carrying out a scheme for profit-making, no uniform rule can be evolved. But general criteria indicating that certain facts have dominant significance in the context of other facts have been adopted in the decided cases. AIR 1965 SC 1898, Rel. on. (Para 7)

The assessee Company, among other businesses, worked certain coal mines. The Company obtained a prospecting licence for certain Colliery in 1944 and after prospecting for coal sold the colliery, and thereby earned a profit of Rs. 51,550 in the account year 1948-49 and Rs. 8,756 in the account year 1949-50. The Income-tax Officer brought the profits arising out of the sale of the colliery to tax as business profits. In appeal, the Company urged that prospecting for coal under a licence was not part of the business operations of the Company and that by selling the rights in the mine, the Company disposed of its assets and made gains of a capital nature.

Held that on the findings recorded by the Tribunal it followed that the prospecting for coal was a part of the coal mining business and the income was properly regarded as taxable. Case law referred to. The decision in I. T. Ref. No. 38 of 1960, D/- 29-8-1963 (Cal), Affirmed. (Para 10)

(B) Income-tax Act (1922), S. 24 (1) — Sale transaction on 1-10-1948 — Price finally settled in December 1949 resulting in loss to assessee — Year in which loss can be taken into account — The decision in I. T. Ref. No. 38 of 1960, D/- 29-8-1963 (Cal), Reversed.

The sale transaction of a Factory was completed on October 1, 1948, but the price was finally settled in December 1949. By the settlement, the Company suffered a loss of Rs. 34,891 in business transaction and the question related to the year in which the loss was liable to be taken into account.

Held that until the price was settled, loss did not accrue or arise to the Company. The loss was thus suffered in the account year 1949-50 and could be allowed against the income of that year under Sec. 24 (1). The assumption that the loss was suffered in the previous year i.e., 1948-49 was not warranted. The case was plainly governed by sub-section (1) of Sec-

tion 24 The decision in I. T. Ref. No. 38 of 1960, D/- 29-8-1963 (Cal), Reversed

(Para 13)

Cases Referred Chronological Paras
(1965) AIR 1965 SC 1898 (V 52) =

1965-57 ITR 21, Janki Ram Bahadur Ram v. Commr. of Income-tax 'Calcutta'

(1944) 25 Tax Cas 292, Imperial Tobacco Co Ltd v Kelly

(1928) 12 Tax Cas 720=1925 AC 469, Gloucester Rly. Carriage and Wagon Co Ltd v. Commrs of Inland Revenue

(1918) 7 Tax Cas 125, T Beynon & Co., Ltd v Ogg

(1914) 1914 AC 1001, Commr of Taxes v Melbourne Trust Ltd.

(1905) 5 Tax Cas 159, Californian Copper Syndicate Ltd v Harris

Mr Sachin Chaudhuri, Senior Advocate (M/s. T A Ramchandran and D N Gupta, Advocates, with him), for Appellant (In both the Appeals), Mr D Narasaru, Senior Advocate (M/s S K Aiyar, R N Sachthey and B D Sharma, Advocates, with him), for Respondent (In both the Appeals)

The following Judgment of the Court was delivered by

SHAH, J. In respect of assessment years 1949-50 and 1950-51 the Income-tax Appellate Tribunal referred five questions to the High Court of Calcutta under Section 66 (1) of the Indian Income-tax Act, 1922. Three of those questions which are canvassed in these appeals need be set out.

Assessment year 1949-50

"(1) Whether, on the facts and in the circumstances of the case, the sum of Rs 51,550 was a profit in the nature of revenue and therefore liable to tax under the Indian Income-tax Act?"

Assessment year 1950-51

"(3) Whether, on the facts and in the circumstances of the case, the sum of Rs 8,756 was a profit in the nature of revenue and was subject to tax under the Indian Income-tax Act?"

(4) Whether, on the facts and in the circumstances of the case the loss of Rs 34,891 was allowable as a deduction against the business income of the assessee for the assessment year 1950-51?"

2. The appellant — a limited Company incorporated under the Indian Companies Act, 1913 — carries on business as Managing agents, dealers in shares and stocks, stores and spare parts of

machinery and acts as insurance agents and manufacturers of carbon dioxide. It also works certain coal mines. The Company obtained a prospecting licence from the State of Korea for the *Churmiri Colliery* in 1944 and after prospecting for coal sold the colliery and thereby earned a profit of Rs 51,550 in the account year 1948-49 and Rs 8,756 in the account year 1949-50. The Income-tax Officer brought the profits arising out of the sale of the colliery to tax as business profits. The order was confirmed in appeal by the Appellate Assistant Commissioner and the Income-tax Appellate Tribunal.

3. The Company conducted a Dry Ice Factory at Lahore. The factory was sold in September 1948 to the Indo-Pakistan Corporation Ltd. The purchaser took over the factory on October 1, 1948, but the price was finally settled in December 1949. By the sale the Company suffered a loss of Rs 34,891. The Company claimed to deduct this loss from its income assessable to tax in the assessment year 1950-51. The Income-tax Officer disallowed the claim. The Appellate Assistant Commissioner agreed with that view, and the Tribunal confirmed the order.

4. In answering questions (1) and (3) the High Court observed

"The *Churmiri Colliery* was sold after prospecting and proving coal. The sale in such a case was a part of the trading activities of the assessee and such activity could be gathered from the surrounding circumstances as also from the manner in which it was sold, that is, within a very short time after its acquisition and after it was made fit for obtaining a reasonably higher price at the sale. . . . The profit thus acquired cannot be treated as a capital asset."

In answering question (4) the High Court observed,

"The loss of Rs 34,891 sustained by the assessee after the sale of Dry Ice Factory at Lahore in September 1948 cannot be treated as a loss of the business of sale, inasmuch as the Tribunal found as a fact that the loss not having occurred in the relevant accounting year, was referable to the transaction of business during a period when the business completely ceased before the commencement of the accounting year. . . ."

5. Counsel for the Company urges that prospecting for coal under a licence obtained from the State of Korea was not part of the business operations of the Company and that by selling the rights

in the mine, the Company disposed of its assets and made gains of a capital nature. In any event, it was urged, this was a single transaction and in the absence of evidence that the Company carried on the business of obtaining prospecting licences and of selling the mines if "coal was proved", the profit arising out of sale of the mine which was a capital asset acquired by that transaction was not taxable.

6. Where a person disposes of a part or the whole of his assets, the general rule is that the mere change or realisation of an investment does not attract liability to income-tax, but where such a realisation is an act which in itself is a trading transaction, profit earned by sale or conversion is taxable: *Commissioner of Taxes v. Melbourne Trust Ltd.*, 1914 AC 1001 at p. 1010. The cases which illustrate this distinction fall broadly into two categories—those where the sales formed part of trading activity, and, those in which the sale or realisation was not an act of trading. As observed in *Californian Copper Syndicate (Limited and Reduced) v. Harris* (Surveyor of Taxes), (1905) 5 Tax Cas 159 at p. 166 the test is—"Is the sum of gain that has been made a mere enhancement of value by realising a security or is it a gain made in an operation of business in carrying out a scheme for profit-making."

7. In determining whether the gain is realization of mere enhancement of value or is a gain made in an operation of business in carrying out a scheme for profit-making, no uniform rule can be evolved. It was observed by this Court in *Janki Ram Bahadur Ram v. Commissioner of Income-tax*, 1965-57 ITR 21 at p. 25 = (AIR 1965 SC 1898 at p. 1900):

".....no single fact has decisive significance, and the question whether a transaction is an adventure in the nature of trade must depend upon the collective effect of all the relevant materials brought on the record. But general criteria indicating that certain facts have dominant significance in the context of other facts have been adopted in the decided cases. If, for instance, a transaction is related to the business which is normally carried on by the assessee, though not directly part of it, an intention to launch upon an adventure in the nature of trade may readily be inferred. A similar inference would arise where a commodity is purchased and sub-divided, altered, treated or re-

paired and sold, or is converted into a different commodity and then sold. Magnitude of the transaction of purchase, the nature of the commodity, subsequent dealings and the manner of disposal may be such that the transaction may be stamped with the character of a trading venture: * * * * *"

8. A transaction of sale may in a given case be isolated: in another it may be intimately related to the normal business of the tax-payer. In the latter class profit arising from the transaction will probably arise out of the taxpayer's business and will be assessable as business profits. An instructive case of this class is *Imperial Tobacco Co. (of Great Britain and Ireland) Ltd. v. Kelly*, (1944) 25 Tax Cas 292. In that case the Company carried on the business of tobacco manufacture, for which large quantities of tobacco leaf were purchased in the United States, where the Company maintained a large buying organisation. To finance the purchases and the expenses of his organisation the Company bought dollars in the United Kingdom through its bankers who remitted them to the banking accounts of the Company in the United States, and it was the practice of the Company to accumulate a large holding of dollars each year before the leaf season commenced. The Company never bought dollars for the purpose of resale as a speculation. On the outbreak of war, in September, 1939, the appellant Company, at the request of the Treasury, stopped all further purchases of tobacco leaf in the United States, and, as a result, the Company had on hand a holding of dollars accumulated between January and August 1939. On September 30, 1939, the Company was ordered under the Defence (Finance) Regulations, 1939, to sell its surplus dollars to the Treasury, and, owing to the rise in the rate of exchange, the sale resulted in a profit to the Company. It was held by the Court of Appeal that the profit was liable to be included as profits of its trade under Sch. D, Case I. The tax-payer was not carrying on business in dollars, but the transactions in dollars were intimately related to their principal business and the profits earned by sale of dollars were treated as profits taxable as business profits.

9. In *T. Beynon and Co. Ltd. v. Ogg* (Surveyor of Taxes), (1918) 7 Tax Cas 125 the tax-payer carrying on business as Coal Merchants, Ship and Insurance Brokers, and as sole selling agent for various Col-

liery Companies, in which latter capacity it was part of its duty to purchase wagons on behalf of its clients, bought a large number of wagons on his own account with the intention of reselling them at profit. The contention of the tax-payer that the transaction being an isolated one, the profit was in the nature of a capital profit on the realisation of an investment was negatived. The profits realised in this transaction were held to result from the operation of the Company's business and properly includible in the computation of the Company's profits for assessment under Sch. D. In *Gloucester Railway Carriage and Wagon Co. Ltd. v. Commissioners of Inland Revenue*, (1928) 12 Tax Cas 720 the tax-payer carried on the business of manufacturing wagons for sale or hire. The tax-payer sold some of the wagons which were formerly hired out. The tax-payer contended that the profit realized by sale was an isolated transaction resulting in a capital profit. The House of Lords held that the "business was all one", namely, to make profit out of wagons and on that account the profits realized by sale of wagons were taxable.

10. The Tribunal in the present case recorded the following findings.

"It is no doubt true that this was a single transaction. But we were told by the assessee's counsel that the assessee obtained prospecting licence in the colliery, developed the colliery and then sold out. What was the purpose of obtaining the prospecting licence has not been told to us. The assessee was carrying on business of coal mining. The prospecting of coal is a part of the coal mining business. Therefore, in our opinion, the transaction of prospecting, developing and selling the colliery is a transaction in nature of a business. Therefore, the profit arising from the sale is a profit in the nature of revenue and has been rightly brought to tax." Our task would have been lightened if the Tribunal had stated the findings in greater detail. Nevertheless the Tribunal has found that the Company was carrying on the business of coal mining and prospecting of coal was a part of the coal mining business and on that account the transaction of prospecting, developing and selling the colliery was a transaction in the nature of a business. On the findings recorded by the Tribunal it follows that the prospecting for coal being a part of the coal mining business, the income was properly regarded as taxable. The

answer recorded by the High Court on questions (1) and (3) must be upheld.

11. Turning to the fourth question: the sale transaction of the Dry Ice Factory was completed on October 1, 1948, but the price was finally settled in December 1949. In the settlement, the Company suffered a loss of Rs 34,891. The loss was suffered in the business transaction and the only dispute raised before the Tribunal related to the year in which the loss was liable to be taken into account. The Tribunal disallowed the loss in the assessment of income for the year 1950-51. The Tribunal held that the business of the Dry Ice Factory was not carried on in the year of account—April 1, 1949 to March 31, 1950 and on that account the loss was not admissible as a permissible deduction in computing the taxable income of the Company for the assessment year 1950-51. The High Court agreed with the Tribunal. In our judgment, the High Court was in error in holding that the loss was not a permissible deduction.

12. Section 24 of the Income-tax Act, 1922, in the relevant year of assessment read as follows:

"(1) Where any assessee sustains a loss of profits or gains in any year under any of the heads mentioned in Section 6, he shall be entitled to have the amount of the loss set off against his income, profits or gains under any other head in that year."

Provided that * * *

(2) Where any assessee sustains a loss of profits or gains in any year, being a previous year not earlier than the previous year for the assessment for the year ending on the 31st day of March, 1940, under the head profits of business, profession or vocation, and the loss cannot be wholly set off under sub-section (1) the portion not so set off shall be carried forward to the following year and set off against the profits or gains, if any, of the assessee from the same business, profession or vocation for that year.

Provided that * * *

13. By sub-section (1) the loss or profits or gains suffered under any head in any year was liable to be set off against the income, profits or gains under any other head, and by sub-sec. (2) where the loss suffered in any business, profession or vocation could not be wholly set off under Sub-section (1) the loss not so set off had to be carried forward to the following year and set off against the profits and gains of the same business in the sub-

sequent years. The Tribunal and the High Court applied Sub-section (2) of Section 24 in computing the taxable income of the Company for the assessment year 1950-51. But in so proceeding, in our judgment, they were in error. The business of Dry Ice Factory was sold in October, 1948. We will assume that the Dry Ice Factory was a separate business of the Company and was not a part of the other business carried on by the Company. But the price for which the business was sold was settled in December, 1949. Until the price was settled loss did not accrue or arise to the Company. The loss was suffered in the account year 1949-50 and could be allowed against the income of that year under Section 24 (1), the assumption that the loss was suffered in the previous year i. e. 1948-49 was, in our judgment, not warranted. The case was plainly governed by Sub-section (1) of Section 24. The answer to the fourth question recorded by the High Court must be discharged.

14. The answers to questions (1) & (3) recorded by the High Court are affirmed. Question (4) will be answered in the affirmative and in favour of the Company. In view of the divided success, there will be no order as to costs in this Court. The order as to costs in the High Court is maintained.

DRR

Reference answered accordingly.

AIR 1969 SUPREME COURT 1245 (V 56 C 226)

(From Rajasthan: AIR 1965 Raj 234)
J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

State of Rajasthan and another, Appellants v. M/s. Man Industrial Corporation Ltd., Jaipur, Respondent.

Civil Appeal No. 812 of 1966, D/- 4-2-1969.

Sales Tax — Rajasthan Sales Tax Act (XXIX of 1954), Section 2 (o) — Sale — Works contract — Contract for fixing special type of steel windows as per specifications — Predominant idea being the fixing of the windows — ‘Fixing,’ held would require special technical skill and contract is a works contract and not contract of sale.

It cannot be laid down as universal test that whenever there is a contract to ‘fix’

certain articles made by a manufacturer, the contract must be deemed one for sale and not of service. The test in each case is whether the object of the party sought to be taxed is that the chattel as chattel passes to the other party and the services rendered in connection with the installation are under a separate contract or are incidental to the execution of the contract of sale.

Thus where the assessee carrying on the business of fabricating steel doors, windows and other goods entered into a contract to prepare the window leaves according to specifications and to ‘fix’ them to the building, the work to be completed within the specified time,

Held, on a consideration of the terms of the contract, that the contract entered into by the assessee was a contract of service and not one for sale. The primary undertaking was not merely to supply the windows but to fix them. This service was not rendered in separate contract nor was it shown to be rendered under customarily or normally as incidental to the sale by the person who supplied the window leaves. The ‘fixing’ of windows in the manner stipulated required special technical skill since it was only upon fixing of the window leaves and after the window leaves had become a part of the building construction that the property passed under the terms of contract. The contract was therefore a contract for work in which the use of material was accessory or incidental to the execution of the work. 1944-1 KB 484, Distinguished; AIR 1958 SC 560 and AIR 1965 SC 1396 and AIR 1965 SC 1655 and 1965-16 STC 518 (SC) and 1965-16 STC 385 (Bom) and 1966-17 STC 576 (SC) and 1968-21 STC 245 (SC), Ref.

(Paras 10, 14 and 15)

Cases Referred: Chronological Paras
(1968) 1968-21 STC 245 (SC), State of Madras v. Richardson & Gurdas Ltd. 13
(1966) 1966-17 STC 576 (SC), Arun Electrics, Bombay v. Commr. of Sales Tax, Maharashtra State 12
(1965) AIR 1965 SC 1396 (V 52) = 1965-16 STC 240, Govt. of Andhra Pradesh v. Guntur Tobaccos Ltd. 10
(1965) AIR 1965 SC 1655 (V 52) = 1965-16 STC 364, Patnaik and Co. v. State of Orissa 11
(1965) 1965-16 STC 518 (SC), McKenzies Ltd. v. State of Maharashtra 11
(1965) 1965-16 STC 385 (Bom), Commr. of Sales Tax, Maharashtra State, Bombay v. Arun Electrics 12

(1938) AIR 1958 SC 560 (V 45) =
1958-9 STC 353, State of Madras
v Gannon Dunkerley and Co
(Madras) Ltd

(1914) 1944-1 KB 484 = 1944-1 All
ER 618, Love v. Norman Wright
(Builders) Ltd

Mr M C Chagla, Senior Advocate,
(Mr K Baldeva Mehta, Advocate with
him), for Appellants, M/s Sanat P Mehta
and O P Malhotra, Advocates, and M/s
J B Dadachanji and O C Mathur, Advoca-
tes of M/s J B Dadachanji and Co,
for Respondents

The following Judgment of the Court
was delivered by

SHAH, J: The respondent carries on
the business of fabricating "steel doors,
windows, sashes and other goods" On
April 20, 1957, the respondent submitted
in pursuance of an invitation by the Exe-
cutive Engineer, Ajmer Central Division,
its tender for providing and fixing "S H.
Windows 'W' Type", "S H Windows 'W1'
type, "T H Windows" & "Composite Win-
dows" of certain sizes "in accordance with
the specifications, designs, drawing and
instructions" The tender was accepted
and the respondent carried off the con-
tract

2 The Sales Tax Officer 'B' Circle,
Jaipur City, included in the taxable turn-
over of the respondent Rs 23480 received
under the contract He held that the con-
tract with the Executive Engineer was
one of sale of goods and the respondent
had with a view to promote sales of
goods manufactured by it "voluntarily of-
fered to fit" the goods and had made no
separate charge for that service The
Deputy Commissioner Excise and Taxa-
tion in appeal held that from the accep-
tance of the tender, two contracts result-
ed one for providing doors and windows
and another for "fixing" those doors and
windows in a specified building, and that
the price of the goods supplied, but not
the charge for service, was taxable He
accordingly remanded the case with a
direction to assess tax on the price for
sale of materials only The Board of
Revenue exercising revisional power con-
firmed the order passed by the Deputy
Commissioner observing that the contract
undertaken by the respondent was not a
contract of service

3 The following question was refer-
red by the Board of Revenue to the High
Court of Rajasthan

"Whether on the proper interpretation
of the contract between the applicant and

the Executive Engineer, C.P.W.D., Ajmer,
regarding the providing and fixing of the
steel windows to the Accountant Gene-
ral's Office, Jaipur, and looking to the
terms of the transaction of the type under-
taken by the applicant the Board were
justified in holding that the contract was
divisible between two parts representing
the sale of the windows and the labour
charges in fixing the same and thus partly
liable to sales-tax?"

The High Court held that the contract
between the respondent and the Execu-
tive Engineer was a "building contract"
and the amount received by the respon-
dent was not taxable

4 The relevant terms of the tender
which was accepted by the Executive
Engineer were

"Item Rate-tender for Works

I/we hereby tender for the execution
for the President of India of the work
specified in the under-written memoran-
dum within the time specified in such
memorandum at the rates specified there-
in, and in accordance in all respects with
the specifications, designs, drawing, and
instructions in writing referred to in
Rule I hereof and in Class II of the condi-
tions of contract and with such materials
as are provided for, by and in all other
respects in accordance with such condi-
tions so far as applicable"

This recital was followed by a memoran-
dum setting out the "general description"
of the building in respect of which the
window-leaves were to be supplied, the
estimated cost of the contract and the
description and the number of items of
work offered to be done The items of
work offered to be done were "providing
and fixing" four different types of win-
dows The relevant conditions were

"1 The work shall be executed as per
the specifications attached

2 The work is to be completed in 6
months from the date of award of works

3
4 The windows are to be fitted with
rawl plugs in cut stone works.

5 Work will be executed either by
plain glass or ground glass as may be
decided by the Engineer in Charge

"Note —

1

2 We are offering windows which will
be glazed with plain glass only If at a
later date it is desired to have windows
glazed with ground glass, the difference
in cost of glass will have to be paid by
you.

3.

4. * * * * *

5. The quotation is based on the current prices of mild steel billets fixed by the Government. Should there be any change in the controlled price of billets supplied to us, proportionate revision in the cost of rolled sections used in the fabrication will be made in the quotation.

6. Sales Tax or any other tax is applicable will be extra.

7. Work will be completed in 6 months from the date of order.” These were followed by specifications relating to the steel to be used in the fabrication, glazing, fittings and finish of the windows.

5. The respondent offered to execute and complete the “work” mentioned in the written memorandum according to the specifications and conditions. In the view of the High Court the contract was for work, in the execution of which some movable property passed: it was not a contract for sale of windows and for rendering service in connection with the fixing of those windows.

6. Counsel for the State of Rajasthan contends that the respondent carried on the business of fabricating and selling window and door leaves and sashes etc. and entered into a contract for “sale of windows”, and to promote sale of its manufactured goods undertook to fix the windows without demanding any charge for that service, and the High Court was in error in holding that the contract was one of service in the execution of which property in the materials supplied by the respondent passed. Counsel urged that the terms of the tender were not decisive and the Court was entitled to ascertain the true effect of the contract as disclosed by the nature of the work, and the “invoice” for payment made out by the respondent. Counsel submitted that it is usual for manufacturers or dealers in specialized articles to arrange to “fix and service” the articles sold by them and on that account the contract does not acquire the character of a contract of service. He gave instances of sale of motor-tyres, luggage carriers, air-conditioning units, refrigerators and contended that in undertaking to instal or fix these units or articles the sellers do not enter into a works contract merely because they undertake to instal or for the articles sold so as to make them fit for immediate service. But whether a particular contract is one for sale of goods or is a contract for service depends upon the main

object of the parties gathered from the terms of the contract, the circumstances of the transaction, and custom of the trade and no universal rule applicable to all transactions may be evolved.

7. As observed in Halsbury’s Laws of England, 3rd Edn., Vol. 34 Art. 3 at p. 6:

“A contract of sale of goods must be distinguished from a contract for work and labour. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed and in anything that can properly become the subject of sale; neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel.”

What did the respondent agree to do when it offered its tender? Did the respondent agree to sell the window-leaves as described in the tender or did it, as part of a works contract, agree to “fix” windows of certain specifications in the building intended to be used for the offices of the Accountant-General? On a consideration of all the circumstances, we are of the view that the object of the respondent was to enter into a works contract. That clearly appears from the terms of the tender and its acceptance. The windows were to be fabricated according to the specifications with glass—plain or ground—as decided by the Engineer in Charge, and were to be “fixed” within six months from the date of its acceptance “to the building with rawl plugs in cut stone-work.” The rate quoted by the respondent was based on the current price of mild steel billets, and the price was to be revised in the light of cost revision of the controlled price of steel supplied to the respondent.

8. The contract undertaken by the respondent was to prepare the window-leaves according to the specifications and to fix them to the building. There were not two contracts—one of sale and another of service. “Fixing” the windows to the building was also not incidental or

subsidiary to the sale, but was an essential term of the contract. The window-leaves did not pass to the Union of India under the terms of the contract as window-leaves. Only on the fixing of the windows as stipulated, the contract could be fully executed and the property in the windows passed on the completion of the work and not before.

9. It was said by this Court in *State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd.*, 1958-9 STC 353 = (AIR 1958 SC 560) that in a building contract which is one, entire and indivisible, there is no sale of goods. In the case of a building contract the property in materials used does not pass to the other party to the contract as movable property. In the absence of an agreement to the contrary, the materials in the construction of a building become the property of the other party to the contract only on the theory of accretion.

10. In *Government of Andhra Pradesh v. Guntur Tobaccos Ltd.*, 1965-16 STC 240 = (AIR 1965 SC 1396) this Court pointed out (at p 235 (of STC)) = (at p. 1404 of AIR)

"A contract for work in the execution of which goods are used may take one of three forms. The contract may be for work to be done for remuneration and for supply of materials used in the execution of the works for a price; it may be a contract for work in which the use of materials is accessory or incidental to the execution of the work, or it may be a contract for work and use or supply of materials though not accessory to the execution of the contract is voluntary or gratuitous. In the last class there is no sale because though property passes it does not pass for a price. Whether a contract is of the first or the second class must depend upon the circumstances, if it is of the first, it is a composite contract for work and sale of goods, where it is of the second category, it is a contract for execution of work not involving sale of goods."

The contract in question in this case is of the second variety

11. Counsel relied upon *Patnaik and Co. v. State of Orissa*, 1965-16 STC 364 = (AIR 1965 SC 1655) and *Mckenzie Ltd. v. State of Maharashtra*, 1965-16 STC 518 (SC). But in both these cases the Court held on a consideration of the terms of the contract and the circumstances that the assessee had agreed to and did supply "motor-bus bodies" and the con-

tract being one for sale of chattels, they were liable to pay sales-tax.

12. Our attention was also invited to *Commissioner of Sales Tax, Maharashtra State, Bombay v. Arun Electrics*, 1965-16 STC 385 (Bom). In that case a firm of electrical contractors undertook the job of installing electrical fittings in the houses of their customers, which involved the supply and fixing of goods such as wire, brass clips, wall brackets and tube lights with accessories. The assessee charged their customers consolidated rates for the materials consumed and labour involved in carrying out the contracts. The Sales Tax Officer charged to tax under the Bombay Sales Tax Act, 1959, the value of materials supplied in carrying out the contracts. It was held by the High Court of Bombay that the transaction of the assessee with their customers was not a pure works contract, but a combination of two distinct and separate contracts, one for the supply or the sale of goods for consideration, and the other for the supply of work and labour, and only that part of the contract, which consisted of supply of goods for consideration, was liable to tax under the Sales Tax Act. That case was brought in appeal to this Court at the instance of the assessee. This Court in *Arun Electrics, Bombay v. Commissioner of Sales Tax, Maharashtra State*, 1966-17 STC 576 (SC) discharged the answer recorded by the High Court, holding that the conclusions recorded by the Deputy Commissioner and the Tribunal were based on no evidence, and the High Court could not record, on the facts found, an answer to the question referred. The Deputy Commissioner had proceeded only upon the terms of the invoice in which a charge was made for supplying and "fixing" the materials and providing light points complete with 1/8 CTS wire, brass clips, tapes and all approved accessories. The conclusion of the departmental authorities was not based on any intention of the parties as disclosed by the evidence, but plainly on the terms of the invoice which was ambiguous.

13. In *State of Madras v. Richardson and Gurudas Ltd.*, 1968-21 STC 245 (SC) the assessee without a formal contract agreed to supply, fabricate and erect steel structures for a sugar factory. The assessee completed the contract. A bill was submitted by the assessee for charges for fabrication, supply and erection of steel structures at certain rates. The High

Court of Madras on a consideration of the evidence held that there was a stipulation for a consolidated lump-sum payment of Rs. 1,160 per ton for fabricating, supplying and erecting at site all steel work etc.; there was no stipulation for passing of property in the goods to the factory before actual completion of the erection work; there the contract did not contemplate dissecting the value of the goods supplied and the value of work and labour bestowed in the execution of the work; and the predominant idea underlying the contract was the bestowing of special skill and labour by the experienced engineers and mechanics of the assesseees. This Court agreed with the High Court and held that the contract was a works contract and not a contract for sale.

14. Our attention was invited to a judgment of the Court of Appeal in *Love v. Norman Wright (Builders) Ltd.*, 1944-1 KB 484. In that case the respondents contracted with the Secretary of State for War to do the work and supply the materials mentioned in the Schedules to the contract, including the supply of blackout curtains, curtain rails and battens and their erection at a number of police stations. It was held by the Court of Appeal that the respondents were liable to pay purchase-tax. Reliance was placed upon the observations made by Goddard, L. J. at p. 484:

"If one orders another to make and fix curtains at his house the contract is one of sale though work and labour are involved in the making and fixing, nor does it matter that ultimately the property was to pass to the War Office under the head contract. As between the plaintiff and the defendants the former passed the property in the goods to the defendants who passed it on to the War Office." We do not think that these observations furnish a universal test that whenever there is a contract to "fix" certain articles made by a manufacturer the contract must be deemed one for sale and not of service. The test in each case is whether the object of the party sought to be taxed is that the chattel as chattel passes to the other party and the services rendered in connection with installation are under a separate contract or are incidental to the execution of the contract of sale.

15. In the present case, the specifications of the windows were set out in the contract. The primary undertaking of the respondent was not merely to supply the windows but to "fix" the windows.

This service is not rendered under a separate contract, nor is the service shown to be rendered customarily or normally as incidental to the sale by the person who supplies window-leaves. The "fixing" of windows in the manners stipulated required special technical skill. If the windows were not properly "fixed", the contract would not be complete, and the respondent could not claim the amount agreed to be paid to it. We agree with the High Court that it was only upon the "fixing" of the window-leaves and when the window-leaves had become a part of the building construction that the property in the goods passed under the terms of the contract.

16. The appeal fails and is dismissed with costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 1249 (V 56 C 227)

(From Orissa: ILR (1967) Cut 735)

S. M. SIKRI, R. S. BACHAWAT, AND
K. S. HEGDE, JJ.

State of Orissa and another, Appellants
v. Binode Kishore Mohapatra, Respondent.

Civil Appeal No. 2162 of 1968, D/- 11-4-1969.

(A) Civil Services — Indian Police Service (Regulation of Seniority) Rules (1954), R. 3 (3) (b) Second proviso — Indian Police Service (Appointment by Promotion) Regulation (1955), Regn. 5 — Pre-existing Draft Rules for preparation of select list, R. 2 — Lists of Police Service Officers 'fit for trial to promotion posts' purporting to be made under Draft R. 2, held could not be deemed to be 'select lists' within meaning of either Draft R. 2 or Promotion Regulation 5. ILR (1967) Cut 735, Reversed.

The lists of the Police Service officers' 'fit for trial to promotion posts', purported to have been prepared under Draft Rule 2 by the Selection Committee in the year 1951, 1952, 1954 cannot be deemed to be 'Select Lists' within the second proviso to R. 3 (3) (b) of the Regulation of Seniority Rules because, as a matter of fact, the Selection Committee did not select names for the purpose of substantive appointment but only selected names for the purpose of officiation in the senior posts of the Indian Police Service. In view of the Regulation 5 of the Promo-

IM/IM/B847/69/D

tion Regulations and the pre-existing Draft Rule 2 (prepared by Federal Public Service Commission and acted upon by the States) the Committee should think of substantive appointments in the service and not officiating appointments. These 'fit for trial' lists cannot be deemed to be select lists made within the meaning of the draft rules which were being acted upon before the Promotion Regulations came into force or within the Promotion Regulations. (It was assumed without deciding that if proper select list had been made under Draft Rules, it would be a select list within meaning of the Second Proviso to R 3 (3) (b) of the Regulation of Seniority Rules — Para 23) ILR (1967) Cut 735, Reversed (Paras 19, 22)

(B) Civil Services — Indian Police Service (Regulation of Seniority) Rules (1954), R 3 (3) (b), Second proviso and Explanation 1 — Scope — Object of second proviso and Explanation 1 — Officer appointed by promotion — Fixation of seniority and year of allotment ILR (1967) Cut 735, Reversed.

The object of the second proviso is to cut down the period of officiation which would be taken into consideration under R 3 (3) (b). It cannot be said that the only object of the second proviso is to limit the operation of the first proviso.

(Para 24)

Explanation 1 really explains the expression "officiated continuously" occurring in rule 3 (3) (b). But it does not mean that where Explanation 1 applies the second proviso does not apply. The object of Explanation 1 is to deal with the problem arising in the case of officers holding appointments as a purely temporary or local arrangement.

(Para 25)

The petitioner was appointed as Deputy Superintendent of Police in State of Orissa in 1947 and was confirmed as D S P on January 1, 1950. In May 1952 he was promoted as Additional Superintendent of Police in the I P. S. cadre. His name was included in the lists of officers fit for trial to promotion post to Indian Police Service, prepared by the selection Committee in the year 1951, 1952, 1954. On 10-2-1956, the Union Public Service Commission approved the 'fit for continuous officiation' list containing the name of the petitioner. On 15-2-1957 the Selection Committee placed the petitioner, including some others in the 'Select List' for substantive appointment to I P. S. and the petitioner was appointed to I P. S. on 10-7-1957.

The Government of India approved the period of officiation of these officers from 10-2-1956 for counting seniority. That date being later than the date i.e. 7th September, 1955 on which one officer (1951) R. R.) started officiating in senior posts but earlier than the date on which regular recruits of 1952 started officiating these officers including the petitioner were allotted to 1951. The petitioner challenged the order and prayed to fix his seniority and year of allotment as 1948 instead of the year 1951.

Held that, the petitioner's case was covered by second proviso to R 3 (3) (b) of Seniority Rules and it was for the Central Government to approve, or not to approve, the period of officiation prior to the date of inclusion of the petitioner in the Select List. The first period (i.e., period before the date of inclusion of an Officer in the Select List) could only be counted if such period was approved by the Central Government in consultation with the Commission AIR 1967 SC 1301, Foll., ILR (1967) Cut 735, Reversed.

(Para 26)

It could not be said that February 10, 1956 was an arbitrary date. It had definite relation to the question of approved period of officiation because it was on this date that the Public Service Commission approved the inclusion of the petitioner in the list for officiating appointment for the first time after the Promotion Regulations had come into force. The 'fit for trial lists' of 1951, 1952, 1954 could not be deemed to be select lists within the second proviso to R. 3 (3) (b) and there was nothing to show that the Government of India had approved his period of officiation prior to 10-2-1956. At any rate the approval had to be recorded after the appointment to I P. S. and not before. ILR (1967) Cut 735, Reversed.

(Paras 28, 30)

(C) Constitution of India, Art. 14 — Indian Police Service (Regulation of Seniority) Rules (1954), R 3 (3) (b) provisos — Petitioner governed by second proviso — His case cannot have any relationship to the case of officer appointed after the coming into force of Seniority Rules and governed by first proviso — There can be no question of discrimination in consideration of seniority. ILR (1967) Cut 735, Reversed.

(Para 31)

Cases Referred. Chronological Paras (1967) AIR 1967 SC 1301 (V 54) = 1967-2 SCR 325, D. R. Num v. Union of India

(1967) Civil Appeal No. 405 of 1967,
D/- 14-8-1967 (SC), Padam Singh
Jhina v. Union of India 32

Mr. Niren De, Attorney-General for India, (M/s. Santosh Chatterjee and R. N. Sachthey, Advocates, with him), for Appellants; M/s. B. M. Patnaik, Vinoo Bhagat and P. C. Bhartari, Advocates and M/s. J. B. Dadachanji and Co., for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.: This is an appeal by certificate granted by the High Court of Orissa under Article 133 (1) (c) of the Constitution from the judgment and order of the High Court in Writ Petition O. J. C. No. 156 of 1965 filed by B. K. Mohapatra, I. P. S., hereinafter referred to as the petitioner, against the State of Orissa and the Union of India. In this petition the petitioner had prayed for a writ of mandamus directing the respondents to fix the petitioner's seniority and year of allotment as 1948 instead of the year 1951 fixed by the Government of India. The High Court quashed the order of the Union Government, dated July 22, 1958, and directed the Central Government to fix the year of allotment and seniority of the petitioner in accordance with its judgment and the law.

2. In order to appreciate the points raised before us it is necessary to set out the facts somewhat in detail. The petitioner was appointed as Deputy Superintendent of Police in the State of Orissa on January 1, 1947. On January 1, 1950, he was confirmed as D. S. P. In the meantime an agreement had been arrived at between the Central Government and some State Governments, including Orissa, regarding the constitution of an Indian Police Service. This agreement is printed as annexure to the Indian Police Cadre Rules, 1950. This agreement provided for various matters such as the strength, including both the number and character of posts of the Indian Police Service, the method of recruitment to the Service, framing of rules regarding conditions of service, the penalties which could be imposed, etc. We are concerned, in particular, with para 2 (e) and para 7 which are as under:

"2 (e) The rules regulating the promotion of Provincial Police Service Officers to the Indian Police Service shall be framed by the Provincial Government concerned in consultation with the Federal Public Service Commission shall provide

that no Provincial Police Service Officer shall be appointed to hold a superior post included in the Schedule for a period of more than one year unless the Federal Public Service Commission have certified that the officer is in every way fit to hold a superior post in the Indian Police Service.

7. In order to ensure that the conditions of service applicable to officers of the Indian Police Service are as uniform as possible, rules regulating pay and other conditions of services will be framed by the Central Government to such extent as may be considered necessary. Provincial Governments will, however, be consulted before the rules are framed, and before they are amended in any manner. In respect of matters not covered by the said rules, an officer of the Indian Police Service will be governed by such rules as may be framed by the Government under which he is for the time being serving and, if no such rules are framed, by the rules applicable to the Central Service/Provincial Police Service Class I, as the case may be."

3. The All India Services Act, 1951, came into force on October 29, 1951. Section 3 enabled the Central Government to make rules for the regulation of recruitment and conditions of service of persons appointed to an All India Service which was defined to include, among others, the Indian Police Service. Section 4 provided:

"All rules in force immediately before the commencement of this Act and applicable to an All India Service shall continue to be in force and shall be deemed to be rules made under this Act."

4. On April 30, 1951, the State Government wrote to the Secretary, Union Punjab Service Commission, that they proposed to hold a meeting of the committee (to be constituted in accordance with R. 2 of the Draft Rules) sometime in June 1951 with a view to prepare a select list of officers suitable for promotion to the Indian Police Service. The Commission was asked to depute one of its members to preside over the said meeting in accordance with Rule 3 of the Draft Rules. On September 6, 1951, the Union Public Service Commission approved the recommendation of the above committee which met to prepare the select list for promotion to Indian Police Service, and agreed to the select list as drawn up by the Committee. The petitioner's name appears

at No 5 of Part II of the list which is in the following form

"I List of Officers fit for confirmation in promotion post

- 1
- 2
- 3
- 4

II List of officers fit for trial to promotion posts

1 H F Singh Deo.

- 2
- 3
- 4

5 Shri Binode Kishore Mohapatra.

6 Shri Banamali Das".

5. On May 14, 1952, the petitioner was promoted as Additional Superintendent of Police in the I P. S cadre. On August 21, 1952, his name again appeared in the list which we may call "fit for trial list". His name also appeared in a similar list on July 12, 1954.

6. One of the questions which has to be decided in this case is whether these lists can come within the expression "select list" used in the second proviso in R 3 (3) of the Indian Police Service (Regulation of Seniority) Rules, 1954, hereinafter referred to as the Seniority Rules, which came into force on September 8, 1954.

7. On November 10, 1955, the first meeting of the Selection Committee set up in accordance with Regulation 3 of the Indian Police Service (Appointment by Promotion) Regulation, 1955, hereinafter referred to as the Promotion Regulations, was held at Cuttack. In this meeting the Committee selected and recommended officers for officiating appointment in the I. P. S. and the petitioner's name appeared as No 2 in the List.

8. On February 10, 1956, the Union Public Service Commission approved the recommendations of the above selection committee. On December 1, (sic) 1956, the Government of India wrote to the Union Public Service Commission requesting for its advice as to whether the list prepared by the Selection Committee could be treated as "Select List" as recommended by the State Government. On January 10, 1957, the Commission replied as follows.

"I am directed to refer to Shri S. P. Mukherjee's letter No. 5/1/56-AIS(I) dated the 10th (sic) December, 1956 and to say that the Selection Committee which met at Cuttack on the 10th November, 1955, did not recommend any officer for appointment to the Indian Administrative

Service/Indian Police Service. The Committee only recommended officers who were considered suitable to hold Indian Administrative Service/Indian Police Service cadre posts in an officiating capacity. Lists of such officers are made to avoid frequent references to the Commission in making interim arrangements in cadre posts till cadre officers become available and these lists cannot be considered as Select Lists.

I am to suggest that the State Government may be advised to place the cases of all these officers before the Selection Committee when it meets again in Orissa sometime in the month of February, 1957, for preparation of the Select List."

9. On February 15, 1957, the Selection Committee met and placed the petitioner, including some others, in the "Select List" for substantive appointment to the Indian Police Service. The Committee also recommended some persons for holding cadre posts in an officiating capacity.

10. Reiterating the view that it had already expressed on January 23, 1957, on March 27, 1957, the Commission wrote to the Government of India stating

"(i) that the "fit for trial" list is intended merely in order to avoid specific references to the Commission for casual appointments to senior Indian Administrative Service/Indian Police Service Posts.

(u) that the Commission have advised in para 2 of their letter No F. 950/55-R.III dated the 25th September, 1956, that the "fit for trial" list being not a list envisaged under the Indian Administrative Service/Indian Police Service (Appointment by Promotion) Regulations, any officiation of an officer included in the "fit for trial" list cannot be taken as approved officiation for purposes of seniority and"

11. On May 7, 1957, the Government of India wrote to the State Governments and observed.

"The question whether the officiation in senior posts of the State Civil Service/State Police Officer after inclusion of their names in the "fit for trial list" should or should not be taken into account for the purpose of seniority, on their subsequent appointment to the Indian Administrative Service, Indian Police Service, has been engaging the attention of the Government of India for some time past. As the State Governments are aware, the Indian Administrative/Police Service (Appointment by Promotion) Regulations do not provide for the preparation of any

such "fit for trial list". Such a list has been devised merely to enable the State Government to try out a few officers irrespective of their seniority with a view to test their suitability for senior posts and is intended only to avoid specific reference to the Union Public Service Commission for casual short term appointments of the State Civil Service/State Police Service officers to senior Indian Administrative Service/Indian Police Service posts. The Union Public Service Commission, who were consulted in this respect have advised that any officiation of State Civil Service/State Police Service officers included in the fit for trial list should not be taken into account to determine their seniority in the Indian Administrative Service/Indian Police Service."

12. The Central Government further stated:

"The Government of India have accordingly decided that wherever such lists have been prepared in some States, the officiation in the senior posts of the State Civil Service/State Police Service officers included in the 'fit for trial' list cannot be counted for the purpose of determining the seniority of such officers, under the Indian Administrative Service/Indian Police Service (Regulation of Seniority) Rule, 1954."

13. On July 10, 1957, the petitioner was appointed to the Indian Police Service. On July 22, 1958, the Government of India wrote to the Government of Orissa regarding the seniority of the petitioner. It stated:

"The approved continuous officiation of these officers counting for seniority commenced from the 10th February, 1956 — the date on which the Union Public Service Commission approved the 'fit for continuous officiation list' containing their names. This date being later than the date i.e., 7th September, 1955 on which Shri S. S. Padhi (1951 R. R.) started officiating in the senior posts but earlier than the date on which regular recruits of 1952 started officiating, it has been decided that these officers may be finally allotted to 1951 and placed enbloc below Shri S. S. Padhi (1951 R. R.) and above Shri B. N. Misra (1952-R.R.)."

14. It is this order which has been quashed by the High Court.

15. The learned Attorney-General, who appears for the appellant, urges that the case of the petitioner is covered by the second proviso to Rule 3 (3) of the Seniority Rules and is not governed only by

Rule 3 (3) (b). He urges that the lists of 1951, 1952 and 1954, mentioned above, were not Select Lists within the meaning of the second proviso, and it is only the Select List which was made on February 15, 1957, which is the Select List within the second proviso, and that there has been no discrimination or breach of Article 14, as held by the High Court."

16. The learned Counsel for the petitioner on the other hand contends that the second proviso does not govern R. 3 (3) (b) but in fact governs the first proviso only. He says that the Select List of 1951 was a Select List within the meaning of the second proviso and the seniority of the petitioner should be counted from that date. In the alternative he contends that the petitioner's officiation in senior posts prior to July 10, 1957, had in fact been approved and was approved officiation within the second proviso. He further contends that the date, February 10, 1956, mentioned in the order dated July 22, 1958, is an arbitrary date and the Government has, in fact not applied its mind to the question. He further says that there has been discrimination and one Singhdeo has been given benefit which has been denied to the petitioner.

17. The main point that arises in this case is whether the Select Lists of 1951, 1952 and 1954 can be deemed to be treated as Select Lists within the second proviso. It is necessary to set out rule 3 of the Seniority Rules in order to deal with this point.

18. Rule 3 reads thus:

"3. Assignment of Year of Allotment. — (1) Every officer shall be assigned a year of allotment in accordance with the provisions hereinafter contained in this rule.

(2) The year of allotment of an officer in service at the commencement of these rules shall be the same as has been assigned to him or may be assigned to him by the Central Government in accordance with the orders and instructions in force immediately before the commencement of these rules:

Provided that where the year of allotment of an officer appointed in accordance with Rule 9 of the Recruitment Rules has not been determined prior to the commencement of these Rules, his year of allotment shall be determined in accordance with the provision in clause (b) of sub-rule (3) of this rule and for this purpose such officer shall be deemed to have officiated in a senior post only if and for the period for which he was approved for

such officiation by the Central Government in consultation with the Commission

(3) The year of allotment of an officer appointed to the Service after the commencement of these rules, shall be—

(a) where the officer is appointed to the Service on the results of a competitive examination, the year following the year in which such examination was held,

(b) where the officer is appointed to the Service by promotion in accordance with Rule 9 of the Recruitment Rules, the year of allotment of the junior-most among the officers recruited to the Service in accordance with Rule 7 of those Rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former,

Provided that the year of allotment of an officer appointed to the Service in accordance with Rule 9 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the Service, in accordance with rule 7 of those Rules, so started officiating shall be determined ad hoc by the Central Government in consultation with the State Government concerned,

Provided further that an officer appointed to the Service after the commencement of these Rules in accordance with Rule 9 of the Recruitment Rules shall be deemed to have officiated continuously in a senior post prior to the date of the inclusion of his name in the Select List prepared in accordance with the requirements of the Indian Police Service (Appointment by Promotion) Regulations framed under Rule 9 of the Recruitment Rules, if the period of such officiation prior to that date is approved by the Central Government in consultation with the Commission.

Explanation 1—An officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from that date to the date of his confirmation in the senior grade he continues to hold without any break or reversion a senior post otherwise than as a purely temporary or local arrangement.

Explanation 2—An officer shall be treated as having officiated in a senior post during any period in respect of which the State Government concerned certifies that he would have so officiated but for his absence on leave or appointment to any special post or any other exceptional circumstance."

19. It seems to us that the 1951, 1952 and 1954 lists cannot be deemed to be Select Lists within the second proviso because, as a matter of fact, the Selection Committee did not select names for the purpose of substantive appointment but only selected names for the purpose of officiation in the senior posts of the Indian Police Service Regulation 5 (1) of the Promotion Regulations inter alia provided

"5 Preparation of a list of suitable officers — (1) The committee shall prepare a list of such members of the State Police Service as satisfy the condition specified in regulation 4 and as are held by the committee to be suitable for promotion to the Service"

Now this clearly means that the Committee should think of substantive appointments in the service and not officiating appointments.

20. Similarly, the draft Rule 2, which was being acted upon before the Promotion Regulations came into force, provided

"A committee shall be constituted by the State Government composed . . . (for the Indian Police Service) of the Chief Secretary the Inspector-General of Police and Deputy Inspectors of General of Police This Committee shall prepare a select list of State. . . Police Service Officers who are considered suitable for promotion The list will be renewed and revised annually."

21. Draft Rule 3 provided that "the State Government should invite the Union Public Service Commission to depute one of their members to preside at the meetings of the Committee" Draft Rule 4 provided that "in preparing this list, the Committee shall be guided by the suitability of the officers for appointment to the . . . Indian Police Service No officer shall be included in the list who has not definitely proved his fitness for such appointment"

22. It seems to us that the Public Service Commission and the Government of India were quite right in deciding that the 'fit for trial' lists could not be deemed to be select lists made within the draft rules or the Promotion Regulations

23 In view of this conclusion it is not necessary to decide the question, which was raised by the learned Attorney General, that in any event the second proviso is only dealing with select lists made after the Promotion Regulations came into force and not with select lists made under

the so-called draft rules. We are assuming, without deciding, that if a proper select list had been made under the draft rules it would be a select list within the meaning of the second proviso.

24. This takes us to the next point whether the petitioner is governed by the main portion of rule 3 (3) (b) and not by the second proviso. In our opinion, the object of the second proviso is to cut down the period of officiation which would be taken into consideration under Rule 3 (3) (b). It is common ground that the case of the petitioner is not covered by the first proviso. We are unable to agree with the learned Counsel for the petitioner that the only object of the second proviso is to limit the operation of the first proviso.

25. Explanation 1 really explains the expression "officiated continuously" occurring in Rule 3 (3) (b). But it does not mean that where Explanation 1 applies the second proviso does not apply. The object of Explanation 1 is to deal with the problem arising in the case of officers holding appointments as a purely temporary or local arrangement.

26. If the second proviso applies, as we hold it does, it was for the Central Government to approve, or not to approve, the period of officiation prior to the date of inclusion of the petitioner in the Select List. As observed by this Court in *D. R. Nim v. Union of India*, (1967) 2 SCR 325 at p. 329=(AIR 1967 SC 1301 at p. 1303), "the first period (i.e., period before the date of inclusion of an officer in the Select List) can only be counted if such period is approved by the Central Government in consultation with the Commission." They have approved the period from February 10, 1956, to July 10, 1957. No material has been brought to our notice to show that the Central Government did not apply its mind to the problem.

27. The learned Counsel for the petitioner contends that in the letter dated July 22, 1958, a list called the "fit for continuous officiation list" is mentioned which is said to have been approved by the Public Service Commission. The learned Counsel rightly points out that no such list exists. Apparently this is an expression coined by the draftsman to express the views of the Public Service Commission which clearly stated in the letter dated February 10, 1956, that they approved the recommendation of the Selection Committee which met at Cuttack for

the selection of police officers for promotion to the Indian Police Service in an officiating capacity.

28. There is no doubt from the correspondence we have set out above that the Government of India were quite aware of the requirements of a Select List.

29. We are unable to agree with the learned Counsel that February 10, 1956, is an arbitrary date. It has definite relation to the question of approved period of officiation because it is on this date that the Public Service Commission approved the inclusion of the petitioner in the list for officiating appointment for the first time after the Promotion Regulations had come into force.

30. The next point which we may now consider is whether the officiation period prior to February 10, 1956, was as a matter of fact, approved by the Government of India. The learned counsel has taken us through the correspondence. He has been able to point out some letters written by the State Government on the point but no letter from the Government of India has been shown which could possibly be read as approving his period of officiation prior to February 10, 1956. At any rate the approval of Government of India has to be accorded after the appointment to I. P. S. and not before.

31. The only point that remains now is the question of discrimination. Singh Deo was an officer who was appointed on June 1, 1955, after the Seniority Rules had come into force and he seems to be governed by the first proviso. We have not been able to appreciate how this case has any relationship to the case of the petitioner.

32. The learned Attorney General had raised the point that all the officers who were likely to be affected by the decision of the writ petition had not been impleaded as parties to the petition, and he referred to us the decision of this Court in *Padam Singh Jhina v. Union of India*, Civil Appeal No. 405 of 1967, D/- 14-8-1967 (SC) where Shah, J., speaking for the Court observed:

"But we are unable to investigate the question whether there has been infringement of the rules governing fixation of seniority, for a majority of those who were placed above the appellant in the seniority list are not impleaded in the petition before the Judicial Commissioner and are not before this Court. It is impossible to pass an order, assuming that the appellant is able to convince us that a breach of the rules was committed, al-

tering the list of seniority, unless those who are likely to be affected thereby are before the Court and have an opportunity of replying to the case set up by the appellant."

This is a salutary rule and should be observed. But the learned Counsel for the petitioner says that he was concerned with his year of allotment and in that question nobody else was interested directly. Each officer has to have a year of allotment and no other officer is directly interested in it. But as we are allowing the appeal it is not necessary to finally decide whether the petition should have been dismissed only on this ground.

33 In the result the appeal is allowed, the judgment and order of the High Court set aside and the petition dismissed, but there will be no order as to costs here and in the High Court
LGC/D.V.C. Appeal allowed.

AIR 1969 SUPREME COURT 1256 (V 56 C 228)

(From Madhya Pradesh)*

M. HIDAYATULLAH, C J, V. RAMASWAMI AND G. K. MITTER, JJ.

1 Beohar Rajendra Sinha and others (In C. A. No 386 of 1966), 2 The State of Madhya Pradesh (In C. A. No. 387 of 1966), Appellants v 1 The State of Madhya Pradesh and another (In C. A. No 386 of 1966), 2 Mst. Maharaniabai and others (In C. A. No. 387 of 1966), Respondents.

Civil Appeals Nos. 386 and 387 of 1966, D/- 11-3-1969.

(A) Civil P. C. (1908), Section 80 — Object of notice under — Compliance with section — Matters to be taken into consideration — Notice given by Karta of joint family — Partition subsequent to notice — Notice held sufficient to sustain suit by divided coparceners — F. A. No. 217 of 1959, D/- 16-4-1963 (M. P.), Reversed.

Section 80 is no doubt imperative, failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating

a just claim. In considering whether the provisions of the statute are complied with, the Court must take into account the following matters in each case (1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice, (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particularity, (3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section, and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left. In construing the notice the Court cannot ignore the object of the legislature, viz. to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position. If on a reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or irregularities should be ignored.

(Para 4)

Suit was instituted on 20-7-1954 against State of Madhya Pradesh by one A and his three grandsons C, D and E. A's son B was pro forma defendant. Notice under Section 80 was given on 11-1-1954 by only A. C, D and E were joined as plaintiff because in partition made subsequent to giving of notice but before institution of suit, they were each entitled to one fifth share along with A. There was substantial identity between the person giving notice and the persons filing the suit. Notice was given by A as representative of the joint family and in view of partition suit had to be instituted by all divided members. Requirements as to cause of action, the name, description and residence of plaintiff were complied with and reliefs were duly set out in notice, though A did not describe himself as Karta of the family.

Held that notice given by karta was sufficient to sustain the suit brought by divided coparceners. F. A No 217 of 1959, D/- 16-4-1963 (M. P.). Reversed; AIR 1947 PC 197 and AIR 1949 PC 143, Distinguished.

(Paras 3, 6)

(B) Limitation Act (1908), Article 149 — Suit for declaration of title to disputed plots and for correction of entry in settlement records for showing status of plaintiff as that of "Raiyat Sarkar" — In all

* (First Appeal No 217 of 1959, D/- 16-4-1963—M. P.)

settlement entries, land was recorded as belonging to Government i. e. "Milliat Sarkar" — Column regarding tenancy right was blank — Plaintiff's name was only shown in remark column — Between 1891 to 1932 there was no evidence regarding user of property by plaintiff — In subsequent years, part of property was found in possession of Municipal Committee — Plaintiffs held failed to establish their title by prescription for statutory period of sixty years — Suit brought by plaintiff against State Government held must be dismissed — First Appeal No. 217 of 1959, D/- 16-4-1963 (M. P.), Reversed. (Paras 10, 12)

(C) Tenancy Laws — Central Provinces Settlement Instructions (Reprint of 1953), Page 213 — Passage relating to proposed method of settlement of titles — Applicability.

The passage relating to proposed method of settlement in p. 213 of C. P. Settlement Instructions (Reprint of 1953) only applies to a case where the ownership of the land was unknown i. e. where possession is proved for a long time, but its original title could not be traced, and not to a case where the land is recorded as Government land. (Para 11)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 11 (V 52) = 7
1964-4 SCR 945, State of Andh.
Pradesh v. Gundugola Venkata
Suryanarayan Garu
- (1958) AIR 1958 SCR 274 (V 45) = 5
1958 SCR 781, Dhian Singh Sobha
Singh v. Union of India
- (1949) AIR 1949 PC 143 (V 36) = 8
76 Ind App 85, Govt. of Province
of Bombay v. Pestonji Ardeshir
Wadia
- (1947) AIR 1947 PC 197 (V 34) = 8
74 Ind App 223, Vellayan Chattiari
v. Govt. of Province of Madras
- (1943) AIR 1943 Bom 138 (V 30) = 5
ILR (1943) Bom 128, Chandulal
Vadilal v. Govt. of Bombay
- (1935) AIR 1935 Mad 389 (V 22) = 8
156 Ind Cas 333, Venkata Rangiah
Appa Rao v. Secy. of State
- (1931) AIR 1931 Mad 175 (V 18) = 8
ILR 54 Mad 416, Venkata Ran-
giah Appa Rao v. Secy. of State
- (1927) AIR 1927 PC 176 (V 14) = 5
54 Ind App 333, Bhagchand Dag-
dusa v. Secy. of State
- (1844) 13 M & W 361 = 153 ER 5
149, Jones v. Nicholls
- Mr. S. V. Gupte, Senior Advocate (P. C.
Bhartari and J. B. Dadachanji, Advocates

of M/s. J. B. Dadachanji and Co., with him), for Appellants (In C. A. No. 386 of 1966) and Respondents (In C. A. No. 387 of 1966); Mr. I. N. Shroff, Advocate and Miss Rama Gupta, Govt. Advocate of Madhya Pradesh, for State of Madhya Pradesh.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: These appeals are brought by special leave from the judgment of the High Court of Madhya Pradesh dated 16th April, 1963 in First Appeal No. 217 of 1959, whereby the High Court modified partly the judgment of the first Additional District Judge, Jabalpur dismissing Civil Suit No. 10-A of 1954.

2. The suit was instituted against the State of Madhya Pradesh by Beohar Raghubir Singh and his three grandsons. Beohar Raghubir Singh's son Beohar Rajendra Sinha, was a pro forma defendant. A notice under Section 80 of the Civil Procedure Code had been given by Raghubir Singh on 11th January, 1954. Plaintiffs 2, 3 and 4, his grand-sons were joined as plaintiffs because in a partition made subsequent to the giving of the notice, they were each entitled to 1/5th share along with the first plaintiff. Beohar Rajendra Sinha was joined as a defendant because he did not choose to join as the plaintiff. The plaintiffs sought a declaration (1) that the three nazul plots in suit had been in possession of the plaintiffs and their predecessors in their own right from time immemorial and their status was that a Raiyat Sarkar; and (2) that the order of the State Government in the Survey and Settlement Department refusing to recognise their possession over the plots was wrong and ultra vires. The dispute relates to Phoota Tal a tank situated within the town of Jabalpur. It was plot No. 282 in the settlement of 1863 A. D. Its area then was 5.24 acres. It was recorded as Malkiat Sarkar and in the last column there was an entry showing possession of Aman Singh Thakur Prasad. The next settlement took place in 1890-91. The survey number of Phoota Tal was changed to plot No. 325. Its area remained the same, it was recorded as "water (pani)" and in the last column, the entry showed the possession of Beohar Narpatsingh Raghubir Singh. The third settlement took place in 1909-10. The plot number of Phoota Tal was then changed to 327. Its area remained the same, it was still recorded as "water" but there was no entry in favour of any one

showing possession. The nazul settlement took place in 1922-23. In this settlement the tank was given new numbers 33, 34, 35, 36, 37 and 171. Its area was recorded as 5.24 acres. In this settlement about 2 acres of land was found to be occupied by the Municipal Committee, Jabalpur. The land so found to be occupied was recorded in the possession of the Municipal Committee, Jabalpur and the remaining land was again recorded as "milkiat sarkar". There was no entry regarding possession in the remarks column so far as the remaining land was concerned. The plaintiffs alleged that Thakur Prasad and Aman Singh were their ancestors, that they had been in continuous possession of the disputed land and the omission to record their possession in the last two settlements of 1909-10 and 1922-23 was due to some oversight. In 1948 the first plaintiff made an application for correction to the Deputy Commissioner, Jabalpur, who made an order in his favour Ex P-5. The order of the Deputy Commissioner was however set aside by the State Government on 28th May, 1953 and it was held that the plaintiffs had no title to the disputed land. The plaintiff therefore prayed for a declaration of the title to the disputed plots and for the correction of the entry in the settlement record showing the status of the plaintiff as that of "Rayat Sarkar". The suit was contested by the State of Madhya Pradesh. It was urged that the plaintiff had no possession over the disputed land and the order of the State Government dated 28th May, 1953 was correct. It was contended that plaintiffs 2, 3 and 4 had no right to institute the suit because no notice under Section 80 of the Civil Procedure Code was given on their behalf. The suit was not contested by the second defendant Beohar Rajendra Sinha. By its judgment dated 24th January, 1959 the trial Court held that there was no documentary evidence from 1891 to 1932 to support the possession of the ancestors of the plaintiffs regarding Phoota Tal. The trial Court also held that in all the settlement entries, the land was recorded as belonging to the Government "Milkiat Sarkar". In any event, between 1891 to 1932 there was no evidence regarding the user of the property by the plaintiffs and in the subsequent years a part of the property was found in possession of the Municipal Committee. The trial Court dismissed the suit. Against the judgment of the trial Court the plaintiffs preferred an appeal to the High Court. The High

Court held in the first place that the notice Ex. P-8 was not in conformity with section 80 of the Civil Procedure Code. The High Court held that Beohar Raghubir Singh had lost the right to represent the joint family as karta at the time of institution of the suit because there had been a severance of joint status and the notice served by Beohar Raghubir Singh could not enure to the benefit of the other plaintiffs. On the merits of the case, the High Court found that the plaintiffs had established their possession for the statutory period of 60 years. The High Court held that the plaintiffs had acquired the right of Rayat Sarkar, and that the order of the State Government refusing to correct the revenue record was illegal. On these findings the High Court modified the judgment of the trial Court to the extent that there was a declaration in favour of the plaintiffs that they were entitled to 1/5th share of the property in dispute and the claim regarding the 4/5th share was dismissed. The order of the State Government dated 28th May, 1953 refusing to recognise the possession of the plaintiffs was held to be wrong and illegal.

3 The first question to be considered in these appeals is whether the High Court was right in holding that the notice given under Section 80 of the Civil Procedure Code by the first plaintiff was effective only with regard to Raghubir Singh and the notice was ineffective with regard to the other plaintiffs and therefore Raghubir Singh alone was entitled to a declaration as regards the 1/5th share of the disputed plot. On behalf of defendant No. 1 it was contended by Mr. Shroff that at the time of giving notice the plaintiff and the second defendant were joint and plaintiff No. 1 Raghubir Singh was karta of the joint family. The notice was given on 11th January, 1954 and the suit was instituted on 20th July, 1954. It was admitted that between these two dates there was a disruption of the joint family of which Raghubir Singh was a karta. It was argued that the right of the first plaintiff to represent the family had come to an end before the institution of the suit, and hence plaintiffs 2, 3 and 4 had to comply individually with the provisions of Section 80 of the Civil Procedure Code before appearing as plaintiffs in the suit. In our opinion, there is no justification for this argument. We consider that there is substantial identity between the person giving the notice and the persons

filing the suit in the present case. At the time of giving notice the first plaintiff Beohar Raghubir Singh was admittedly the eldest member of the joint family and being a karta he was entitled to represent the joint family in all its affairs. The cause of action had accrued at the time of giving of the notice and it was not necessary to give a second notice merely because there was a severance of the joint family, before 20th July, 1954 when the suit was actually instituted. It is obvious that the notice was given by Beohar Raghubar Singh as a representative of the joint family and in view of the subsequent partition the suit had to be instituted by all the divided members of the joint family. We are of the opinion that the notice given by Beohar Raghubir Singh on 11th January, 1954 was sufficient in law to sustain a suit brought by all the divided coparceners who must be deemed to be as much the authors of the notice as the karta who was the actual signatory of the notice. There is substantial identity between the person giving the notice and the persons bringing the suit in the present case and the argument of defendant No. 1 on this point must be rejected.

4. The object of the notice under Section 80, Civil Procedure Code is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course is justified to make amends or settle the claim out of court. The section is no doubt imperative; failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim. In considering whether the provisions of the statute are complied with, the Court must take into account the following matters in each case (1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice; (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particularity, (3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section; and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left. In construing the

notice the Court cannot ignore the object of the legislature, viz., to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position. If on a reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or irregularities should be ignored.

5. In the present case, the notice was served on 11th January, 1954 by Beohar Raghubir Singh. The notice stated the cause of action arising in favour of the joint family. The requirements as to cause of action, the name, description and residence of the plaintiff were complied with and the reliefs which the plaintiff claimed were duly set out in the notice. It is true that Beohar Raghubir Singh did not expressly describe himself as the karta. But reading the contents of the notice Ex. P-8 in a reasonable manner it appears to us that the claim of Beohar Raghubir Singh was made on behalf of the joint family. It is true that the terms of Section 80 of the Civil Procedure Code must be strictly complied but that does not mean that the terms of the notice should be scrutinised in an artificial or pedantic manner. In *Dhian Singh Sobha Singh v. The Union of India*, 1958 SCR 781 = (AIR 1958 SC 274) Bhagwati, J. observed in the course of his judgment:—

“We are constrained to observe that the approach of the High Court to this question was not well founded. The Privy Council no doubt laid down in *Bhakchand Dagadusa v. Secretary of State*, 54 Ind App 333 = (AIR 1927 PC 176) that the terms of this section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinised in a pedantic manner or in a manner completely divorced from common sense. As was stated by Pollock C. B. in *Jones v. Nicholls*, (1844) 13 M and W 361, 363 = 153 ER 149, 150. “We must import a little common sense into notices of this kind”. Beaumont C. J. also observed in *Chandu Lal Vadilal v. Government of Bombay*, ILR (1943) Bom 128 = (AIR 1943 Bom 138). ‘One must construe section 80 with some regard to common sense and to the object with which it appears to have been passed.....’

6. As already pointed out, the suit was instituted in the present case by the divided members of the Hindu joint family on 20th July, 1954. The notice

had been given on 11th January, 1954 by Beohar Raghubir Singh who was the karta of the undivided joint family. In our opinion, there was identity between the person giving a notice and the persons filing the suit because it must be deemed in law that each of the plaintiffs had given the notice under Section 80 of the Civil Procedure Code through the karta Beohar Raghubir Singh. It is not disputed that the cause of action set out in the notice remained unchanged in the suit. It is also not said that the relief set out in the plaint is different from the relief set out in the notice. We are accordingly of the opinion that the notice given by the karta was sufficient to sustain the suit brought by the divided coparceners and the decision of the High Court on this point must be overruled.

7. The view that we have expressed is borne out by the judgment of this Court in State of Andhra Pradesh v. Gundugola Venkata Suryanarayan Garu, 1964-4 SCR 945 = (AIR 1965 SC 11). In that case the Government of Madras applied the provisions of the Madras Estates Rent Reduction Act, 1947 to the lands in the village Mallindhapuram on the ground that the grant was of the whole village and hence an estate within the meaning of Section 3 (2) (d) of the Madras Estates Land Act, 1908. The respondent and another person served a notice under Section 80 of the Code of Civil Procedure upon the Government of the State of Madras in which they challenged the above mentioned notification and asked the Government not to act upon it. Out of the two persons who gave the notice, the respondent alone filed the suit. The trial Court held that the original grant was not of the entire village and was not so confirmed or recognised by the Government of Madras and as it was not an "Estate" within the meaning of S 3 (2) (d) of the Madras Estates Land Act, the Madras Rent Reduction Act, 1947 did not apply to it. But the suit was dismissed on the ground that although two persons had given notice under Section 80 of the Code of Civil Procedure, only one person had filed the suit. The High Court agreed with the trial Court that the grant was not of an entire village but it also held that the notice was not defective and the suit was maintainable as it was a representative suit and the permission of the Court under Order I, Rule 8 had been obtained in this case. The High Court granted the respondent the relief prayed for by him. Against the order of the

High Court the appellant appealed to this Court which dismissed the appeal holding that in the circumstances of the case there was no illegality even though the notice was given by two persons and the suit was filed by only one. If the Court grants permission to one person to institute a representative suit and if the person had served the notice under Section 80, the circumstance that another person had joined him in serving the notice but did not join him in the suit, was not a sufficient ground for regarding the suit as defective. At p. 953 (of SCR) = (at p. 15 of AIR) Shah, J., observed as follows -

"The notice in the present suit was served by the plaintiff and Yegnehwara Sastri. They raised a grievance about the notification issued by the Government of Madras on May 16, 1950, it was not an individual grievance of the two persons who served the notice but of all the Inamdars, or agramamdars. The relief for which the suit was intended to be filed was also not restricted to their personal claim. The notice stated the cause of action arising in favour of all the Inamdars, and it is not disputed that the notice set out the relief which would be claimable by all the Inamdars or on their behalf in default of compliance with the requisition. The plaintiff it is true alone filed the suit but he was permitted to sue for and on behalf of all the Inamdars by an order of the Court under Order I, Rule 8 of the Code of Civil Procedure. The requirements as to the cause of action, the name, description and place of residence of the plaintiff were therefore complied with and the relief which the plaintiff claimed was duly set out in the notice. The only departure from the notice was that two persons served a notice under Section 80 informing the Government that proceedings would be started, in default of compliance with the requisition, for violation of the rights of the Inamdars, and one person only out of the two instituted the suit. That in our judgment is not a defect which brings the case within the terms of Section 80".

8. On behalf of respondent No. 1 reference was made to the two decisions of the Judicial Committee in Vellayan Chettiar v. Government of the Province of Madras, AIR 1947 PC 197 and Government of the Province of Bombay v. Pestonji Ardeshir Wadia, 78 Ind App 85 = (AIR 1949 PC 143). But the principle of these decisions has no bearing on the question presented for determination in the present case. In Vellayan Chettiar's case, AIR 1947

PC 197 (supra) a notice was given by one plaintiff stating the cause of action, his name, description and place of his residence and the relief which he claimed although the suit was instituted by him and another. It was observed by the Judicial Committee:

"The section according to its plain meaning requires that there should be in the language of the High Court of Madras "identity of the person who issues the notice with the person who brings the suit": See Venkata Rangiah Appa Rao v. Secretary of State, ILR 54 Mad 416 = (AIR 1931 Mad 175) and on appeal Venkata Rangiah Appa Rao v. Secretary of State, AIR 1935 Mad 389. To hold otherwise would be to admit an implication or exception for which there is no justification."

9. Two persons had sued for a declaration that certain lands belonged to them, and for an order setting aside the decision of the Appellate Survey Officer in regard to those lands. It was found that one alone out of the two persons had served the notice. The relief claimed by the two persons was personal to them and the right thereto arose out of their title to the land claimed by them. It was held by the Judicial Committee that without a proper notice under Section 80 the suit could not be instituted for to hold otherwise would be to admit an implication or exception for which there was no justification. In the other case, in Pestonji Ardeshir Wadia's case 76 Ind App 85 = (AIR 1949 PC 143) (supra) two trustees of a trust served a notice in October, 1933 upon the Government of Bombay under Section 80 intimating that the trustees intended to institute a suit against the Government on the cause of action and for the relief set out therein. One of the trustees died before the plaint was lodged in Court, and two more trustees were appointed in the place of the deceased trustee. Thereafter the two new trustees and the surviving trustee filed the suit out of which the appeal arose which was decided by the Judicial Committee. No notice was served on the Government on behalf of the two new trustees. The Judicial Committee accepted the view of the High Court that where there were three plaintiffs, the names and addresses of all of them must be given in the notice. Their Lordships observed that:

"the provisions of Section 80 of the Code are imperative and should be strictly complied with before it can be said

that a notice valid in law has been served on the Government. In the present case it is not contended that any notice on behalf of plaintiffs 2 and 3 was served on the Government before the filing of the suit".

It is clear that the principle of these two decisions of the Judicial Committee has no application in the present case because the material facts are different.

10. We proceed to consider the next question arising in these appeals viz., whether the High Court was right in holding that the plaintiffs had established their title as raiyat sarkar with regard to 1/5th share in nazul plots Nos. 84/3, 33 and 171/1 mentioned in the Deputy Commissioner's order dated 7th May, 1948 in Revenue Case No. 9/45-46. It was argued on behalf of defendant No. 1 that there was no evidence to show that the plaintiffs were in possession of the land from 1909 to 1932, and the plaintiffs had not established their title by prescription for the statutory period of 60 years. It was contended that the High Court had no justification for holding that the plaintiffs had established the title of "Raiyat Sarkar" and the finding of the High Court was not based upon any evidence. In our opinion, the argument put forward on behalf of defendant No. 1 is well founded and must be accepted as correct. In the settlement of 1863-64 Ex. P-1 the names of Amansingh and Thakurprasad were noted in the remarks column. But the column regarding tenancy right is definitely blank. The owner is shown in the Khasra as the State "Milkiat Sarkar". In the settlement of 1890-91 Amansingh Narpatsingh is again shown in the remarks column of the khata. But the column regarding any kind of tenancy right is again blank. It is clear that in the settlements of 1860 and 1890-91 the ownership of the land is recorded as that of the Government. The possession of the plaintiffs or of their ancestors could not be attributed to ownership or tenancy right of the property. In the settlement of 1909-10, Ex. P-3 there is no entry in the remarks column showing the possession of the ancestors of the plaintiffs. It was said on behalf of the plaintiffs that no notice was given to them of the proceedings of the settlements of 1909-10. Even assuming that this allegation is correct the entries of the khasra P-3 cannot be treated to be a nullity and of no effect. In any event it was open to the plaintiffs to adduce other reliable evidence to prove their possession between the years 1909 to 1932.

But the plaintiffs have failed to produce any such evidence. In the nazul settlement of 1922-23 the tank was given new plot numbers 33, 34, 35, 36, 37 and 171 and its area was recorded as 5.24 acres. In this settlement about 2 acres of land was found to be occupied by the Municipal Committee, Jabalpur. The land so found to be occupied was recorded in the possession of the Municipal Committee, Jabalpur and the remaining land was again recorded as "Milkiat Sarkar". There is no entry as regards the remaining land recording anybody's possession in the remarks column. Actually proclamations were made during this settlement and objections were invited as per Ex ID-14. A date was fixed upto 31st August, 1924 but no one came forward. The proclamation clearly recited that the vacant sites which were not in possession of anybody were not recognised as belonging to any person. It is impossible to believe that the plaintiffs or their ancestors were unaware of such a proclamation. Had they been in possession they would not have failed to make a claim. For the period after 1933-34 the plaintiffs produced account books to show that they exercised certain rights. Certain receipts were also proved but they also relate to a period after 1939. We have gone through the oral evidence produced by the plaintiffs and it appears to be unreliable. The result is that for the period 1891 till 1932 there is no reliable oral documentary evidence to prove that the plaintiffs or their ancestors had any possession over the disputed land. On the contrary the disputed land i.e., Phoota Tal was always recognised as Milkiat Sarkar and the State Government was justified in holding that the order of the Deputy Commissioner dated 7th May, 1948 should be set aside.

11. In the course of the argument reference was made by Mr. Gupta to the following passage in the Central Provinces Settlement Instructions (Reprint of 1953) page 213

"In dealing with proposed method of the settlement of titles it will be convenient in order to remove all causes for misapprehension among residents, to lay emphasis on the policy of Government in making these settlements. That policy was defined in the Chief Commissioner's Resolution No. 502-B-K dated the 19th October, 1917, in the Revenue and Scarcity Department, but its main principles will bear repetition.

As it is not the intention of Government in making the settlement to disturb long

possession, but only to obtain an accurate record of the lands which are its property and to secure its right to any land revenue to which it may be entitled, long possession, even without clear proof of a definite grant from Government will be recognised as entitled the holder to possession. In deciding what constitutes long possession in any individual town, regard will be had to the special circumstances of the place, and while this point will be dealt with more particularly in the Deputy Commissioner's report, the following general principles will ordinarily be observed.

(1) all occupants who are able to prove possession to any land prior to 1891 or such later date as may be fixed for each town, either by themselves or by a valid title from a previous holder, and all occupants who can prove a definite grant or lease from Government will be recorded as entitled to hold such land as against Government (paragraph 6 of the Resolution)."

On the basis of this passage it was argued that it was the duty of the settlement officer to treat the plaintiffs as having established their title because they were shown to be in possession in the settlement of the year 1890-91. We are unable to accept this argument as correct. The passage quoted above only applies to a case where the ownership of the land was unknown i.e., where possession is proved for a long time, but its original title could not be traced, and not to a case where the land is recorded as Government land.

12. For the reasons expressed, we hold that the suit brought by the plaintiffs being Civil Suit No. 10-A of 1954 should be dismissed. Civil Appeal 386 of 1966 is accordingly dismissed and Civil Appeal 387 of 1966 is allowed with costs in favour of defendant No 1 i.e., State of Madhya Pradesh. There will be one hearing fee.
SSG/D V C. Order accordingly.

AIR 1969 SUPREME COURT 1262
(V 56 C 229)

(From Calcutta (1965) 57 ITR 774)

J C SHAH AND V. RAMASWAMI, JJ.

Netherlands Steam Navigation Co Ltd.,
(In all the Appeals), Appellant v. The
Commissioner of Income-tax, West Bengal,
(in all the Appeals), Respondent.

Civil Appeals Nos 1622 to 1626 of 1963,
D/- 14-3-1969

IM/IM/B790/69/D

(A) Income-tax Act (1922), S. 10 (2) (vi) and (vi-a) — Income-tax Rules (1922), R. 33 — Assessee non-resident Company engaged in shipping business — Computation of taxable business income — Method of.

Section 10 of the Act which charges to tax the profits and gains of business, profession or vocation carried on by an assessee applies also to assessee who are non-residents. Profits and gains of business of a non-resident received or deemed to be received in the taxable territories by or on behalf of the assessee and profits and gains of business which accrue or arise or are deemed to accrue or arise to him in the taxable territories are taxable. Section 4 is one of the pivotal sections in the scheme of the Income-tax Act. The Act, however, gives no clear guidance for determining when income may be said to have arisen or accrued within the taxable territories. But R. 33 framed under the Act purports to give some direction to the Income-tax Officer for determining income, profits or gains accruing or arising to a non-resident for the purpose of assessment to income-tax. The profits of the business taxable under the Income-tax Act, 1922, are a fraction of the world-profits — and the profits are to be determined under Rule 33 of the Income-tax Rules. (Paras 8, 9)

Rule 33 of the Income-tax Rules authorises the Income-tax Officer to adopt one of the three methods of determining income, profits or gains for the purpose of assessment to income-tax where the Income-tax Officer is unable to ascertain the actual amount of income; profits or gains, arising inter alia out of a business connection in the taxable territories: (a) a percentage of turnover considered reasonable; (b) a proportion of the total profits (computed according to the provisions of the Income-tax Act) of the business of the assessee equal to the proportion which the receipts accruing or raising bear to the total receipts of the business and (c) such other manner as the Income-tax Officer may deem suitable. (Paras 9, 10)

(B) Income-tax Act (1922), Section 10 — Income-tax Rules (1922), Rule 33 — Claim of non-resident assessee for additional depreciation — Additional depreciation is a statutory allowance in the determination of taxable profits under Section 10 of the Act, and in the case of a non-resident where actual income cannot be determined, and resort is had to

Rule 33 and not when a special empirical method evolved by I. T. O. is adopted for computation of the taxable income. (Para 15)

(C) Income-tax Act (1922), S. 66A — Powers of Supreme Court — In appeal from order of High Court in Income-tax reference Supreme Court exercises only advisory jurisdiction and has only to answer question referred by the Tribunal. (Para 15)

(D) Income-tax Act (1922), S. 10 (2) (vi) — Assessee non-resident company — Computation of taxable business income — Observation of High Court that “no relief in any shape or form can be enjoyed by any assessee under the Income-tax Act in respect of a source of income unless the income from that source is taken into consideration for the purpose of that Act” when that was not the plea of the commissioner held on facts was wrong. (1965) 57 ITR 774 (Cal), Reversed. (Para 16)

Mr. Sachin Chaudhuri, Senior Advocate, (M/s. T. A. Ramachandran and D. N. Gupta, Advocates, with him), for Appellant (In all the Appeals); Mr. S. T. Desai, Senior Advocate, (M/s. S. A. L. Narayana Rao, R. H. Dhebar, R. N. Sachthay and B. D. Sharma, Advocates, with him), for Respondent (In all the Appeals).

The following Judgment of the Court was delivered by

SHAH, J.: Netherlands Steam Navigation Company Ltd. — hereinafter called “the assessee” — is a non-resident Company engaged in shipping business. For the assessment years 1952-53 to 1956-57 the assessee filed its return of income for the relevant accounting years disclosing taxable income computed on the basis of its annual turnover in its Indian trade i.e., “round voyages” to and from Indian Ports. The assessee did not furnish particulars of its world income. The Income-tax Officer computed the taxable business income of the assessee for each year by the application of the following formula:

Indian trade profits

Total Port receipts

By the expression “Indian trade profits” in the formula was meant profit earned in “round voyages” made by the assessee’s ships which touched Indian ports. Operation of the formula may be illustrated

"Total gross earnings in Indian Trade . . .		Kr. 10,024,996
<i>Deduct :—</i>		
(1) Total expenses in Indian Trade. . .	Kr. 7,705,474	
(2) Depreciation allowance Net profit Indian Trade	Kr. 733,671	Kr. 8,439,145
Gross earnings from Indian ports		Kr. 1,585,851
Proportionate Indian profits—		Kr. 5,440,042
5,440,042		
	x 1,585,851	Kr. 860,559
10,024,996		
(Rs. 100: Kr. 79,80)		Rs. 10,78,395"

2. In computing the profits of the assessee in India in each year the Income-tax Officer allowed normal depreciation and other trade allowances admissible under the Indian Income-tax Act, 1922, and the relevant rules made thereunder. He, however, did not allow initial depreciation and additional depreciation in respect of the ships of the assessee in any of the assessment years, because the ships acquired by the assessee were not introduced into the Indian business in the years in which they were newly acquired. The orders of assessment were confirmed by the Appellate Assistant Commissioner.

3. In appeal to the Income-tax Appellate Tribunal the assessee claimed additional depreciation for four ships for which the following details were furnished:

"(1) S S. Buntang — Brought into use in 1950

Brought into use in the Indian trade in 1951.

Claim for the assessment years 1952-53 to 1954-55

(2) S S. Billiton — Brought into use in 1951

Brought into use in the Indian trade in 1952.

Claim for the assessment years 1953-54 to 1956-57.

(3) S S. Banka. — Brought into use in 1953

Brought into use in the Indian trade in 1954

Claim for the assessment years 1955-56 and 1956-57.

(4) S S. Bawean. — Brought into use in 1953

Brought into use in the Indian trade in 1954

Claim for the assessment years 1955-56 and 1956-57."

The assessee and the Commissioner were agreed that the taxable income of the as-

sessee had to be determined by the application of the second method in Rule 33 of the Indian Income-tax Rules, 1922. The Tribunal also observed that the Commissioner and the assessee agreed that the formula adopted by the Income-tax Officer was "the correct method of assessment."

4. The Commissioner submitted before the Tribunal that if the Indian business of the assessee be regarded as part of its world business and not independent of it, the world profits of the assessee must be computed according to the provisions of the Indian Income-tax Act, 1922, and additional depreciation may be taken into account in determining the taxable profits under the Indian Income-tax Act as a fraction of the world profits. But he maintained that if the Indian trade be regarded as a separate business and not part of the world trade of the assessee, additional depreciation could only be allowed under Section 10 (2) (vi-a) of the Indian Income-tax Act, provided ships which are new are introduced into the Indian trade and not otherwise.

5. In the opinion of the Tribunal, in computing the taxable income of the assessee under the Indian Income-tax Act, 1922 the Indian business must be taken to be part of the assessee's world business, and "depreciation which the assessee was entitled to, in respect of its world business by the application of the Indian Income-tax Act would be proportionately "available in respect of its business." The Tribunal observed that under Rule 33 "the profits have to be calculated under the terms of the Indian Income-tax Act and this Act postulated that on all machinery, plants and such other things like steamers brought into business after March 31, 1948, additional depreciation

must also be granted." The Tribunal then observed that the ships brought into the Indian trade were not new in the years of account relevant to the five years of assessment, but the assessee was still qualified under Section 10 (2) (vi-a) to additional depreciation for a continuous period of five years, and "the fact that in the first of these years the new ships did not call at the Indian Ports in one assessment year did not disentitle the assessee to the benefit not only for that year but also for the succeeding four years." Accordingly the Tribunal held that in respect of all the four ships of the assessee, additional depreciation was admissible as claimed.

6. At the instance of the Commissioner of Income-tax, the following question was referred by the Tribunal to the High Court of Calcutta for opinion in respect of each of the five years:

"Whether on the facts and circumstances of the case the assessee-Company is entitled to additional depreciation in respect of the four ships mentioned above?"

The High Court answered the question in the negative.

7. Clause (vi-a) was inserted in Section 10 (2) of the Indian Income-tax Act, 1922, by Section 11 of the Taxation Laws (Extension to Merged States and Amendment) Act 67 of 1949. The clause as amended by Section 8 of the Indian Income-tax (Amendment) Act 25 of 1953 with effect from April 1, 1952, reads as follows:

"In respect of depreciation of buildings newly erected, or of machinery or plant being new which has been installed, after the 31st day of March, 1948, a further sum (which shall be deductible in determining the written down value) equal to the amount admissible under clause (vi) (exclusive of the extra allowance for double or multiple shift working of the machinery or plant and the initial depreciation allowance admissible under that clause for the first year of erection of the building or the installation of the machinery or plant) in not more than five successive assessments for the financial years next following the previous year in which such buildings are erected and such machinery and plant installed and falling within the period commencing on the 1st day of April, 1949, and ending on the 31st day of March, 1959."

The assessee is a non-resident Company. It maintains a Branch Office in Calcutta;

but on that account the Indian business of the assessee cannot be regarded as business distinct from its world business. It was not so treated by the Income-tax Officer, or by the Appellate Assistant Commissioner. In computing profits or gains of business carried on by an assessee, normal depreciation under Section 10 (2) (vi) and additional depreciation under Section 10 (2) (vi-a) are undoubtedly admissible in the conditions and to the extent allowed under the two clauses.

8. By Section 4 (1) of the Indian Income-tax Act, the total income of any previous year of a non-resident includes all income, profits and gains from whatever source derived which—

(1) are received or are deemed to be received in the taxable territories in such year by or on behalf of such person, and

(2) which accrue or arise or are deemed to accrue or arise to him in the taxable territories during such year.

Section 10 of the Act which charges to tax the profits and gains of business, profession or vocation carried on by an assessee applies to assessee who are residents, residents but not ordinarily residents, and non-residents. Profits and gains of business of a non-resident received or deemed to be received in the taxable territories by or on behalf of the assessee are taxable under the Indian Income-tax Act 1922; profits and gains of business which accrue or arise or are deemed to accrue or arise to him in the taxable territories are also taxable under that Act; but profits and gains which accrue or arise or are deemed to accrue or arise to a non-resident without the taxable territories are not taxable under the Act.

9. Section 4 is one of the pivotal sections in the scheme of the Income-tax Act. Thereby within the total income of a non-resident is included income received, arising or accruing, or deemed to be received, or to have arisen or accrued, within the taxable territories. The Act however gives no clear guidance for determining when income may be said to have arisen or accrued within the taxable territories. But Rule 33 framed under the Act purports to give some direction to the Income-tax Officer for determining income, profits or gains accruing or arising to a non-resident for the purpose of assessment to income-tax. There is no dispute that the profits of the business taxable under the Indian Income-tax Act, 1922, are a fraction of the world-profits — and the profits are to be determined under R. 33

of the Income-tax Rules. Rule 33 of the Income-tax Rules reads as follows:

"In any case in which the Income-tax Officer is of opinion that the actual amount of the income, profits or gains accruing or arising to any person residing out of the taxable territories whether directly or indirectly through or from any business connection in the taxable territories or through or from any property in the taxable territories, or through or from any asset or source of income in the taxable territories, or through or from any money lent at interest and brought into the taxable territories in cash or in kind cannot be ascertained, the amount of such income, profits or gains for the purposes of assessment to income-tax may be calculated on such percentage of the turnover so accruing or arising as the Income-tax Officer may consider to be reasonable, or on an amount which bears the same proportion to the total profits of the business of such person (such profits being computed in accordance with the provisions of the Indian Income-tax Act) as the receipts so accruing or arising bear to the total receipts of the business, or in such other manner as the Income-tax Officer may deem suitable."

The rule authorises the Income-tax Officer to adopt one of the three methods of determining income, profits or gains for the purpose of assessment to income-tax where the Income-tax Officer is unable to ascertain the actual amount of income, profits or gains, arising *inter alia* out of a business connection in the taxable territories — (a) a percentage of turnover considered reasonable, (b) a proportion of the total profits (computed according to the provisions of the Indian Income-tax Act) of the business of the assessee equal to the proportion which the receipts accruing or arising bear to the total receipts of the business and (c) such other manner as the Income-tax Officer may deem suitable.

10. The second method, it was common ground, was properly applicable to the determination of taxable income of the assessee. That method requires as a first step, determination of the total profits of the business of the assessee in accordance with the provisions of the Indian Income-tax Act, the next step is to determine the proportion between the receipts accruing or arising within the taxable territories and the total receipts of the business, and the third step is to determine the income, profits or gains by the applica-

tion of the proportion for the purpose of assessment to income-tax. This method ordains that the fraction which the total profits bear to the total world receipts is to be applied to the Indian receipts for determining the taxable profits. The income so determined will be the taxable income without any further allowances, because the permissible allowance will all enter the computation of the world income and income taxable under the Income-tax Act is also a fraction thereof.

11. Apparently the Income-tax Officer did not apply the second method under Rule 33 in computing the taxable income of the assessee, for under that method in determining the taxable income the receipts accrued or arising in India had to be multiplied by the proportion between the total profits of the business and the total receipts of the world business.

12. Counsel for the assessee asked us to assume that the profits computed by the Income-tax Officer according to the formula adopted by him are profits determined by the second method in Rule 33, and claimed on that footing that besides normal depreciation, additional depreciation ought also to have been taken into account and the taxable profits of the assessee determined on that basis. But that assumption cannot be made. One of the essential conditions of the applicability of the second method in Rule 33 is the determination of the total world profits of the assessee under the Indian Income-tax Act, and reduction of the Indian taxable profits by the application of the appropriate fraction. The assessee has not produced its books of account of its world trade to enable the Income-tax Officer to determine its total taxable profits arising from its world business.

13. There was apparently no clear appreciation of the true import of the second method under Rule 33 before the Departmental Authorities and the Tribunal. Counsel for the assessee suggested that his client may be willing to produce before the Income-tax Officer the books of account of the relevant years for computing the total world profits according to the Indian Income-tax Act, 1922, and the benefit of additional depreciation may then be allowed to the assessee in computing the total profits under the Indian Income-tax Act. Counsel for the Commissioner expressed his willingness to the adoption of that course. Counsel requested us to adjourn the hearing to enable them to obtain instructions from their respective clients, and the hearing was ad-

cordingly adjourned for three weeks. But ultimately counsel for the assessee informed us that his client may not be able to bring before the Income-tax Officer the books of account of their world trade.

14. The Income-tax Officer has evolved a special formula for determining the profits which is not the second method in Rule 33 of the Income-tax Rules. The assessee has not challenged the correctness of that method, nor has the Department. In the application of that formula, normal depreciation and trade expenses are deducted from the total gross earning in the Indian trade, but not the additional depreciation.

15. Clearly the Income-tax Officer did not in computing the taxable income resort to the second method in Rule 33 of the Income-tax Rules. We are exercising in these appeals advisory jurisdiction, and are only called upon to answer the question referred by the Tribunal. We are incompetent to decide whether computation of the taxable income by the Income-tax Officer by the application of the formula evolved by him is correct; that question is not before us. We are only concerned to determine the validity of the claim for admitting additional depreciation in the computation of the taxable income of the assessee by the method adopted by the Income-tax Officer. Additional depreciation is a statutory allowance in the determination of taxable profits under Section 10 of the Act, and in the case of a non-resident where actual income cannot be determined, and resort is had to Rule 33, not when an empirical method is adopted for computation of the taxable income.

16. We are however unable to agree with the observations of the High Court that "no relief in any shape or form can be enjoyed by any assessee under the Indian Income-tax Act in respect of a source of income, unless the income from that source is taken into consideration for the purpose of that Act. In the reference before us the income in question was outside the purview of assessment under the Indian Income-tax Act." That was not the plea of the Commissioner. The source of the income of the assessee charged to tax was business; it was not income from any other source. The Commissioner and the assessee were ad idem on that matter. The only dispute was whether additional depreciation was admissible in the computation of the taxable income, when the taxable business profits were determined

by the Income-tax Officer by the method evolved by him.

17. It was common ground that the appropriate method for determining the profits was the second method in Rule 33. But that method was never applied; if it was applied in the computation of the world profits of the assessee, it would have been necessary to allow the various depreciation allowances. The assessee could not, while accepting determination of taxable profits in a manner not warranted by the second method under Rule 33, claim that additional depreciation should be allowed. The answer to the question therefore is that additional depreciation is not admissible as an allowance in the computation of the taxable income by the special formula adopted by the Income-tax Officer.

18. The appeals fail. The assessee will pay the costs of these appeals. One hearing fee.

MVJ/D.V.C.

Appeals dismissed.

AIR 1969 SUPREME COURT 1267 (V 56 C 230)

(From Allahabad: AIR 1965 All 586)

J. C. SHAH AND A. N. GROVER, JJ.

Jai Jai Ram Manohar Lal, Appellant v. National Building Material Supply, Gurgaon, Respondent.

Civil Appeal No. 697 of 1966, D/- 17-3-1969.

(A) Civil P. C. (1908), O. 6, Rr. 17 and 153 and O. 30, R. 1 — Amendment of plaint — Discretion of Court — Not to be refused on technical grounds — AIR 1965 All 586, Reversed.

Where the plaintiff, M, who was the manager of a joint family, and was carrying on its business under a business name, brought a suit in that business name, and, when objection was taken by the defendant that the firm being an unregistered firm was incompetent to sue, applied for the amendment of the plaint stating that he himself had intended to file and had in fact filed the action on behalf of the family in the business name.

Held that the application could not be refused on the ground that there was no averment therein that the misdescription was on account of a bona fide mistake, and on that account the suit must fail. There is no rule that unless in an application for amendment of the plaint it is

expressly averred that the error, omission or misdescription is due to a bona fide mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations. (Para 7)

The description of the plaintiff by a firm name in a case where the Code of Civil Procedure did not permit a suit to be brought in the firm name should properly be considered as a case of description of the individual partners of the business and as such a misdescription, which in law can be corrected. It should not be considered to amount to a description of a non-existent person. AIR 1961 SC 325 & AIR 1933 Bom 304, Rel. on; AIR 1965 All 586, Reversed. (Para 6)

Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side (Para 5)

(B) Limitation Act (1908), Sec. 3 — Amendment of plaint — Suit originally instituted misdescribing the plaintiff — Amendment of plaint substituting real plaintiff — No question of limitation arises — Plaint must be deemed on such amendment to have been instituted in the name of the real plaintiff, on the date on which it was originally instituted. (Para 8)

Cases Referred: Chronological Paras
(1961) AIR 1961 SC 325 (V 48)=
1961-1 SCR 982, Purushottam
Umedbhai and Co. v. Manilal and
Sons 4, 6
(1933) AIR 1933 Bom 304 (V 20)=
35 Bom LR 569, Amulakhchand
Mewaram v. Babulal Kanlal 5

Mr. S. C. Manchanda, Senior Advocate (M/s. S. K. Mehta and K. L. Mehta, Advocates, with him), for Appellant; Mr. Bishan Narain, Senior Advocate (Mr. Harbans Singh, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

SHAH, J.: On March 11, 1950, Manohar Lal s/o Jai Jai Ram commenced an action in the Court of the Subordinate Judge, Nanital, for a decree for Rs 10,139/12 being the value of timber supplied to the defendant — the National Building Material Supply, Gurgaon. The action was instituted in the name of "Jai Jai Ram Manohar Lal" which was the name in which the business was carried on. The plaintiff Manohar Lal subscribed his signature at the foot of the plaint as "Jai Jai Ram Manohar Lal, by the pen of Manohar Lal", and the plaint was also similarly verified. The defendant by its written statement contended that the plaintiff was an unregistered firm and on that account incompetent to sue.

2. On July 18, 1952, the plaintiff applied for leave to amend the plaint. Manohar Lal stated that "the business name of the plaintiff is Jai Jai Ram Manohar Lal and therein Manohar Lal the owner and proprietor is clearly shown and named. It is a joint Hindu family business and the defendant and all knew it that Manohar Lal whose name is there along with the father's name is the proprietor of it. The name is not an assumed or fictitious one". The plaintiff on those averments applied for leave to describe himself in the cause title as "Manohar Lal proprietor of Jai Jai Ram Manohar Lal" and in paragraph 1 to state that he carried on the business in timber in the name of Jai Jai Ram Manohar Lal. Apparently no reply was filed to this application by the defendant. The Subordinate Judge granted leave to amend the plaint. He observed that there was no doubt that the real plaintiff was Manohar Lal himself, that it was Manohar Lal who intended to file and did in fact file the action, and that the "amendment was intended to bring what in effect had been done in conformity with what in fact should have been done".

3. The defendant then filed a supplementary written statement raising two additional contentions — (1) that Manohar Lal was not the sole owner of the business and that his other brothers were also the owners of the business, and (2) that in any event the amendment became effective from July 18, 1952, and on that account the suit was barred by the law of limitation.

4. The Trial Judge decreed the claim for Rs 6,568/6/3. Against that decree an appeal was preferred to the High Court of Allahabad. The High Court being of

the view that the action was instituted in the name of a "non-existing person" and Manohar Lal having failed to aver in the application for amendment that the action was instituted in the name of "Jai Jai Ram Manohar Lal" on account of some bona fide mistake or omission, the Subordinate Judge was incompetent to grant leave to amend the plaint. The High Court after making an extensive quotation from the judgment of this Court in *Purushottam Umedbhai and Co. v. Messrs. Manilal and Sons*, 1961-1 SCR 982=(AIR 1961 SC 325) observed that the action could not be instituted by the plaintiff in the business name; it should have been instituted in the name of the Karta of the Hindu undivided family in his representative capacity or else all the members of the joint family must join as plaintiffs. The Court then observed.

"The suit instituted by the joint Hindu family business in the name of an assumed business title was a suit by a person, who did not exist and was, therefore, a nullity. Hence there could be no amendment of the description of such a plaintiff who did not exist in the eye of law. The Court below was in obvious error in thinking otherwise and allowing the name of Manohar Lal to be added as proprietor of the original plaintiff Jai Jai Ram Manohar Lal, which was neither a legal entity nor an existing person who could have validly instituted the suit."

The High Court was also of the opinion that the substitution of the name of Manohar Lal as a plaintiff during the pendency of the action took effect from July 18, 1952, and the action must be deemed to be instituted on that date: the amendment could not take effect retrospectively and on the date of the amendment the action was barred by the law of limitation. The plaintiff has appealed to this Court with special leave.

5. The order passed by the High Court cannot be sustained. Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting mala fide, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However, negligent or careless may have been the first omission, and, however, late

the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side. In *Amulakchand Mewaram v. Babulal Kanlal*, 35 Bom LR 569=(AIR 1933 Bom 304), Beaumont, C. J., in delivering the judgment of the Bombay High Court set out the principles applicable to cases like the present and observed:

"..... the question whether there should be an amendment or not really turns upon whether the name in which the suit is brought is the name of a non-existent person or whether it is merely a misdescription of existing persons. If the former is the case, the suit is a nullity and no amendment can cure it. If the latter is the case, prima facie, there ought to be an amendment because the general rule, subject no doubt to certain exceptions, is that the Court should always allow an amendment where any loss to the opposing party can be compensated for by costs."

In *Amulakchand Mewaram's case*, 35 Bom LR 569=(AIR 1933 Bom 304) a Hindu undivided family sued in its business name. It was not appreciated at an early stage of the suit that in fact the firm name was not of a partnership, but was the name of a joint Hindu family. An objection was raised by the defendant that the suit as filed was not maintainable. An application to amend the plaint, by substituting the names of the three members of the joint family for the name of the family firm as plaintiffs, was rejected by the Court of first instance. In appeal the High Court observed that a suit brought in the name of a firm in a case not within Order 30, Civil Procedure Code being in fact a case of misdescription of existing persons, leave to amend ought to have been given.

6. This Court considered a somewhat similar case in *Purushottam Umedbhai's case*, 1961-1 SCR 982=(AIR 1961 SC 325). A firm carrying on business outside India filed a suit in the firm name in the High Court of Calcutta for a decree for compensation for breach of contract. The plaintiff then applied for amendment of the plaint by describing the names of all the partners and striking out the name of the firm as a mere misdescription. The application for amendment was rejected on the view that the original plaint was no plaint in law and it was not a case of misnomer or misdescription, but a case of a non-existent firm or a non-existent person suing. In appeal, the High Court held that the description of the plaintiff

by a firm name in a case where the Code of Civil Procedure did not permit a suit to be brought in the firm name should properly be considered a case of description of the individual partners of the business and as such a misdescription, which in law can be corrected and should not be considered to amount to a description of a non-existent person. Against the order of the High Court an appeal was preferred to this Court. This Court observed (at p. 994)

"Since, however, a firm is not a legal entity the privilege of suing in the name of a firm is permissible only to those persons who, as partners, are doing business in India. Such privilege is not extended to persons who are doing business as partners outside India. In their case they still have to sue in their individual names. If however, under some misapprehension, persons doing business as partners outside India do file a plaint in the name of their firm they are misdescribing themselves, as the suit instituted is by them, they being known collectively as a firm. It seems, therefore, that a plaint filed in a Court in India in the name of a firm doing business outside India is not by itself a nullity. It is a plaint by all the partners of the firm with a defective description of themselves for the purpose of the Code of Civil Procedure. In these circumstances, a Civil Court could permit, under the provisions of Section 153 of the Code (or possibly under Order VI, Rule 17, about which we say nothing), an amendment of the plaint to enable a proper description of the plaintiffs to appear in it in order to assist the Court in determining the real question or issue between the parties." These cases do no more than illustrate the well-settled rule that all amendments should be permitted as may be necessary for the purpose of determining the real question in controversy between the parties, unless by permitting the amendment injustice may result to the other side.

7. In the present case, the plaintiff was carrying on business as commission agent in the name of "Jai Jai Ram Manohar Lal". The plaintiff was competent to sue in his own name as Manager of the Hindu undivided family to which the business belonged he says he sued on behalf of the family in the business name. The observations made by the High Court that the application for amendment of the plaint could not be granted, because there was no averment therein that the misdes-

cription was on account of a bona fide mistake, and on that account the suit must fail, cannot be accepted. In our view, there is no rule that unless in an application for amendment of the plaint it is expressly averred that the error, omission or misdescription is due to a bona fide mistake, the Court has no power to grant leave to amend the plaint. The power to grant amendment of the pleadings is intended to serve the ends of justice and is not governed by any such narrow or technical limitations.

8. Since the name in which the action was instituted was merely a misdescription of the original plaintiff, no question of limitation arises; the plaint must be deemed on amendment to have been instituted in the name of the real plaintiff, on the date on which it was originally instituted.

9. In our view, the order passed by the Trial Court in granting the amendment was clearly right, and the High Court was in error in dismissing the suit on a technicality wholly unrelated to the merits of the dispute. Since all this delay has taken place and costs have been thrown away, because the defendant raised and persisted in a plea which had no merit even after the amendment was allowed by the Trial Court, he must pay the costs in this Court and the High Court. The appeal is allowed and the decree passed by the High Court is set aside. It appears that the High Court has not dealt with the appeal on the merits. The proceedings will stand remanded to the High Court for disposal according to law on the merits of the dispute between the parties.

MKS/D.V.C.-

Appeal allowed.

AIR 1969 SUPREME COURT 1270
(V 56 C 231)

(From Allahabad ILR (1965) 2 All 383)
S M SIKRI, R S BACHAWAT AND
K. S. HEGDE, JJ

Balak Singh, Appellant v Waqf Alu-Allah Kavamkarda Ahmad Ullah Khan Sahab, Respondent.

Civil Appeal No. 708 of 1968, D/- 20-3-1969

Tenancy Laws — U. P. Tenancy Act (17 of 1939), Ss 163, 271 (2) — Civil P. C. (1908), S. 47 — Rent decree — Order under S 163 directing delivery of posses-

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sion to decree-holder — Order relates to execution, discharge or satisfaction of decree and is appealable — ILR (1965) 2 All 383, Reversed.

The whole scheme of the Section 168 shows that the application under it is a step in the execution, discharge or satisfaction of the decree. Where, therefore, in a decree for arrears of rent obtained by the land-holder, the Assistant Collector confirms an order under S. 168 for delivery of possession to the decree-holder, the order is one relating to execution, discharge or satisfaction of the decree and an appeal lies against it. ILR (1965) 2 All 383, Reversed.

(Paras 8, 10, 12)

Mr. S. P. Sinha, Senior Advocate (M/s. J. P. Goyal and S. P. Singh, Advocates, with him), for Appellant; Mr. C. B. Agarwala, Senior Advocate (Mr. S. Shaukat Hussain, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.: The only question involved in this appeal by special leave is whether an appeal lies against an order passed under Section 168 of the U. P. Tenancy Act, 1939, hereinafter referred to as the Act. Before we deal with this point it is necessary to give a few facts.

2. Balak Singh, appellant before us, was a tenant of the respondent Waqf. The respondent had obtained a decree on May 17, 1956, for Rs. 752/- against Balak Singh for arrears of rent. The respondent tried to execute the decree by attachment of crops, but Balak Singh had apparently removed the crops. Thereupon the respondent, through one Reazuddin, claiming to be the Mutawalli of the respondent Waqf, applied under Section 168 of the Act, praying that the amount of the decree be got paid under Section 168 and in default of payment of the decretal amount Balak Singh may be dispossessed. This application was filed on July 4, 1957. On April 3, 1958, notice was issued under Section 168 for May 2, 1958. On the latter date Parwana Dakhil (Warrant of Possession) in favour of the decree-holder was issued, and it was directed that the file be put up on June 13, 1958. On May 30, 1958, Balak Singh put in a petition raising various objections, one of them being that no notice of the proceedings taken under Section 168 had been served on him. He further contended that Reazuddin had no right to file the application under Section 168. On July 12, 1958,

the Assistant Collector, 1st Class, cancelled the order dated May 2, 1958, and directed that fresh notice be issued under Section 168 of the Act to the judgment-debtor giving him time upto August 8, 1958, "to deposit the decretal amount otherwise he will be ousted of the land in suit". He also directed that the decree-holder should file evidence of the succession of Reazuddin to Abdul Latif who was the previous Mutawalli.

3. On August 8, 1958, Balak Singh raised some more objections, including the objection that he should be granted 120 days time for payment of the decretal amount in execution as provided in Section 168. On August 8, 1958, the Assistant Collector held that he had already given a long time to pay the dues and no question of granting further time arose. He further held that Reazuddin had filed papers to prove that he had a right to continue the proceedings. The Assistant Collector confirmed the order previously passed regarding delivery of possession to the decree-holder. He noted that possession had already been delivered.

4. Against this order Balak Singh filed an appeal to the District Judge. The District Judge held that it had not been established that Reazuddin was a legal representative or agent of the decree-holder and that, at any rate, no proper notice under Section 168 of the Act had been served on Balak Singh and it was not right for the Court to have confirmed the previous order without complying with the mandatory provisions of Section 168. He accordingly allowed the appeal and sent the case back to the execution Court with a direction to readmit it and deal with it according to law.

5. The respondent then filed an appeal to the High Court. Mathur, J., came to the conclusion that the appeal to the District Judge was incompetent as no appeal lay against an order passed under Section 168 of the Act. He was of the view that an order under Section 168 was passed in the main suit and not in execution.

6. Section 168 of the Act reads thus:

"168. (1) When a decree for arrears of rent against an exproprietary, an occupancy or hereditary tenant has not been completely satisfied within one year from the date of such decree by any mode of execution other than sale of holdings, the land-holder may apply to the Court, which passed the decree, for the issue of a notice to the tenant for payment of the amount outstanding and for his ejectment,

in case of the default and the Court shall thereupon issue such notice.

(2) The notice shall require the tenant to appear within thirty days of the service of the notice, and either to show cause why he should not be ejected from the holding, or to admit the claim and obtain leave to pay the amount into the Court within one hundred and twenty days from the date of his appearance in the Court.

(3) If the tenant does not appear in accordance with the terms of the notice, or having appeared either does not show cause why he should not be ejected or does not ask for leave to pay, the Court shall immediately order his ejectment from the holding.

(4) If the tenant appears and obtains leave to pay, then, unless within one hundred and twenty days from the date of his appearance in the court, the tenant has paid the amount or payment thereof has been certified to the Court in accordance with Rule 2, Order XXI of the Code of Civil Procedure, 1908, the Court shall on the 31st of May next following, order his ejectment.

(5) The order of ejectment shall be executed on or after the first day of June next following the date of the order. If within one month after the delivery of possession, the tenant deposits the decretal amount, the ejectment order shall be cancelled and possession restored forthwith to the tenant.

(6) No extension of time for payment shall be allowed:

Provided that the tenant shall be ejected only from such portion of the holding the rent of which does not exceed one-sixth of the decretal amount."

7. The learned counsel for the appellant contends that an appeal lies under Section 271 (2) of the Act, which reads as follows.

"An appeal shall lie from an order mentioned in Section 47 or Section 104 or Section 144 or in Order XLIII, Rule 1 of the Code of Civil Procedure, 1908, and made by an Assistant Collector of the first class or a collector.

Such appeal shall lie to the Court, if any, having jurisdiction under Section 265 of this Act to hear an appeal from the decree in the suit, or in the case of an application for execution, to the Court having jurisdiction to hear an appeal from the decree which is being executed."

8. The answer to the question depends on whether the order under Section 168

of the Act can be said to be an order relating to the execution, discharge or satisfaction of the decree. It seems to us that the order dated August 8, 1958, was an order relating to the execution, discharge or satisfaction of the decree for rent, dated May 17, 1956.

9. It will be noticed that sub-s. (1) of Section 168 contemplates the decree-holder having tried to execute the decree by other modes of execution. If the decree has not been satisfied within one year of the date of the decree, the decree-holder is entitled to apply to the Court which passed the decree for the issue of the notice to the tenant for payment of the amount outstanding and for ejectment in case of default. Once the conditions are satisfied the Court has no option but to issue a notice. The object of the application is satisfaction of the decree, it may be satisfied by payment of the amount outstanding or failing that by ejectment in case of default. Under sub-section (2) the tenant is entitled to apply and obtain leave to pay the amount in Court within 120 days from the date of appearance in the Court. He is also entitled to show cause why he should not be ejected. Under sub-sec. (3) the Court is entitled to immediately order his ejectment from the holding if the tenant does not appear in accordance with the terms of notice or having appeared either does not show cause why he should not be ejected or does not ask leave to pay. Under sub-section (4) in default of payment or certification to the Court in accordance with R. 2, O. 21 of the Code of Civil Procedure, the Court is entitled to order his ejectment on May 31, next following. Then sub-section (5) provides for the execution of the order of ejectment.

10. It seems to us that the whole scheme of the section shows that the application under Section 168 of the Act is a step in the execution, discharge or satisfaction of the decree. The learned Counsel for the respondent contends that the application is to the Court which passed the decree. But this does not necessarily show that the order passed on the application is not one relating to the execution, discharge or satisfaction of the decree. As provided in Section 38 of the Civil Procedure Code "a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution."

11. While Section 168 deals with a decree for arrears of rent against an expro-

prietary, an occupancy or hereditary tenant, Section 170 of the Act deals with a decree passed for arrears of rent against a non-occupancy tenant. A similar application is provided for in Section 170 and the legislature clearly contemplates that this is a mode of execution for it uses the words "the land-holder may, in addition to any other mode of execution, apply to the Court which passed the decree for issue of a notice." A mode similar to the mode or proceeding under Section 168 is thus treated as a mode of execution.

12. In the result we hold that the High Court erred in holding that the appeal to the District Judge was not competent. Various other questions arise in the appeal to the High Court. In the circumstances we set aside the judgment and order passed by the High Court and remit the case to it to dispose of it in accordance with law. The appellant will have his costs of this appeal.

DRR

Appeal allowed.

AIR 1969 SUPREME COURT 1273

(V 56 C 232)

(From: Punjab)*

M. HIDAYATULLAH, C. J. AND
G. K. MITTER, J.

Shri Vidya Prachar Trust, Appellant v.
Pt. Basant Ram, Respondent; Duli Chand,
Intervener.

Civil Appeal No. 499 of 1966, D/- 21-3-1969.

Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), S. 13 (2) (i), Proviso — Tender of payment — Tenant depositing money under S. 31, East Punjab Relief of Indebtedness Act, 1934 — Not a valid tender of payment — Civ. Revn. No. 750 of 1962, D/- 18-3-1964 (Punj), Reversed; ILR (1964) 1 Punj 626, Overruled — (Debt Laws — Punjab Relief of Indebtedness Act (7 of 1934), S. 31).

The deposit of the amount in the Civil Court under S. 31, East Punjab Relief of Indebtedness Act, 1934 by the tenant who is in arrears of rent is not a valid tender of payment under S. 13 (2) (i) of the East Punjab Rent Restriction Act, 1949 and hence cannot save him from

*(Civil Revision No. 750 of 1962, D/- 18-3-1964 — Punj).

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the consequences of the default under S. 13 of the Rent Restriction Act. Civil Revision No. 750 of 1962, D/- 18-3-1964 (Punj), Reversed; ILR (1964) 1 Punj 626, Overruled. (Para 6)

Eviction under the Rent Restriction Act takes place on the ground of non-payment or tender of rent due within time fixed by the tenancy and 15 days thereafter. There is only one saving for the tenant and that is when he tenders the full rent in Court before the Rent Controller together with interest and costs. (Para 4)

Section 31 of the Relief of Indebtedness Act is intended to operate between debtors and creditors where difficulty in making the payment, either wholly or partly may arise and the debtor wishes to save himself from interest which is running. The Act is not intended to operate between landlords and tenants; nor is the Civil Court created into a clearing house for rent. The phrase "any person who owes money" in that section must be read to cover cases of debtors and creditors between whom there is an agreement for payment of interest because the deposit is intended to stop interest from running. No interest is agreed to be paid by tenants, at any rate, nor ordinarily, and, therefore, the section cannot be said to cover a case between a landlord and a tenant. Further the amount can be deposited in part under this section and that cannot possibly be a valid tender in case of rent. (Para 5)

Further where the deposit of money under the Relief of Indebtedness Act is not only of the rent due but also of future rent the conclusion that it cannot be treated as a valid tender of payment becomes inevitable. Under Section 19 read with Section 6 of the Urban Rent Restriction Act a landlord is liable to be sent to jail if he recovers advance rent beyond one month. It is impossible to think that the landlords would be required to go to the Civil Court with a view to finding out whether their tenants have deposited rent due to them or not. No doubt there is a provision for sending a notice, but that notice is not intended to cover such cases. (Para 6)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 345 (V-51)=
1964-3 SCR 480, Rajabhai Abdul
Rehman Munshi v. Wasudeo
Dhanjibhai Mody 8
(1964) ILR (1964) 1 Punj 626=66
Pun LR 93, Mam Chand v. Chhotu
Ram 2

(1963) AIR 1963 SC 1558 (V 50)=

1964-2 SCR 203, Hari Naram v.

Badri Das

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Mr Bishan Narain, Senior Advocate (Mr Naunit Lal, Advocate, with him), for Appellant, Mr. N. N. Keswani, Advocate, for Respondent, M/s Janardan Sharma and S K. Nandy, Advocates, for Intervener

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is a landlord's appeal against an order of the High Court of Punjab, March 18, 1964, confirming the dismissal of his petition for the eviction of the respondent from certain premises taken on rent. The appellant had made the application under Section 13 of the East Punjab Urban Rent Restriction Act, 1949 on the allegation that rent for the premises from October 1, 1959 to June 30, 1961 had not been paid. The rent of the premises was Rs 32-8-0 and the water connection charges were Rs 2-8-0. On the first date of hearing the tenant appeared and tendered Rs 292-8-0 as rent from October 1, 1960 to June 30, 1961. He also paid Rs 7 as interest and Rs 25 as costs. These amounts were accepted by the landlord without prejudice to his claim that the rent for the earlier period had not been paid.

2. It appears that the tenant had made two deposits in the Court of the Senior Sub-Judge, Ludhiana under Section 31 of the East Punjab Relief of Indebtedness Act, 1934 on December 23, 1959 and July 18, 1960, the amount being Rs 210 on each occasion. The tenant claimed that this was a valid tender of rent to the landlord. The Rent Controller, by his order, decided that the tenant was not in default and the Appellate Authority and the High Court also took the same view. It was held by the Appellate Authority, as well as by the High Court, that the deposit under Section 31 of the Relief of Indebtedness Act was a valid tender under Section 13 of the Urban Rent Restriction Act. The Division Bench in the High Court followed an earlier decision of the same Court reported in *Mam Chand v. Chhotu Ram*, ILR (1964) 1 Punj 626. The correctness of that decision as well as the decision under appeal are challenged before us.

3. Before the hearing commenced the respondent took objection to the grant of special leave stating that the appellant was guilty of making "certain inaccurate, untrue and misleading statements in res-

pect of certain material facts". The charge was that before the Rent Controller there was no issue that the deposit under Section 31 of the Relief of Indebtedness Act was a valid tender of payment, although this was mentioned as a fact in the petition for special leave. It was also said that this question was given up before the Appellate Authority although it was stated that the point was decided by the Appellate Authority. Reliance was placed in this connection upon two decisions of this Court reported in *Hari Naram v. Badri Das*, (1964) 2 SCR 203 = (AIR 1963 SC 1558) and *Rajabhai Abdul Rehman Munshi v. Vasudev Dhanjibhai Mody*, 1964-3 SCR 480 = (AIR 1964 SC 345). There were cases of gross-misstatement where the party applying for special leave had deliberately chosen to make false statements and false pleas. In the present case the same cannot be said of the appellant. There was only one issue before the Court and it was whether the deposit under one Act was good for the purposes of the other Act. All that the courts had to consider was whether that deposit saved the tenant from eviction or not. The High Court mentioned that this was the only point before all the Courts below and we do not think that the complaint that there had been any false averment in the petition for special leave was sustainable. We accordingly rejected the contention, raised by C M P No 64 of 1969.

4. As regards the merits of the case Section 13 (2) (i) of the East Punjab Urban Rent Restriction Act reads as follows —

"13 Eviction of tenant

(1) A tenant in possession of a building or rented land shall not be evicted therefrom in execution of a decree passed before or after the commencement of this Act or otherwise and whether before or after the termination of the tenancy, except in accordance with the provisions of this section, or in pursuance of an order made under Section 13 of the Punjab Urban Rent Restriction Act, 1947, as subsequently amended.

(2) A landlord who seeks to evict his tenant shall apply to the Controller for a direction in that behalf. If the Controller, after giving the tenant a reasonable opportunity of showing cause against the applicant, is satisfied—

(i) that the tenant has not paid or tendered the rent due by him in respect of the building or rented land within fifteen days after the expiry of the time fixed in the agreement of tenancy with

his landlord or in the absence of any such agreement, by the last day of the month next following that for which the rent is payable:

Provided that if the tenant on the first hearing of the application for ejectment after due service pays or tenders the arrears of rent and interest at six per cent per annum on such arrears together with the cost of application assessed by the Controller, the tenant shall be deemed to have duly paid or tendered the rent within the time aforesaid."

The Act does not lay down any other procedure under which money can be deposited with any Government Authority. Such provisions are to be found in other Rent Control Acts but are missing in this Act. Eviction, therefore, takes place on the ground of non-payment or tender of rent due within time fixed by the tenancy and 15 days thereafter. There is only one saving for the tenant and that is when he tenders the full rent in Court before the Rent Controller together with interest and costs. In the present case, the tenant did tender rent but only for a portion of the period and he relied on his deposit under the Relief of Indebtedness Act as due discharge of his liability for the earlier period. It may be stated that the deposit before the Senior Sub-Judge was made not only of arrears of rent but prospectively for some future period for which the rent was then not due. The question is whether such payment is a valid payment or tender to the landlord.

5. Section 31 of the Relief of Indebtedness Act reads as follows:—

"31. Deposit in Court.

(1) Any person who owes money may at any time deposit in Court a sum of money in full or part payment to his creditor.

(2) The Court on receipt of such deposit shall give notice thereof to the creditor and shall, on his application, pay the sum to him.

(3) From the date of such deposit interest shall cease to run on the sum so deposited."

This Act was passed to govern the relation between the debtors and creditors. The scheme of the Act bears upon this relationship because it provides for insolvency procedure, usurious loans, dampdupat, redemption of mortgages, deposit in Court, and sets up Debt Conciliation Boards, suitably amending the civil law wherever necessary. Incidentally, it provides for deposit in Court with a view to giving a chance to debtors to save in-

terest on the outstanding dues either wholly or partially. The section therefore, is intended to operate between debtors and creditors where difficulty in making the payment, either wholly or partly, may arise and the debtor wishes to save himself from interest which is running. The Act is not intended to operate between landlords and tenants; nor is the Court of the Senior Sub-Judge created into a clearing house for rent. Although the general words "any person who owes money" may appear to cover the case of a tenant, we have to look at the Act as a whole and see what kind of a person is intended thereby. The phrase must be read to cover cases of debtors and creditors between whom there is an agreement for payment of interest because the deposit is intended to stop interest from running. No interest is agreed to be paid by tenants, at any rate, nor ordinarily, and, therefore, the section cannot be said to cover a case between a landlord and a tenant. There is no provision in the Urban Rent Restriction Act for making a deposit except one, and that is on the first day of the hearing of the case. It could not have been intended that all tenants who may be disinclined to pay rent to their landlords should be enabled to deposit it in the Court of a Senior Sub-Judge making the Senior Sub-Judge a kind of a Rent Collector for all landlords. The provision for stoppage of interest is a pointer that the interest in the first instance must have been due. In our judgment, Section 31 has been misunderstood in the High Court. A second pointer is that the amount may be deposited in part which cannot possibly be a valid tender in case of rent. It may be pointed out that the decision of the Division Bench runs counter to two other decisions of Single Judges of the same High Court who have taken the same view which we are taking here. The decisions are noticed by the Division Bench but have not been accepted. The decisions of the learned Single Judges are to be preferred. The Division Bench has taken a very extended view of the deposit under the Relief of Indebtedness Act.

6. Further the deposit of money in the present case was not only of the rent due but also of future rent. Under Section 19 read with Section 6 of the Urban Rent Restriction Act a landlord is liable to be sent to jail if he recovers advance rent beyond one month. It is impossible to think that the landlords would be required to go to the Court of the Senior Sub-

Judge with a view to finding out whether their tenants have deposited rent due to them or not. No doubt there is a provision for sending a notice, but we do not think that that notice is intended to cover such cases. On the whole, therefore, we are of opinion that the deposit under Section 31 of the Relief of Indebtedness Act did not save the tenant from the consequences of the default as contemplated by Section 13 of the Urban Rent Restriction Act. We accordingly allow the appeal and, setting aside the judgment of the High Court, order the eviction of the tenant from the premises rented out by him. He shall have three months' time in which to vacate the premises. The costs throughout must also be borne by the respondent.

MKS/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 1276
(V 56 C 233)

(From Madhya Pradesh 1965 Jab LJ 1073)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Ganesh Prasad Dixit (In both the appeals), Appellant v. The Commissioner of Sales Tax, Madhya Pradesh (In both the appeals), Respondent.

Civil Appeals Nos. 940 and 941 of 1966,
D/- 3-2-1969.

(A) Sales Tax — M. P. General Sales Tax Act (2 of 1959), Section 18 (5) — M. P. General Sales Tax Rules (1959), Rule 33 — Requirement under, of giving 15 days' period to show cause against assessment — Non-compliance with — Does not invalidate notice under S. 18 (5) in absence of any prejudice to assessee.

A notice of assessment under S. 18 (5) which does not give an assessee, a clear period of 15 days to show cause as required under Rule 33, is not invalid in absence of any suggestion that because of the insufficiency of time the assessee was unable to submit his explanation for failure to make his returns of turnover. The rule is not intended to be either invariable or rigid and unless prejudice has resulted to the tax payer the proceedings are not liable to be set aside. The terms of Rule 33 are not mandatory. AIR 1930 All 209 and AIR 1935 Lah 201, Distinguished; 1965 Jab LJ 1073, Affirmed.

(Para 3)

(B) Sales Tax — M. P. General Sales Tax Act (2 of 1959), Section 2 (d) — 'Dealer' — Who is — Person carrying on business of buying is also a dealer.

A person to be a 'dealer' within the meaning of the Act need not both purchase and sell goods a person who carries on the business of buying is by the express definition of the term in S. 2 (d) a "dealer". It is not predicated of a dealer that he must carry on the business of buying and selling the same goods. A person does not cease to be a registered dealer merely because in respect of the periods his turnover in respect of sales was assessed as nil. 1965 Jab LJ 1073, Affirmed, AIR 1965 SC 531, Rel. on.

(Para 6)

(C) Sales Tax — M. P. General Sales Tax Act (2 of 1959), Section 7 — Purchase of taxable commodities in course of business by dealer — Consumption thereof otherwise than in manufacture of goods for sale — Purchase price of commodities to liable to tax.

Where a registered dealer purchases building materials, which are taxable under the Act, in the course of his business and consumes them otherwise than in the manufacture of goods for sale and for a profit motive, the purchase price of the building materials is taxable on the plain meaning of Section 7.

(Para 7)

The expression "either consumes such goods in the manufacture of other goods and otherwise" in Section 7 does not mean that the price paid for buying goods consumed in the manufacture of other goods intended to be sold or otherwise disposed of alone is taxable. It is intended by the Legislature that consumption of goods renders the price paid for their purchase taxable, if the goods are used in the manufacture of other goods for sale or if the goods are consumed otherwise. Whether in a particular set of circumstances a person may be said to be carrying on business in a commodity must depend upon the facts of that case and no general test may be applied for determining that question. (1968) 22 STC 116 (Bom), Distinguished.

(Paras 8, 9)

Cases Referred: Chronological Paras (1968) 22 STC 118 (Bom), Versova Koli Sahakari Vahatuk Sangh Ltd. v. State of Maharashtra 9 (1965) AIR 1965 SC 531 (V 52) = 15 STC 644, State of Andhra Pradesh v. H. Abdul Bakshi and Bros. 5

- (1963) 14 STC 753 = 1963-2 Mad LJ 455, L. M. S. Sadak Thamby and Co. v. State of Madras 6, 7
 (1935) AIR 1935 Lah 201 (V 22) = 3 ITR 112, Jamna Dhar Potdar and Co. Lyallpur v. Commr. of I-T. Punjab 3
 (1930) AIR 1930 All 209 (V 17) = 3 ITC 451, M/s. Kajorimal Kalyanmal v. The Commr. of I-T., U. P. 3

Mr. M. C. Chagla, Senior Advocate (Mr. B. L. Neema and Mrs. Anjali K. Varma, Advocates and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co. with him), for Appellant (In both the Appeals); Mr. I. N. Shroff, Advocate, for Respondent (In both the Appeals).

The following Judgment of the Court was delivered by

SHAH, J.: In respect of assessment to sales-tax for two accounting periods April 1, 1961 to June 30, 1961 and July 1, 1961 to September 30, 1961, the Board of Revenue, Madhya Pradesh, referred the following questions to the High Court of Madhya Pradesh for opinion:

"(1) Whether in the facts and circumstances of the case the notice in Form XVI that was served on the applicant was invalid and therefore the assessment of the applicant on the basis of that notice was bad in law?

(2) Whether in the facts and circumstances of the case the applicant was a dealer during the assessment period under the Act and the imposition of purchase tax on him under Section 7 of the Act was in order?"

The High Court answered the first question in the negative, and the second in the affirmative. These appeals are preferred with special leave granted by this Court.

2. The appellants are a firm of building contractors and are registered as dealers under the Madhya Pradesh General Sales Tax Act 2 of 1959. The appellants purchased building materials in the two account periods and used the materials in the course of their business. The Sales Tax Officer, Jabalpur Circle, served notices under Section 18 (5) of the Act calling upon the appellants to show cause why "best judgment" assessments should not be made, and by order dated November 30, 1961, he assessed the appellants to tax in respect of goods purchased by the appellants for use in their construction business and imposed a penalty of Rs. 200 in

each case. Appeals against the orders imposing tax and penalty were dismissed by the Assistant Commissioner of Sales Tax and the Board of Revenue.

3. Rule 33 of the Madhya Pradesh General Sales Tax Rules, 1959, provides that a notice of assessment under Section 18 (5) shall be in Form XVI, and ordinarily it shall give not less than 15 days from the date of the service to the assessee to show cause why he should not be assessed or reassessed to tax and/or to pay penalty. The notices served upon the appellants did not give them a clear period of 15 days to show cause. But we are unable to hold on that account that the notices and the assessments were invalid. We agree with the High Court that the rule is not intended to be "either invariable or rigid", and "unless prejudice has resulted to the tax-payer the proceedings are not liable to be set aside". It is not even suggested that because of the insufficiency of time the appellants were unable to submit their explanation for failure to make their returns of turnover. Two cases on which reliance was placed by counsel for the appellants in support of the plea that the notices were invalid have, in our judgment, no bearing. In Messrs. Kajorimal Kalyanmal v. The Commissioner of Income-tax, U. P., 3 ITC 451 = (AIR 1930 All 209) it was held that a notice under Section 22 (2) of the Income-tax Act, 1922, giving the assessee 29 days for filing the return was "entirely illegal". In Jamna Dhar Potdar and Co., Lyallpur v. Commissioner of Income-tax, Punjab, 3 ITR 112 = (AIR 1935 Lah 201) it was held, following the judgment in Kajorimal Kalyanmal's case, 3 ITC 451 = (AIR 1930 All 209) that a notice which does not give to a tax-payer under Section 22 (2) of the Income-tax Act, 1922 clear notice for furnishing a return, of thirty days from the date of service is illegal. But these cases were decided under Section 22 (2) of the Income-tax Act, 1922, before it was amended by the Income-tax (Amendment) Act 7 of 1939. Under the section as it then stood, it was enacted that the Income-tax Officer shall serve a notice upon any person whose total income is in the opinion of the Income-tax Officer of such an amount as to render that person liable to pay income-tax. The section was held to be mandatory. But the terms of Rule 33 of the Madhya Pradesh General Sales Tax Rules are plainly not mandatory. The answer given by the High Court on the first question must be accepted.

4. To appreciate the scope of the enquiry under the second question, the relevant provisions of the Act may be summarised. By Section 2 (d) of the Act, insofar as it is relevant, the expression "dealer" is defined as meaning, amongst others, "any person who carries on the business of buying, selling, supplying or distributing goods, directly or otherwise". By Section 4 (2) every dealer is liable to tax in respect of sales or supplies of goods effected in Madhya Pradesh with effect from the date on which his turnover calculated during a period of twelve months immediately preceding such date first exceeds the limits specified in sub-s (5). Section 6 provides that the tax payable by a dealer under the Act shall be levied on his taxable turnover relating to the goods specified in Sch. II. Section 7 provides

"Every dealer who in the course of his business purchases any taxable goods, in circumstances in which no tax under S 6 is payable on the sale price of such goods and either consumes such goods in the manufacture of other goods for sale or otherwise or disposes of such goods in any manner other than by way of sale in the State or despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce, shall be liable to pay tax on the purchase price of such goods at the same rate at which it would have been leviable on the sale price of such goods under section 6

Provided"

5 Counsel for the appellants submitted that the appellants were not "dealers" within the meaning of the Act because they did not carry on the business of buying goods, and that in any event, the goods purchased by them for use in their construction business were not liable to tax under Section 7.

6 The appellants are registered dealers under the Madhya Pradesh General Sales Tax Act, 1958 (Act 2 of 1959). It is true that in respect of the periods their turnover in respect of sales was assessed as "nil". But on that account they did not cease to be registered dealers within the meaning of the Act. A person to be a dealer within the meaning of the Act need not both purchase and sell goods: a person who carries on the business of buying is by the express definition of the term in Section 2 (d) a

"dealer". This Court held in the State of Andhra Pradesh v. H. Abdul Bakshi and Bros, 15 STC 644 = (AIR 1965 SC 531) that it is not predicated of a dealer that he must carry on the business of buying and selling the same goods. A person who buys goods for consumption in the process of manufacture of articles to be sold by him is a dealer within the meaning of the Hyderabad General Sales Tax Act 14 of 1950. In H. Abdul Bakshi and Bros's case, 15 STC 644 = (AIR 1965 SC 531) the assessee sold skins after tanning hides and skins purchased by them. In the process of tanning, they had to use tanning bark purchased by them. This Court held that the turnover arising out of the tanning bark purchased by the assessee for consumption in the process of tanning was liable to tax on the footing that the assessee was carrying on the business of buying goods, even though the goods bought were consumed in the process of tanning. In dealing with the question whether an activity of purchase of goods required for consumption in a manufacturing process may be regarded as a business, the Court observed (at p 647 of STC) = (at p. 532 of AIR)

"A person to be a dealer must be engaged in the business of buying or selling or supplying goods. The expression "business" though extensively used is a word of indefinite import. In taxing statute it is used in the sense of an occupation, or profession which occupies the time, attention and labour of a person normally with the object of making profit. To regard an activity as business there must be a course of dealings, either actually continued or contemplated to be continued with a profit motive, and not for sport or pleasure. But to be a dealer a person need not follow the activity of buying, selling and supplying the same commodity. Mere buying for personal consumption, i. e., without a profit motive will not make a person dealer within the meaning of the Act, but a person who consumes a commodity bought by him in the course of his trade, or use in manufacturing another commodity for sale, would be regarded as a dealer. The Legislature has not made sale of the very article bought by a person a condition for treating him as a dealer, the definition merely requires that the buying of the commodity mentioned in Rule 5 (2) must be in the course of business, i. e., must be for sale or use with a view to make profit out of the integrated activity

of buying and disposal. The commodity may itself be converted into another saleable commodity, or it may be used as an ingredient or in aid of a manufacturing process leading to the production of such saleable commodity."

This Court agreed with the view expressed in *L. M. S. Sadak Thamby and Co. v. The State of Madras*, (1963) 14 STC 753 (Mad) in which a similar question was decided by the High Court of Madras. In that case the assessee had purchased tanning bark and had consumed it in tanning raw hides. The Madras High Court held that the buying of goods was in the course of business since it was associated with the business of tanning of hides carried on with a profit-making motive. These decisions support the contention of the State that price paid for goods bought for consumption in manufacturing an article for sale is exigible to purchase-tax even if the goods purchased are either destroyed or transformed into another species of goods.

7. Counsel for the appellants urged that in the cases of *H. Abdul Bakshi and Bros.*, 15 STC 644 = (AIR 1965 SC 531) and *L. M. S. Sadak Thamby and Company*, (1963) 14 STC 753 (Mad) the assesseees were carrying on the business of selling goods manufactured by them and for the purpose of manufacturing those goods certain other goods were purchased and consumed in the process of manufacture, but here the goods are not consumed in producing another commodity for sale and on that account the two cases are distinguishable. The answer to that argument must be sought in the terms of Section 7. The phraseology used in that section is somewhat involved, but the meaning of the section is fairly plain. Where no sales tax is payable under Section 6 on the sale price of the goods, purchase-tax is payable by a dealer who buys taxable goods in the course of his business, and (1) either consumes such goods in the manufacture of other goods for sale, or (2) consumes such goods otherwise; or (3) disposes of such goods in any manner other than by way of sale in the State, or (4) despatches them to a place outside the State except as a direct result of sale or purchase in the course of inter-State trade or commerce. The assesseees are registered as dealers and they have purchased building materials in the course of their business: the building materials are taxable under the Act,

and the appellants have consumed the materials otherwise than in the manufacture of goods for sale and for a profit-motive. On the plain words of Sec. 7 the purchase price is taxable.

8. Mr. Chagla for the appellants urged that the expression "or otherwise" is intended to denote a conjunctive introducing a specific alternative to the words "for sale" immediately preceding. The clause in which it occurs means, says Mr. Chagla, that by S. 7 the price paid for buying goods consumed in the manufacture of other goods intended to be sold or otherwise disposed of, alone is taxable. We do not think that that is a reasonable interpretation of the expression "either consumes such goods in the manufacture of other goods for sale or otherwise". It is intended by the Legislature that consumption of goods renders the price paid for their purchase taxable, if the goods are used in the manufacture of other goods for sale or if the goods are consumed otherwise.

9. The decision in *Versova Koli Sahakari Vahatuk Sangh Ltd. v. The State of Maharashtra*, (1968) 22 STC 116 (Bom) on which reliance was placed by Mr. Chagla has, in our judgment, no application. In that case a society registered under the Bombay Co-operative Societies Act, 1925, carried on the business of transporting fish belonging to its members from fishing centres to the markets and vice versa. For preserving fish in the course of transport, the society used to purchase ice, and the members, whose fish was transported, were charged for the quantity of ice required in respect of their baskets of fish. The difference between the price paid by the society for ice purchased and the charge made by the society for ice supplied was brought to tax by the Sales Tax Officer under the Bombay Sales Tax Act, 1959. The High Court of Bombay held that the society was not supplying ice with the intention of carrying on business in ice, and on that account the society was not a "dealer" within the definition of that term in Section 2 (11) of the Act in regard to the supply of ice by it to its members. In that case the taxing authority did not seek to impose purchase-tax: he sought to bring to tax the difference between the price paid by the society for purchasing ice and the charges which it made from its members for supplying ice, and the High Court held that in supplying ice the

society was not carrying on business in ice, and on that account was not a "dealer." Whether in a particular set of circumstances a person may be said to be carrying on business in a commodity must depend upon the facts of that case and no general test may be applied for determining that question.

10. The appeals fail and are dismissed with costs. One hearing fee.

BNP/D.V.C.

Appeals dismissed.

AIR 1969 SUPREME COURT 1280 (V 56 C 234)

(From Labour Court, Bangalore)*

J. M. SHELAT, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

Workmen of the Motor Industries Co. Ltd., Appellants v. Management of Motor Industries Co. Ltd. and another, Respondents

Civil Appeal No. 2123 of 1968, D/- 15-4-1969.

(A) Industrial Disputes Act (1947), Sections 12 (3), 18 (3) and 2 (p) — Settlement arrived at before conciliation officer, between management and association of workmen — Binding on workmen until validly terminated — Settlement by association held was in representative capacity.

A settlement was arrived at between the management and the association of workmen before the conciliation officer on 23-12-1964 and one of its clauses provided that neither the association nor the management would resort to any direct action, such as strikes, go slow tactics or lock out or any such coercive action without giving the other side a four day's notice. It was to come into force as from 1-1-1965 and was to remain in force for three years and was thereafter to continue to be in force until its termination by either side. But on 11-5-1968, the workers spontaneously without giving any notice went on strike.

Held that the settlement was one as defined by Section 2 (p) of the Industrial Disputes Act and was one under S. 12 (3) and binding on workmen under S. 18 (3) of the Act until it was validly terminated and was in force when the strike took place. The strike was lightening one,

was resorted to without notice and was not at the call of association and was therefore, in breach of the settlement. The settlement arrived at by association must be regarded as one made by it in its representative character and it could not be said that strike by workmen without any call from association would not require any such notice. (Paras 4, 5)

As the strike was illegal under the provisions of law, Standing Order 22 of the company came into operation and starting or joining such a strike and inciting others to join amounted to misconduct for which disciplinary action by management was possible. (Para 4)

(B) Industrial Disputes Act (1947), Sections 23 (c), 29, 24 and 26 — Strike envisaged by Sections 23 (c) and 29 — Distinction pointed out — Held on facts that strike in question was not in respect of one of the matters covered by settlement but in contravention of one of the clauses of settlement arrived at between management and workers' association and was illegal and punishable under Section 29 and was not illegal under Section 24 read with Section 23 (c).

There is a distinction between a strike envisaged by Section 23 (c) in respect of a matter covered by a settlement and a strike in breach of a settlement envisaged by Section 29. A strike in breach of a contract during the operation of a settlement and in respect of a matter covered by that settlement falls under Section 23 (c) and is illegal under Section 24. But whereas Section 26 punishes a workman for going on an illegal strike or for any act in furtherance of such a strike Section 29 lays down the penalty for a person, not necessarily a workman, who commits breach of a term of a settlement which is binding under the Act. Thus, commencing a strike or acting in furtherance of it in breach of a settlement binding on the person who so commences it or acts in its furtherance is an offence punishable under Section 29. (Paras 6, 7)

Where one of the clauses of the settlement arrived at between the management and association of workmen, before the conciliation officer for standing the demands, provided that neither the association nor the management would resort to any direct action such as strike or lock out without giving to the other a four day's notice, but during the operation of the settlement, the workers, on the question of suspension of one of the

* (Ref. No 39 of 1967, D/- 23-3-1968 — Lab. Court, Bangalore.)

workers pending a domestic enquiry against him, spontaneously went on strike without giving any notice:

Held that, the strike was in the matter of the suspension of a workman pending a domestic enquiry against him a matter which obviously was not one of the matters covered by the said settlement. It was, therefore, not a strike illegal under Section 24 read with Section 23 (c). However, the strike was in contravention of the clause of the settlement forbidding strike without notice and settlement being binding on the workmen concerned and in operation at the time, was punishable under Section 29, and therefore, illegal under that section. (Para 7)

(C) Constitution of India, Article 136 — Finding of fact — Departmental enquiry — Dismissal of workman for misconduct by incitement and disorderly behaviour — Finding neither perverse nor such as no reasonable body of persons could come to on evidence on record — Labour Court, on evidence on record holding that the workers' Association had failed to prove its case that the management had agreed not to take action against any workman in connection with strike and that in fact the management did not impose any penalty against any workman for joining strike — Finding purely one of fact — Cogent reasons given by Labour Court — No interference. (Paras 9, 11)

(D) Industrial Disputes Act (1947), Sch. 2, Item 6 — Domestic enquiry — Victimisation — Discrimination — Strike by workers — Management dismissing three workers for misconduct by incitement, intimidation and riotous and disorderly behaviour considering them as 'very grave in nature' — No action was taken for striking or stopping or for loitering about in company's premises as a large number of 'misguided' workmen had stopped work: Held on facts that once a misconduct graver than that of rest was found proved against those workers and for which punishment was dismissal, victimisation could not be attributed to management — Having been found to be leaders of crowd, action taken against them could not on any principle be regarded as discriminatory or unequal — (Constitution of India, Article 14).

As a result of domestic enquiry against three workers on charges in relating to strike or stoppage of work, abandoning the place of work, inciting clerks and officers

to join the strike, disorderly behaviour including intimidation and assault on one, the management passed an order of dismissal. That order stated four acts of misconduct: (1) striking or stopping work, (2) inciting, (3) riotous and disorderly behaviour and (4) loitering about in the company's premises. Though each one of those acts, according to the order, was misconduct punishable with dismissal, the order stated that so far as acts 1 and 4 were concerned, the management did not wish to take a serious view of them as a large number of "misguided" workmen had stopped work and left their places of work without permission. The management, therefore, took action only in respect of acts falling under Clauses 3 and 13 of Standing order 22 evidently for the reason that they considered incitement, intimidation and riotous and disorderly behaviour as "very grave in nature".

Held that the order of dismissal could not be characterised as act of victimisation. It could not be said that in taking that view the management discriminated against the three workmen concerned as against the rest or that they dismissed them with the object of victimising. Once a misconduct graver than that of the rest was found proved against these three workmen and for which the punishment was dismissal, victimisation could not legitimately be attributed to the management. So far as their participation in the strike and loitering about were concerned no action was taken against these three workmen on the ground that those acts were common with those of the rest of the workmen. (Para 11)

As the evidence in the enquiry clearly disclosed that when the crowd forced its way into the particular department it was led by those three workmen, all of whom were in the forefront thereof and two of them had defiantly forced the officers to leave their tables and one of them threatened as to what he and the others who were behind him could do to him if he did not comply, the management could not be blamed if they took a serious view of those acts of the three workmen concerned.

(Para 11)

An act of discrimination could only occur if amongst those equally situated an unequal treatment was meted out to one or more of them. Having been found to be the leaders of the crowd, action taken against them could not on any principle be regarded as discriminatory or unequal. (Para 11)

Cases Referred Chronological Paras
 (1964) C A No 633 of 1963, D/-
 2-4-1964 (SC), Tata Engineering
 and Locomotive Co Ltd v C B.
 Mitter 8
 (1959) AIR 1959 SC 529 (V 46) =
 1959-1 Lab LJ 450, Burn and Co.
 Ltd v Workmen 11

Mr M K Ramamurthi, Senior Advocate
 (Mr B R Dolia, Mrs S Pappu and Mr.
 Vineet Kumar, Advocates, with him), for
 Appellants, Mr H R Gokhale, Senior
 Advocate (M/s C Doraswamy and D N
 Gupta, Advocates with him), for Respon-
 dent No 1

The following Judgment of the Court
 was delivered by

SHELAT, J.: This appeal, founded on
 special leave, arises out of an industrial
 dispute between the respondent-company
 and the Motor Industries Company Em-
 ployees Association which the Govern-
 ment of Mysore referred to the Labour
 Court, Bangalore, for adjudication under
 Section 10 (1) (c) of the Industrial Dis-
 putes Act, 1947. The dispute related to
 the dismissal by the management of three
 workmen, Sandhyavoo, G Prabhakar and
 M V Vasudevan out of the five work-
 men against whom the management had
 held a domestic enquiry at which they
 were found guilty of acts of misconduct
 charged against them

2. The facts leading to the said dis-
 pute and the reference are as follows

On August 24, 1964 the said association
 handed over to the management a charter
 of demands. Negotiations between the
 parties having failed, the demands were
 taken before the conciliation officer when
 the parties arrived at a settlement dated
 December 23, 1964. On April 29, 1966,
 the management issued a notice suspend-
 ing for a day, i.e., May 4, 1966, one B
 G Shenoy as and by way of penalty. In
 consequence of the protest by the associa-
 tion, the said suspension was postponed
 and on May 10, 1966, the management
 served a charge-sheet on Shenoy and
 suspended him pending an enquiry. On
 May 11, 1966 the association demanded
 withdrawal of the said suspension and the
 said charge-sheet. Discussions took place
 on that day from 9.45 A.M. to 12.30
 P.M. between the association and the
 management and the parties thereafter
 adjourned at 1 P.M. for lunch having
 decided to resume the talks at 2.30 P.M.
 At 2 P.M. the first shift ended and the
 workers of the second shift began to come
 in. The workmen of the first shift, how-

ever, stayed on and those of the second
 shift along with the workmen of
 the general shift joined them and
 all of them went on strike. The discus-
 sions which were resumed at 2.30 P.M.
 ended in an agreement at 5 P.M. and
 the workmen returned to work. On
 May 18, 1966 the assistant establishment
 officer submitted a complaint to the chief
 personnel officer alleging certain acts of
 misconduct by a crowd of workmen men-
 tioning therein the names of five of them
 including the said three workmen. On
 May 25, 1966 charge-sheets alleging stop-
 page of work, abandoning the place of
 work, inciting clerks and officers of G 2
 department to join the said strike, dis-
 orderly behaviour including intimidation
 and assault on one, A. Lakshman Rao,
 were served upon those five workmen.
 Correspondence thereafter ensued be-
 tween the association and the management
 wherein the association protested against
 the management's decision to adopt
 disciplinary action against the said five
 workmen despite the agreement arrived
 at on May 11, 1966. Thereafter, a
 domestic enquiry was held on June 30,
 1966 which was completed on July 27,
 1966 when the enquiry officer made his
 report holding the said three workmen,
 Sandhyavoo, Prabhakar and Vasudevan,
 guilty of acts of misconduct under stand-
 ing order 22 (2), (3), (13) and (18). He
 exonerated the other two workmen except
 on the charge of participating in the
 strike and loitering about under Cls (2)
 and (18) of the said standing order. On
 August 12, 1966, the management, agree-
 ing with the report, passed orders of dis-
 missal against the said three workmen
 which gave rise to the said reference. On
 March 23, 1968 the Labour Court gave
 its award holding that the said enquiry
 was validly held and that the manage-
 ment were justified in passing the said
 orders of dismissal.

3. Mr Ramamurthi, appearing for the
 association, challenged the said award on
 the following grounds (1) that the said
 association not having given a call for the
 said strike, the said charges were mis-
 conceived and the orders of dismissal were
 consequently not sustainable, (2) that the
 said strike, which was spontaneously
 staged by the workmen, was not illegal
 under Section 24 of the Industrial Dis-
 putes Act, nor was it in contravention
 of any law as required by Standing order
 22 (2) and (3), (3) that the said disciplinary
 proceedings were in contravention of the
 agreement arrived at on May 11, 1966, and

therefore, the dismissal following such disciplinary proceedings amounted to unfair labour practice; (4) that the orders of dismissal were passed on charges including that of intimidation though the misconduct of intimidation was not found proved by the enquiry officer and hence the said orders were illegal; (5) that to punish only three workmen when a large number of workmen had taken part in staging the strike and in inciting others to join it constituted victimisation; and (6) that the findings of the enquiry officer were based on no evidence or were perverse in that no reasonable body of persons could have arrived at them on the evidence before him.

4. The argument on which the first contention was based was that the settlement dated December 23, 1964 was arrived at between three parties, the management, the association and the workmen; and that the association being the union registered under the Trade Unions Act was an entity distinct from the workmen. Under Clause 5 of the settlement it was the association which was obliged to give four days' notice if it decided to resort to strike, go-slow tactics or other coercive action. The said clause did not impose any such obligation on the workmen. The workmen thus having no such obligation and the said strike being a spontaneous one, without any call for it from the association, it could not be said to be in breach of the said settlement, and therefore, would not fall under the mischief of Section 23 of the Act, the first condition of which is that to be illegal under Section 24 read with Section 23 it must be in breach of a contract. Standing Order 22 requires that participating in a strike would be misconduct if it is in breach of some provision of law. But as the strike was not in contravention of Section 23, it would not constitute misconduct under that standing order. Therefore, the charges against the said three workmen were misconceived and the orders of dismissal passed against them on the basis that they stood established were bad. In our view this argument cannot be sustained. The construction of Clause 5 of the settlement suggested by Mr. Ramamurthi is contrary to (a) the tenor of that settlement, and (b) the provisions of the Industrial Disputes Act under which a settlement arrived at between an employer and a union representing the employees during conciliation proceedings is binding not only on such union but

also the workmen whom it represents and (c) the principles of collective bargaining recognised by industrial law. The settlement was a package settlement by which the management and the workmen, through their association, arrived at certain terms in the presence of the conciliation officer. The settlement, besides settling the demands contained in the said charter of demands, sets out the necessity of harmonious relations and of co-operation between the management and the workmen so as to promote higher and better production. It was to achieve this object that direct action on the part of either of them such as a strike by the workmen and a lock out by the employer without notice was prohibited. Evidently the provision for four days' notice before any direct action was taken by either of them was provided for so that during that period if there was any grievance it could be ironed out by negotiation. Clause 5 of the settlement falls in two parts: (1) the substantive part, and (2) the corollary thereof. The first part inter alia provided that neither the association nor the management would resort to any direct action, such as strike, go-slow tactics or lock out or any such coercive action without giving to the other a four days' notice. The second part provided an undertaking on the part of the association to co-operate with the management, if there was any strike by workmen without any call therefor from the association, if the management were to take disciplinary action against the workmen. If the construction of Clause 5 suggested by Mr. Ramamurthi were to be accepted, it would lead to a surprising result, namely, that though a strike at the instance of the association required four days' notice, a strike by the workmen without any call from the association would not require any such notice and that the settlement left complete liberty to the workmen to launch a sudden strike. Such a construction appears on the very face of it contrary to the object and purpose of the settlement and particularly Clause 5 which envisaged a notice period of four days to enable the parties to resolve a dispute before direct action on its account is resorted to by either of them. The suggested construction is also untenable, for, surely the association irrespective of the workmen cannot by itself resort to any direct action. How can, for instance, the association resort to go-slow tactics without giving a call for it

to the workmen? It is obvious, therefore, that Clause 5 does not contemplate any dichotomy between the association and the workmen as suggested by Mr. Ramamurthy, besides being repugnant to the principle that a settlement arrived at by the association must be regarded as one made by it in its representative character, and therefore, binding on the workmen. Therefore, although the settlement mentions in Clause 5 the management, workmen and the association, the expression 'workmen' therein was unnecessary, for, without that expression also it would have been as efficaciously binding on the workmen as on the association. This conclusion is strengthened by the fact that the settlement mentions the management and the association on behalf of the workmen only as the parties thereto and the signatories thereto also are only the representatives of the two bodies. None of the workmen, nor any one separately representing them affixed his signature to it. If a lightning strike without notice is illegal under any provision of law (a question which we shall presently consider) standing Order 22 would come into operation and starting or joining such a strike and inciting others to join it would amount to misconduct for which disciplinary action by the management would be possible.

5 The next question is whether the management could validly take disciplinary action against the workmen concerned in respect of the said strike. The recitals of the said settlement show that as a result of the association presenting the said charter of demands negotiations between the management and the association took place on the said demands as also on certain proposals made by the management, that on their failure conciliation proceedings took place in the course of which the parties arrived at the said settlement which, as aforesaid, was signed by the representatives of the management and the association in the presence of the conciliation officer. The settlement thus was one under Sec. 12 (3) of the Industrial Disputes Act and R 59 of the Rules made thereunder by the Government of Mysore. It was to come into force as from January 1, 1965 and was to remain in force for three years and was thereafter to continue to be in force until its termination by either side. It is clear from Part I thereof that the object with which it was made was to promote

harmonious relations and co-operation between the company, the association and the workmen so that the company may on the one hand be able to achieve increased production and on the other be in a position to afford maximum opportunity for continued employment. To accomplish these aims it was agreed that the company on its part should be managed on sound and progressive lines and the association and the workmen on their part should combat any wasteful practices adversely affecting workmanship and production and assist the management in apprehending persons responsible for acts such as theft, sabotage and other subversive activities. As cl (5) of the settlement itself states it was "in order to ensure continuation of smooth working" that the company and the association agreed that in no case would either of them resort to direct action such as lock outs, strikes, go-slow and other coercive action without four days' notice and that should one or more workmen resort to any such direct action without the approval of the association, the association would co-operate with the company in any disciplinary action which the company would take against such workmen. Then follows the agreement on the said demands of the workmen, and the proposals made by the management in the details of which it is not necessary to go, and finally, the agreement that the parties would adhere to the code of discipline and the grievance procedure annexed as annexure IV to the settlement. The said code also inter alia provided that there should be no strike or lock out without notice, that neither party should resort to coercion, intimidation, victimisation or go-slow tactics, that they would avoid litigation, sit-down and stay-in strikes and lock-outs and would not permit demonstrations which are not peaceful or rowdyism. Read in the context of the other provisions of Part I of the settlement of which it is part, cl 5 was intended to prohibit (a) direct action without notice by or at the instance of the association, and (b) strikes by workmen themselves without the approval of the association. The words "in no case" used in the clause emphasise that direct action by either party without notice should not be resorted to for any reason whatsoever. There can be no doubt that the settlement was one as defined by Section 2 (p) of the Industrial Disputes Act and was binding on the workmen under Section 18 (3) of the Act until it was validly terminated and was

in force when the said strike took place. The strike was a lightening one, was resorted to without notice and was not at the call of the association and was, therefore, in breach of Clause 5.

6. Could the management then take disciplinary action against the concerned workmen in respect of such a strike? Standing Order 22 enumerates various acts constituting misconduct. Clauses 2, 3, 13 and 18 provide that striking either singly or in combination with others in contravention of the provisions of any Act, inciting any other workmen to strike in contravention of any law, riotous or disorderly behaviour or any act subversive of discipline and loitering within the company's premises while on duty or absence without permission from the appointed place of work constitute misconduct. The point is whether participation in and incitement to join the said strike were in respect of a strike which was in contravention of any Act or law. Section 23 provides that no workman employed in an industrial establishment shall go on strike in breach of contract and during the period in which a settlement is in operation, in respect of any of the matters covered by such a settlement. The prohibition against a workman going on strike thus envisages two conditions; (a) that it is in breach of a contract and (b) that it is during the period in which a settlement is in operation and is in respect of any of the matters covered by such settlement. The said settlement was a contract between the company and the association representing the workmen and it was in operation on May 11, 1966. But was it in respect of a matter covered by the settlement? Under Section 24 a strike is illegal if it is commenced in contravention of Section 23. Section 26 inter alia provides that any workman who commences, continues or otherwise acts in furtherance of a strike which is illegal under the Act shall be punished with imprisonment for a term extending to one month or with fine which may extend to Rs. 50 or with both. Section 27 provides punishment of a person who instigates or incites others to take part in or otherwise acts in furtherance of an illegal strike. The strike envisaged by these two sections is clearly the one which is illegal under Section 24 read with Section 23. A strike in breach of a contract during the operation of a settlement and in respect of a matter covered by that settlement falls under Section 23 (c). But whereas Section 26 punishes a workman

for going on an illegal strike or for any act in furtherance of such a strike, Section 29 lays down the penalty for a person, not necessarily a workman, who commits breach of a term of a settlement which is binding under the Act. It is, therefore, an offence for any person on whom a settlement is binding under the Act to commit a breach thereof and the legislature has viewed it to be a more serious offence, for, it has a higher punishment of imprisonment extending to six months than the punishment for commencing etc. an illegal strike under Section 26. Thus, commencing a strike or acting in furtherance of it in breach of a settlement binding on the person who so commences it or acts in its furtherance is an offence punishable under S. 29.

7. It is clear that there is a distinction between a strike envisaged by Section 23 (c) in respect of a matter covered by a settlement and a strike in breach of a settlement envisaged by S. 29. That position was conceded by Mr. Gokhale for the management. But his argument was that the strike in question was, firstly in respect of a matter covered by the said settlement, namely, its prohibition without notice while that settlement was in force and secondly that it was in breach of that settlement, and consequently, it was illegal both under Section 24 and Section 29. This contention does not seem correct, firstly, because though an agreement not to resort to a strike without notice would be the subject matter of a settlement, a strike in contravention of such an agreement is not in respect of any of the matters covered by such settlement. Secondly, such a construction would mean as if Parliament intended to provide two different penalties, one under Section 26 and the other under Sec. 29, for the very same offence, one higher than the other, an intention difficult to attribute. The strike was in the matter of the suspension of the said Shenoy pending a domestic enquiry against him, a matter which obviously was not one of the matters covered by the said settlement. It was, therefore, not a strike illegal under Section 24 read with S. 23 (c). However, the strike was in contravention of Clause 5 of the said settlement and that settlement being binding on the workmen concerned and in operation at the time was punishable under Sec. 29, and therefore, illegal under that section.

8. The question whether a strike in contravention of a similar clause in a

settlement was illegal arose in Tata Engineering and Locomotive Co Ltd v C B Mitter, C A No 633 of 1963, D/- 2-4-1964 (SC) As in Cl 5 of the settlement before us, the settlement there also provided that "in no case" would the parties thereto resort to direct action such as lock-outs, strikes, go-slow and other direct action without four days' notice. The strike in question was commenced in respect of a demand by a workman for a pair of gum-boots, a demand not covered by the settlement. It was common ground that the strike would not fall within the ambit of Section 24 but the controversy was whether it was otherwise illegal, the workmen's contention being that it was not, as the said clause against a strike without notice applied only to one declared for enforcing one or the other demands which formed the subject matter of the settlement and since the strike arose out of a matter not covered by the settlement, that clause was inapplicable. This Court negatived the contention and held that the words "in no case" in that clause meant a strike for whatever reason and though it was conceded that it was not illegal under Section 24, it was, nevertheless, held to be illegal not because it was in respect of a matter covered by the said settlement but because it was in contravention of the settlement which was binding on the concerned workmen which meant that the Court held the strike to be illegal under Section 29. In our view the decision in the present case must be the same. The strike was illegal not under Section 24 but because it was in contravention of the settlement binding on the workmen concerned. Consequently, standing order 22 would apply and participating in or inciting others to join such a strike would amount to misconduct for which the management were entitled to take disciplinary action.

9. But against that position the argument was that the agreement dated May 11, 1968 under which the workmen called off the strike also provided that no disciplinary action would be taken against any workmen in respect of the strike on that day and that therefore the proceedings taken against the three workmen in violation of that agreement amounted to unfair labour practice. The agreement was oral. According to Bernard, Secretary of the association, the agreement was that (a) the charges and the suspension order passed against the

said Shenoy should be withdrawn, (b) the Company should pay the wages for the 3½ hours period of the strike provided the workmen made good the loss of production during that period, and (c) the management would take no action against any one for going on strike. The evidence of Martin, the company's technical director, on the other hand, was that the company agreed only not to punish the said Shenoy and to consider paying wages for the hours of the strike. The Labour Court on this evidence held that the association failed to prove that the management had agreed not to take action against any of the workmen in connection with the strike though it may be that they might have agreed not to victimise any workman for participating in the strike. In fact, the management did not impose any penalty against any workman for joining the strike, not even against the three concerned workmen. This finding being purely one of fact and the Labour Court having given cogent reasons for it, we would not interfere with it without the utmost reluctance. We have been taken through the evidence and the correspondence between the parties but we fail to see any error on the part of the Labour Court in reaching that finding.

10. The next contention was that the orders of dismissal were bad as they took into account the charge of intimidation of the company's officers although the enquiry officer had found that that charge was not proved. The charge-sheets, etc M/4A, M/5A and M/6A against the three workmen alleged in express terms disorderly behaviour and intimidation. The report of the enquiry officer against the said Vasudevan clearly stated that the enquiry officer accepted the evidence of the management's witnesses and that on that evidence all the charges against him stood proved. While summarising those charges he, no doubt, did not in so many words use the expression "intimidation". But the evidence which he, as aforesaid accepted, was that Vasudevan along with other workmen entered the G 2 department at about 3 P. M. on that day and thumping his hand on the table of the said Lakshman Rao threatened that officer in the following words "now I am in the forefront (of the crowd) You cannot do anything. You ask your people to come out and you also come out. Otherwise you can see what we can do for you now." The said Lakshman Rao had also deposed that he was surrounded by the workers who started pushing and pul-

ling him. The evidence of other officers was that as the crowd which forced its way into this department got unruly they were also forced to leave their places of work. The evidence against Prabhakar was that he too was in the forefront of that crowd which squeezed Lakshman Rao and some members thereof inflicted kicks on him. Similarly, there was the evidence of one Raja, the assistant personnel officer, and others that Sandhyavoo was one of those in the forefront of that crowd. According to Raja, Sandhyavoo tried to lift him from his seat with a view to force him to leave his table and finding that the crowd had become restive he left his place. Acceptance of this evidence by the enquiry officer must necessarily mean acceptance of the version of these officers that they were intimidated by the crowd which forced its way into their department led by these workmen. Though enquiry officer has not, in so many words used the expression "intimidation" his finding of disorderly behaviour must be held to include acts of intimidation.

11. Lastly, were the orders of dismissal against the three workmen acts of victimisation on the part of the management when admittedly a large number of workmen had staged the strike and also incited others to join that strike? The orders against the three workmen being identical in terms we take the order passed against Vasudevan as a specimen. That order sets out four acts of misconduct by him; (1) striking or stopping work, (2) inciting, (3) riotous and disorderly behaviour and (4) loitering about in the company's premises. Though each one of these acts, according to the order, was misconduct punishable with dismissal, the order states that so far as acts 1 and 4 were concerned, the management did not wish to take a serious view of them as a large number of "misguided" workmen had stopped work and left their places of work without permission. The management, therefore, took action only in respect of acts falling under Clauses 3 and 13 of Standing order 22 evidently for the reason that they considered incitement, intimidation and riotous and disorderly behaviour as "very grave in nature." We do not think that in taking this view the management discriminated against the three workmen concerned as against the rest or that they dismissed them with the object of victimising. The evidence in the enquiry clearly disclosed that when the crowd forced its way into the G. 2 department

it was led by these three workmen, all of whom were in the forefront thereof and two of them had defiantly forced the officers to leave their tables. One of them had threatened as to what he and the others who were behind him in that crowd could do to him if he did not comply and the other had tried even to lift another officer from his chair to compel him to leave his place of work. In these circumstances the management cannot be blamed if they took a serious view of these acts of the three workmen concerned, who had taken up their position in the forefront of that crowd, a position indicative of their having led that crowd into that department and having acted as its leaders. An act of discrimination can only occur if amongst those equally situated an unequal treatment is meted out to one or more of them. Having been found to be the leaders of the crowd, action taken against them cannot on any principle be regarded as discriminatory or unequal. The decision in *Burn and Co. Ltd. v. Workmen*, 1959-1 Lab LJ 450 = (AIR 1959 SC 529) relied on by Mr. Ramamurthi has no bearing on the facts of this case and cannot assist him. Once a misconduct graver than that of the rest was found proved against these three workmen and for which the punishment is dismissal, victimisation cannot legitimately be attributed to the management. It is relevant in this connection to remember that so far as their participation in the strike and loitering about were concerned, no action was taken against these three workmen on the ground that those acts were common with those of the rest of the workmen. In view of these facts it is not understandable how the impugned orders of dismissal could be characterised as acts of victimisation. It is also not possible to say that the finding of incitement and disorderly behaviour of these three workmen was perverse or such as no reasonable body of persons could come to on the evidence on record on the ground only that the others also were guilty of those acts. For there would be nothing wrong if those who misled or misguided other workmen were selected for disciplinary action and not the victims of their persuasion, who in following their precept did similar acts.

12. In our judgment the orders of dismissal, based on the findings in the domestic enquiry which did not suffer from any infirmity, could not be successfully impeached, and therefore, the

Labour Court was right in upholding them. The appeal fails and is dismissed. There will be no order as to costs.

LJC/D V C.

Appeal dismissed.

AIR 1969 SUPREME COURT 1288

(V 56 C 235)

(From Punjab)*

J C SHAH AND A. N. GROVER, JJ.

S Kartar Singh, Appellant v. Chaman Lal and others, Respondents.

Civil Appeal No 661 of 1966, D/- 14-3-1969

(A) Houses and Rents — Delhi Rent Control Act (59 of 1958), Sections 14 (1) (h) and 57 (2) First proviso — Delhi and Ajmer Rent Control Act (38 of 1952), Section 13 (1) (h) — Effect of first proviso on proceedings pending under 1952 Act.

The first proviso to Section 57 (2) of the new Act (59 of 1958) must be read harmoniously with the substantive provisions of sub-section (2) and the only way of harmonising the two is to read the expression "shall have regard to the provisions of this Act" as merely meaning that where the new Act had slightly modified or clarified the previous provisions those modifications and clarifications should be applied. These words did not take away what was provided by sub-section (2) and ordinarily the old Act (38 of 1952) would apply to pending proceedings.

(Para 7)

The only change that was made in Section 14 (1) (h) of 1958 Act was that the word 'suitable' before the word 'residence' appearing in S 13 (1) (h) of 1952 Act was omitted. However it was held in the facts of the case, that whether S 13 (1) (h) of old Act or Section 14 (1) (h) of new is applied the result, would be the same in the instant case.

(Para 8)

(B) Houses and Rents — Delhi Rent Control Act (59 of 1958) Ss. 14 (1) (h) — Delhi and Ajmer Rent Control Act (38 of 1952), Section 13 (1) (h) — Premises let out to predecessor-in-interest of tenants for residence-cum-business or professional purposes — Suit for eviction under Section 13 (1) (h) — No eviction could be ordered merely on ground that tenants had built a large residential house.

*(Civil Revn No 92-D of 1962, D/- 8-12-1964—Punjab at Delhi)

IM/IM/B782/69/D

Where the premises had been let out to the predecessors-in-interest of the tenants not for residential purpose alone but also for business or professional purposes, no eviction could be ordered under the provisions of Section 13 (1) (h) of the Act of 1952 or Section 14 (1) (h) of the new Act of 1958 merely by showing that the tenant had built a large residential house. Civil Revn No. 92-D of 1962, D/- 8-12-1964, (Punjab at Delhi), Affirmed. (Paras 8, 9)

Where the original tenant was one who was in occupation of premises which were used for a composite purpose, namely, residence and profession, there could, be no eviction merely by acquisition of vacant possession of a residence elsewhere by such a tenant and the position would be the same with regard to his heirs and legal representatives. Section 14 (1) (h) of the new Act could apply only where a tenant was in occupation of a premises which were only residential. (Para 9)

(C) Constitution of India, Art. 136 — Concurrent findings of fact — Eviction suit — Concurrent findings of lower Courts that premises were taken for residential-cum-business purposes — Finding being one of fact must be accepted as final — (Houses and Rents — Delhi Rent Control Act (59 of 1958), S. 14 (1) (h).)

(Para 9)

Cases Referred- Chronological Paras

(1965) AIR 1965 SC 1574 (V 52) =

(1965) 2 SCR 705, *Brij Kishore v.*

Vishwa Mitter

7

(1964) AIR 1964 SC 1305 (V 51) =

1964-4 SCR 647, *Karam Singh v.*

Shri Pratap Chand

7

(1963) AIR 1963 SC 337 (V 50) =

(1962) 2 SCR 678, *Dr. Gopal Dass*

Verma v. Dr S. K. Bhardwaj 9, 10

Mr S C Manchanda, Senior Advocate (M/s S. K. Mehta and K. L. Mehta, Advocates, with him), for Appellant, Mr Bishan Narain, Senior Advocate (M/s I S Sawhney and M. R. Chabra, Advocates, with him), for Respondents

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Punjab High Court (Circuit Bench at New Delhi) dismissing a petition for revision directed against the concurrent judgments of the courts below dismissing the action for eviction filed by the appellant against the respondents from a premises on Ajmal Khan Road Karol Bagh, New Delhi.

2 The facts may be succinctly stated. By means of a rent deed dated February

13, 1950 the appellant, who is the owner of the suit premises inducted as a tenant Labha Mal Arora, now deceased who was a practising Advocate. Clauses (2) and (6) of the rent deed were in the following terms:

"2. That the tenant agrees to use the property for his residence.

6. That the tenant shall not assign or sublet the abovesaid property or any part thereof without the written consent of the landlord or utilise the property for any purpose other than that mentioned above."

3. On the same date a letter Ex. D-2 was written by the appellant to the late Labha Mal Arora saying:

"As per our oral talk regarding your tenancy for my house No. 6/64, I have no objection your having your professional office along with residence there provided it is not inconsistent with the provisions of Delhi Improvement Trust Act."

It appears and it has been so found, that Labha Mal Arora who had his office at a different place shifted the same to the suit premises where he was residing with his family. He died in the year 1952. Till 1952 the premises were being used only for residence by his sons and widow. In August 1957 Chaman Lal respondent No. 1, who qualified himself as a legal practitioner, started having an office in the premises. It would appear that the other son respondent No. 3 also started practising as a lawyer in the same premises some time later. On 21st November, 1957 the appellant served a notice on the sons and widow of the deceased Labha Mal Arora that it had been learnt that they had constructed a double-storeyed building in Naiwala Karol Bagh and that since the suit premises were required bona fide for the personal residence of the appellant they should shift to their house and vacate the rented premises. This was followed by a second notice to the same effect.

4. As the possession of the premises was not delivered the appellant instituted a suit for ejectment against the respondents under the Delhi and Ajmer Rent Control Act, 1952 (hereinafter called the old Act). Two grounds were taken for seeking eviction. One was that the respondents had built a large residential house and were liable to be ejected under Section 13 (1) (h) of the old Act. The second was that the premises were required bona fide for personal use. It may be mentioned that the second ground was

abandoned in the trial court. The suit was contested by the respondents on the ground that the late Labha Mal Arora had taken the premises on rent for residence as well as for an office for professional purposes and the premises had been used as residence-cum-office. For this reason it was asserted that the construction of a residential house by the respondents did not furnish a ground for eviction.

5. During the pendency of the suit the Delhi Rent Control Act, 1958 (hereinafter called the new Act) came into force. Section 14 (1) (h) which was equivalent to Section 13 (1) (h) of the old Act (which?) contained the word 'suitable' which was omitted as it appeared before the word "residence" in S. 13 (1) (h): the relevance and significance of this omission will be noticed presently. The trial court relied inter alia on the letter Ext. D-2 and the statement of Chaman Lal respondent according to whom two rooms were used by the late Labha Mal Arora as his office and another one room was being used by his clerk and held that the premises had been let for "residence-cum-business purposes". The argument that the late Labha Mal Arora had only been granted a licence to use the premises for professional purposes and that the licence came to an end on his death was repelled. It was found that the respondents had built a residential house, and since the premises in suit had been let out to their predecessor-in-interest not for residential purpose alone but also for business purposes no eviction could be ordered under the provisions of Section 13 (1) (h) of the old Act or 14 (1) (h) of the new Act. The Additional Senior Sub-Judge dismissed the appeal preferred by the appellant in agreement with the decision of the trial court. The following portion from his judgment relating to the finding with regard to the purpose for which the premises had been let out to the late Labha Mal Arora may be reproduced:

"It is in evidence that prior to taking the premises in suit on rent from the appellant, Labha Mal deceased, was having his professional office as an advocate in Sadar Bazar, Delhi and on taking the premises in suit on rent he had shifted his office in the suit premises. This fact is fully supported by the statement of Shri Chaman Lal, respondent No. 1, and the notices Ex. D. W. 9/1 and D. W. 9/2 issued by Shri Labha Mal from the suit premises. Shri Chaman Lal has stated that out of the five rooms of the

suit premises, two rooms were used by his deceased father as office. From the above also it is proved that the suit premises were let by the appellant to Shri Labha Mal deceased for residence-cum-business purposes."

On the question of the ambit and scope of Section 13 (1) (h) of the old Act the learned Judge expressed the opinion that it would be unreasonable to hold that a tenancy which had been created both for purposes of residence and carrying on of a profession could be successfully terminated merely by showing that the tenants had acquired a suitable residence.

6. The appellant approached the High Court on the revisional side. J S Bedi J considered the rent deed Ext P-3 and the letter Ex D-2 as also the other evidence and came to the same conclusion at which the courts below had arrived. Reliance was placed on the additional fact that when the suit was instituted the premises were being used by Chaman Lal both for purposes of residence and office.

7. Before dealing with the contentions raised on behalf of the appellant it is necessary to refer to Section 13 (1) (h) of the old Act and Section 14(1) (h) and Sec 57 of the new Act. Section 13 (1) (h) of the old Act contained a provision that if the Court was satisfied inter alia that the tenant had whether before or after the commencement of the Act built, acquired vacant possession of or been allotted a suitable residence it could order ejectment. In Section 14 (1) (h) of the new Act, the only change that was made was that the word "suitable" before the word "residence" was omitted. Under S. 57 of the new Act notwithstanding the repeal of the old Act all suits and other proceedings pending under that Act were to be continued and disposed of in accordance with provisions of the old Act. According to the first proviso to sub-sec (2) the court or other authority "shall have regard to the provisions of this Act". In *Karam Singh v. Shri Pratap Chand*, 1964-4 SCR 647 = (AIR 1964 SC 1305) this Court had to consider the effect of what was contained in Section 57 of the new Act. It was held that the effect of the first proviso to Section 57 (2) was that pending proceedings would continue under the old Act with this addition that where the new Act had slightly modified or clarified the previous provisions those modifications and clarifications would govern the case. Similarly in *Brij Kishore*

and others v *Vishwa Mitter Kapur*, AIR 1965 SC 1574 it was laid down that the first proviso to Section 57 (2) of the new Act must be read harmoniously with the substantive provisions of sub-section (2) and the only way of harmonising the two was to read the expression "shall have regard to the provisions of this Act" as merely meaning that where the new Act had slightly modified or clarified the previous provisions those modifications and clarifications should be applied. These words did not take away what was provided by sub-section (2) and ordinarily the old Act would apply to pending proceedings.

8. It has been contended by Mr S C. Manchanda for the appellant that the new section would be applicable as no radical departure has been made in S 14 (1) (h) by omission of the word "suitable" and that there was only slight modification or clarification of the previous provision, namely, Section 13 (1) (h). In our opinion whether Section 13 (1) (h) of the old Act or Section 14 (1) (h) of the new Act is applied the result, as will be presently seen, will be the same in the instant case.

9. Coming to the question whether the suit premises were taken by the late Labha Mal Arora for residence only or for residence as well as for use as office for carrying on his professional work of a legal practitioner, it may be observed that the concurrent finding of the court below is that the premises had been taken for residential-cum-business or professional purposes. That finding being one of fact must be accepted as final. It would, therefore, seem that the decision of this Court in *Dr Gopal Dass Verma v Dr. S. K. Bhardwaj*, (1962) 2 SCR 678 at p 685 = (AIR 1963 SC 337 at p 340) can be appositely applied. In that case it was held that a tenant could not be ejected under Section 13 (1) (h) because the tenancy of premises let out or used for residence and carrying on of profession could not be terminated merely by showing that the tenant had acquired a suitable residence. There the premises had been let out to a doctor who was an ear, nose and throat specialist. It was found that the premises had been used by the tenant for professional as well as residential purposes with the consent of the landlord. The case, therefore fell outside S 13 (1) (e) but even under S 13 (1) (h) eviction could not be ordered, this is what was said in that connection.

"If the premises from which ejectment is sought are used not only for resi-

dence but also for profession how could Section 13 (1) (h) come into operation? One of the purposes for which the tenancy is acquired is professional use and that cannot be satisfied by the acquisition of premises which are suitable for residence alone, and it is the suitability for residence alone which is postulated by Section 13 (1) (h). Therefore, in our opinion, it would be unreasonable to hold that the tenancy which has been created or used both for residence and profession can be successfully terminated merely by showing that the tenant has acquired a suitable residence."

In the above case this Court further held that Section 2 (g) of the old Act which defined the word "premises" referred to three kinds of user to which the premises can be put to i. e. residence, commerce and any other purpose. This necessarily included residence and commerce combined. Since it was shown that the premises had been let both for residence and for commercial purposes it did not follow that the premises ceased to be premises under Section 2 (g); they continued to be premises under the last clause of that provision. The definition of 'premises' in the new Act is contained in S. 2 (i) and it is the same as in S. 2 (g) of the old Act. The word "tenant" is defined by Section 2 (1) of the new Act to mean "any person by whom or on whose account or behalf the rent of any premises is or but for a special contract would be, payable.....". Having regard to Section 14 (1) (h) of the new Act the original tenant in the present case was one who was in occupation of premises which were used, for a composite purpose, namely, residence and profession. There could, therefore, be no eviction merely by acquisition of vacant possession of a residence by such a tenant and the position would be the same with regard to his heirs and legal representatives, the present respondents. It is quite clear that Section 14 (1) (h) can apply only where a tenant is in occupation of a premises which are only residential; then alone he would have to go if he acquires or has residential accommodation of his own.

10. Mr. Manchanda has next contended that the decision of this Court in Dr. Gopal Das Verma's case, 1962-2 SCR 678 = (AIR 1963 SC 337) is distinguishable because it appeared from various facts that the dominant intention was to use the premises as a nursing home. He submits that in the present case the domi-

nant intention was to use the premises as residence and the late Labha Mal Arora was merely given permission or licence which was of a personal nature to have his office as well there. We are unable to find that any test of dominant intention was applied in Dr. Gopal Das Verma's case, 1962-2 SCR 678 = (AIR 1963 SC 337).

11. The position in England is different where premises are let partly for business purposes and partly for residence. There the statutory provisions lay down that where a dwelling is let partly for business purposes and partly for residence, the Rent Act applies to the whole.* Moreover where there is no covenant as to user and the question is what user was contemplated, the Court will infer what use was contemplated by the tenancy agreement; the test was the "main purpose" or "predominant intention" or "the prevailing contemplation" or "a preponderating contemplation for the letting" (ibid p. 69). We are unable to derive any assistance from the English cases on the point.

12. Lastly Mr. Manchanda sought to raise the question of the permission contained in the letter Ext. D-2 being a licence which was personal to late Labha Mal Arora and which should be deemed to have come to an end on his death. It is further pointed out that after his death for a number of years the respondents used the premises purely for residence. In view of the finding of the courts below that the premises had been let to the predecessor-in-interest of the respondents for residence-cum-business or profession, this submission cannot be entertained.

13. For all the above reasons this appeal fails and it is dismissed with costs. LGC/D.V.C. Appeal dismissed.

*(See the Rent Acts by R. E. Megarry Q. C. Tenth Edition pp. 87-88)

AIR 1969 SUPREME COURT 1291
(V 56 C 236)

(From Rajasthan: 1969 Raj LW 164)
S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

Gappulal, Appellant v. Thakurji Shriji Dwarkadheeshji and another, Respondents.

Civil Appeal No. 53 of 1969, D/- 12-3-1969.

IM/IM/B774/69/D

(A) T. P. Act (1882), Section 111 — Surrender of lease — Agreement as to reduction or increase in rent — Inference of surrender of existing lease and grant of new lease cannot be drawn — Agreement must show intention to terminate old tenancy. (Para 5)

(B) Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), Section 13 (1) (c) — Realisation of rent by landlord after subletting of premises — Permission for subletting cannot be inferred — Knowledge of subletting is essential. (Para 6)

(C) Houses and Rents — Rajasthan Premises (Control of Rent and Eviction) Act (17 of 1950), Section 13 (1) (e) — Subletting without permission of landlord — Eviction is proper — Premises whether sublet before or after commencement of Act is immaterial.

If the "tenant" has sublet the premises without the permission of the landlord either before or after the coming into force of the Act, he is not protected from eviction under Section 13 (1) (e), and it matters not that he had the right to sublet the premises under Section 103 (j) of the Transfer of Property Act. This becomes clear upon construction of Cl (e) of Section 13 (1). The relevant words in Clause (e) are "has sub-let." The present perfect tense contemplates a completed event connected in some way with the present time. The words take within their sweep any sub-letting which was made in the past and has continued up to the present time. It does not matter that the sub-letting was either before or after the Act came into force. All such sub-lettings are within the purview of Clause (e). (Paras 9, 10, 11)

(D) Civil P. C. (1908), Sections 100, 101 — Finding by lower Courts that increase in rent did not import new demise — Finding cannot be interfered in second appeal. (Para 5)

(E) Civil P. C. (1908), Order 14, Rule 2; Order 6, Rule 2 — Denial by tenant that he has sub-let premises — No pleading or issue that permission to sub-let taken — Court has no jurisdiction to decide whether permission was granted. (Para 6)

Mr C B Agarwala, Senior Advocate (M/s Rameshwar Nath and Mahinder Narain, Advocates of M/s Rajinder Narain and Co, with him), for Appellant. Mr. B R. L. Iyengar, Senior Advocate, (M/s. S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co), for Respondents.

The following Judgment of the Court was delivered by

BACHAWAT, J.: This appeal arises out of a suit for ejectment by a landlord against a tenant. The defendant is the tenant of six shops belonging to Thakurji Shri Dwarkadheeshji installed in the temple at Chaura Raasta, Japur. Devendra Prasad is the adhikari or manager of the temple. He gave a notice to the defendant to quit the shop on August 1 1957. On February 28, 1958, the deity and Devendra Prasad filed a suit against the defendant claiming recovery of possession of the six shops and Rs. 1006 on account of arrears of rent. The suit was governed by the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 (Act No. XVII of 1950). The plaintiffs asked for ejectment of the defendant on the ground that he had sub-let the six shops, the other grounds of ejectment were not established, and it is not necessary to mention them. The courts below concurrently found that Devendra Prasad as the adhikari of the temple was entitled to give the notice to quit and to maintain the suit.

2. The trial court held that (1) all the six shops were sub-let by the defendant; (2) the sub-letting was with the permission of the landlord and (3) the notice to quit was waived by acceptance of rent subsequently accrued due. Accordingly, the trial court dismissed the suit so far as it claimed ejectment and passed a decree for Rs. 1006 on account of arrears of rent. The plaintiffs filed an appeal against the decree. The District Judge, Japur City, dismissed the appeal. The plaintiffs filed a second appeal against the decree. The High Court held that (1) there was one integrated tenancy of all the six shops; (2) four shops were sub-let with the permission of the landlord, (3) two shops were sub-let without the permission of the landlord towards the end of 1947; (4) the tenant having sub-let a part of the premises without the permission of the landlord the ground of eviction under Clause (e) of Section 13 (1) was made out and the landlord was entitled to a decree for possession of all the six shops and (5) there was no waiver of the notice to quit. Accordingly, the High Court allowed the appeal and passed a decree for eviction of the defendant from the six shops. The present appeal has been filed by the defendant after obtaining special leave.

3. Counsel for the appellant conceded that there was no waiver of the notice to

quit by acceptance of rent or otherwise. The points arising for determination in this appeal are: (1) was there one integrated tenancy of all the six shops? (2) were the two shops sub-let without the permission of the landlord towards the end of 1947? And (3) is the subletting a ground of ejectment under clause (e) of Section 13 (1) of the Rent Act?

4. As to the first question, we find that four shops were let to the defendant in 1944 and the other two shops on the northern side of the staircase of the temple were let to him in 1945. The rent of the four shops was Rs. 150 per month. The rent of the other two shops was Rs. 65 per month. In paragraph 5 of the plaint it was pleaded that in 1953, the defendant agreed to pay a consolidated rent of Rs. 251/8/- per month for all the six shops and to vacate them by July 31, 1957. In paragraph 5 of the written statement the defendant denied this contract and alleged that in 1953 there was only an enhancement of rent. The first two courts found that in 1953 there was no new contract of tenancy, that there was only an increase of rent and that the other terms and conditions of the tenancy remained unaltered. This finding was not vitiated by any error of law.

5. A mere increase or reduction of rent does not necessarily import the surrender of the existing lease and the grant of a new tenancy. As stated in Hill and Redman's Law of Landlord and Tenant, 14th Ed., Art. 385, p. 493:—

"But a surrender does not follow from a mere agreement made during the tenancy for the reduction or increase of rent, unless there is some special reason to infer a new tenancy, where, for instance, the parties make the change in the rent in the belief that the old tenancy is at an end."

In the present case the first two courts on a review of the entire evidence came to the conclusion that the increase of rent did not import a new demise. This finding of fact was binding on the High Court in second appeal. The High Court was in error in holding that there was one integrated tenancy of the six shops.

6. As to the second question the defendant denied that he sub-let the two shops. The Courts below concurrently found that this denial was false and that he sub-let the two shops to his brother-in-law Ram Gopal. There was no pleading nor any issue that the sub-letting of the two shops was made with the per-

mission of the landlord. It was not the case of the defendant at any stage of the trial that he had obtained the permission of the landlord for sub-letting the two shops. In the absence of any pleading and any issue on this point the first two courts were in error in holding that the two shops were sub-let with the permission of the landlord. The permission of the landlord for the sub-letting is not established from the mere fact that the landlord realised rent after the sub-letting in the absence of proof that the landlord had then clear knowledge of the sub-lease.

7. The date of the sub-letting of the two shops is not mentioned in the plaint. In the absence of any pleading and any issue on this question the High Court was in error in recording the finding that the two shops were sub-let towards the end of 1947 after the Jaipur Rent Control Order 1947 came into force. We can only say that the sub-letting was sometime after 1945.

8. As to the third question: Section 13 (1) of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950 provides:—

"Notwithstanding anything contained in any law or contract, no Court shall pass any decree, or make any order, in favour of a landlord, whether in execution of a decree or otherwise, evicting the tenant so long as he is ready and willing to pay rent therefor to the full extent allowable by this Act, unless it is satisfied—"

The sub-section then sets out several grounds of ejectment under twelve main heads. Clause (e) mentions the following ground:—

"that the tenant had assigned, sub-let or otherwise parted with the possession of, the whole or any part of the premises without the permission of the landlord." The appellant's contention is that sub-letting before the Act came into force is not within the purview of clause (e). The High Court held that the two shops were sub-let after October 15, 1947 when the Jaipur Rent Control Order, 1947 came into force, that the sub-letting was a ground of ejectment under Paragraph 8 (1) (b) (ii) of that Order and that the tenant's liability for eviction on this ground continued after the promulgation of the Rajasthan Premises (Control of Rent and Eviction) Act, 1950. With regard to this line of reasoning it is sufficient to say that the plaintiffs have not established that the sub-letting was after October 15, 1947. The case must be decided on the

footing that on the date of the sub-letting, no Rent Control legislation was in force

9. The question whether a sub-letting before the coming into force of the Act is within the purview of clause (e) of Section 13 (1) depends upon the construction of that clause. The relevant words are "has sub-let". The present perfect tense contemplates a completed event connected in some way with the present time. The words take within their sweep any sub-letting which was made in the past and has continued up to the present time. It does not matter that the sub-letting was either before or after the Act came into force. All such sub-lettings are within the purview of clause (e).

10. Sections 26 and 27 (1) of the Act throw considerable light on the construction of Section 13 (1). They are as follows—

"26 No decree for the eviction of a tenant from any premises in areas to which this Act extends for the time being, passed before the date of commencement of this Act shall in so far as it relates to the eviction of such tenant be executed against him, as long as this Act, remains in force therein, except on any of the grounds mentioned in Section 13 and under the circumstances specified in this Act

27. (1) In all suits for eviction of tenants from any premises in areas to which this Act has been extended under Section 2, pending on the date specified in the notification under that section, no decree for eviction shall be passed except on one or more of the grounds mentioned in Section 13 and under the circumstances specified in this Act"

Section 26 bars the execution of a decree for eviction passed before the commencement of the Act except on any of the grounds mentioned in Section 13 and under the circumstances specified in the Act. Likewise, Section 27 (1) bars the passing of a decree for eviction in a pending suit except on one or more of the grounds under Section 13 and under the circumstances specified in the Act. Sections 26 and 27 (1) clearly contemplate that the grounds of eviction mentioned in Section 13 may have arisen before the Act came into force.

11. The argument that Section 13 (1) (e) takes away vested rights and should not be given a retrospective effect is based on fallacious assumptions. Apart from the Rent Act the landlord is entitled to eject the tenant on the expiry of the

period mentioned in the notice to quit. Section 13 (1) protects the tenant from eviction except in certain specified cases. If one of the grounds of ejection is made out the tenant does not qualify for protection from eviction. We find no reason for presuming that Section 13 (1) (e) is not intended to apply to sub-lettings before the Act came into force. If the "tenant" has sub-let the premises without the permission of the landlord either before or after the coming into force of the Act, he is not protected from eviction under Section 13 (1) (e), and it matters not that he had the right to sub-let the premises under Section 108 (j) of the Transfer of Property Act.

12. The plaintiffs have thus established the ground of eviction under Section 13 (1) (e) with regard to the two shops on the northern side of the staircase of the temple. With regard to the four other shops the Courts below concurrently found that they were sub-let with the permission of the landlord. In our opinion, the plaintiffs are entitled to a decree for ejection of the defendant from the two shops and the claim for eviction from the other four shops should be dismissed.

13. In the result, the appeal is allowed in part. The decree passed by the High Court for eviction of the defendant from the four shops is set aside and the suit in so far as it claims eviction from the four shops is dismissed. The decree passed by the High Court for eviction of the defendant from the other two shops on the northern side of the staircase of the temple mentioned in Paragraph 4 of the plaint is affirmed. Parties will pay and bear their own costs throughout, in this Court and in all the Courts below. The defendant will have one month's time to vacate the two shops. BNP/D V C.

Appeal partly allowed.

AIR 1969 SUPREME COURT 1294
(V 56 C 237)

(From Gujarat)*

J. C. SHAH, V RAMASWAMI AND
A. N GROVER, JJ.

State of Gujarat, Appellant v. R. G. Teredesai and another, Respondents

Civil Appeal No. 961 of 1966, D/- 10-4-1969

* (Spl Civil Appln No 580 of 1961, D/18-3-1965 — Guj)

IM/IM/B843/69/D

Constitution of India, Article 311 (2) — Domestic enquiry — Report by Enquiry Officer regarding findings and recommending mode of punishment — Supply of report along with show cause notice to delinquent — Part of report relating to punishment cannot be withheld.

The Enquiry Officer is under no obligation or duty to make any recommendations in the matter of punishment to be imposed on the servant against whom the departmental enquiry is held, and his function merely is to conduct the enquiry in accordance with law and to submit the record along with his findings or conclusions on the various charges which have been preferred against the delinquent servant. But if the Enquiry Officer proceeds to recommend that a particular penalty or punishment should be imposed in the light of his findings or conclusions such recommendations form part of the record and constitute appropriate material for consideration of the Government and therefore it is essential that that material should not be withheld from him so that he could, while showing cause against the proposed punishment, make a proper representation. The entire object of supplying a copy of the report of the Enquiry Officer is to enable the delinquent officer to satisfy the punishing authority that he is innocent of the charges framed against him and that even if the charges are held to have been proved the punishment proposed to be inflicted is unduly severe. If the Enquiry Officer has also made recommendations in the matter of punishment that is likely to affect the mind of the punishing authority even with regard to penalty or punishment to be imposed on such officer. The requirement of a reasonable opportunity, therefore, would not be satisfied unless the entire report of the Enquiry Officer including his views in the matter of punishment are disclosed to the delinquent servant. AIR 1964 SC 364, Rel. on; Spl. C. A. No. 580 of 1961, D/- 18-3-1965 (Guj), Affirmed.

(Para 5)
Cases Referred: Chronological Paras
(1964) AIR 1964 SC 364 (V 51)=
1964-4 SCR 718, Union of India
v. H. C. Goel 5

M/s. R. H. Dhebar, S. K. Dholakia and S. P. Nayar, Advocates, for Appellant; M/s. G. L. Sanghi and A. G. Ratnaparkhi, Advocates, for Respondent No. 1; M/s. M. S. K. Sastri, R. H. Dhebar and R. N. Sachthey, Advocates, for Respondent No. 2.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave against a judgment of the Gujarat High Court. The sole point for determination is whether omission to supply to the first respondent a copy of the recommendations of the Enquiry officer in the matter of punishment, although a copy of his report containing his findings on the various charges was supplied, amounted to a failure to provide reasonable opportunity of making a representation against the penalty proposed within the meaning of Article 311 (2) of the Constitution.

2. The first respondent joined the Baroda State Service in 1937. He was absorbed as a Sales Tax Officer, Class III in the former State of Bombay after merger. In December 1962 (Sic) he was served with a charge-sheet containing allegations of attempt to obtain illegal gratification from certain cloth dealers. A departmental enquiry was held and on March 15, 1964 (Sic) he was dismissed from service. He challenged the order of dismissal by means of a civil suit. In May 1958 the City Civil Court decreed the suit holding that the order of dismissal was illegal. He was reinstated with effect from October 10, 1958. He was, however, suspended with immediate effect as a fresh enquiry was proposed to be held against him under Rule 55 of the Civil Services (Classification, Control and Appeal) Rules. A fresh charge-sheet was served on him containing the same allegations as on the previous occasion. In December 1959 a notice was served on him by the Government calling upon him to show cause why punishment of removal should not be imposed on him. Along with the show cause notice the report of the Enquiry Officer containing his findings was sent to him. The Enquiry Officer had also made certain recommendations regarding the punishment which in his opinion should be inflicted on the first respondent. No copy of these recommendations, however, was furnished to him. In March 1960 it was proposed that the first respondent be allocated to the State of Gujarat in view of the bifurcation of the erstwhile State of Bombay. In September 1960 he was removed from service by an order passed by the State Government. The first respondent then filed a petition under Article 226 of the Constitution challenging the order of removal.

3. One of the points which was raised before the High Court was that the failure to send a copy of the report of the Enquiry Officer containing his recommendations in the matter of punishment vitiated the proceedings. The High Court expressed the view that since the recommendations were a part of the appropriate material for the consideration of the Government in the matter of imposition of punishment on the first respondent, he was entitled to a copy of those recommendations at the time when he was called upon to show cause. It was consequently held that the proceedings were vitiated from the stage of the show cause notice relating to punishment. The order of removal was set aside but it was made clear that the Government would be at liberty to issue a fresh show cause notice regarding the proposed punishment and to take appropriate proceedings from that stage onwards if it chose to do so. The State has filed the present appeal.

4. Learned counsel for the State urged that the Enquiry Officer was not required to make any recommendation about the punishment which was to be imposed on the first respondent on the charges against him which had been found to have been proved. It was pointed out that the sole duty of the Enquiry Officer was to give his conclusions or findings on the charges which he was called upon to enquire into and the recommendations which he made in the matter of punishment were wholly redundant and irrelevant. For that reason it was not at all necessary that the first respondent should have been supplied a copy of the recommendations relating to punishment. In this connection reference has been made to the Bombay Civil Services (Conduct, Discipline and Appeal Rules) wherein the procedure has been laid down when an order of dismissal, removal or reduction in rank has to be passed on a member of the service. According to the Rule the proceedings shall contain sufficient record of the evidence and a statement of the findings and the grounds thereof. There are similar provisions in Rule 55 of the Civil Services (Classification, Control and Appeal) Rules.

5. In *Union of India v. H C Goel*, 1964-4 SCR 718 = (AIR 1964 SC 364), it has been observed that unless the statutory rules or the specific order under which an officer is appointed to hold an inquiry so requires the Enquiry Officer need not make any recommendations as

to the punishment which may be imposed on the delinquent officer in case the charges framed against him are held proved at the enquiry, if however, the Enquiry Officer makes any recommendations the said recommendations, like his findings on the merits, are intended merely to supply appropriate material for the consideration of the Government. Neither the findings, nor the recommendations are binding on the Government. Now it is correct that the Enquiry Officer is under no obligation or duty to make any recommendations in the matter of punishment to be imposed on the servant against whom the departmental enquiry is held, and his function merely is to conduct the enquiry in accordance with law and to submit the record along with his findings or conclusions on the various charges which have been preferred against the delinquent servant. But if the Enquiry Officer proceeds to recommend that a particular penalty or punishment should be imposed in the light of his findings or conclusions the question is whether the officer concerned should be informed about his recommendations. In other words since such recommendations form part of the record and constitute appropriate material for consideration of the Government it would be essential that that material should not be withheld from him so that he could, while showing cause against the proposed punishment, make a proper representation. The entire object of supplying a copy of the report of the Enquiry Officer is to enable the delinquent officer to satisfy the punishing authority that he is innocent of the charges framed against him and that even if the charges are held to have been proved the punishment proposed to be inflicted is unduly severe. If the Enquiry Officer has also made recommendations in the matter of punishment that is likely to affect the mind of the punishing authority even with regard to penalty or punishment to be imposed on such officer. The requirement of a reasonable opportunity, therefore, would not be satisfied unless the entire report of the Enquiry Officer including his views in the matter of punishment are disclosed to the delinquent servant.

6. We have no manner of doubt that the decision of the High Court must be upheld in the above view of the matter. The appeal fails and it is dismissed with costs.

BNP/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 1297
(V 56 C 238)

(From Gujarat: (1965) 6 Guj LR 34)

S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

State of Gujarat, Appellant v. Patel
Raghav Natha and others, Respondents.

Civil Appeal No. 723 of 1966, D/- 21-4-
1969.

Bombay Land Revenue Code (5 of
1879), Sections 65 and 211 — Power of
Commissioner to revise order made under
S. 65 — Limitation — Power must be
exercised within a few months — Com-
missioner must give reasons for his con-
clusions — Commissioner not empowered
to decide in these proceedings, question
of title against occupant.

Although there is no period of limita-
tion prescribed under Sec. 211 the power
of the Commissioner to revise under Sec-
tion 65 must be exercised in reasonable
time must be determined by the facts of
the case and the nature of the order which
is being revised. In this regard Sec. 65
itself indicates the length of the reason-
able time within which the Commissioner
must act under Section 211. Under Sec-
tion 65 of the Code if the Collector does
not inform the applicant of his decision
on the application within a period of
three months the permission applied for
shall be deemed to have been granted.
This section shows that a period of three
months is considered ample for the Col-
lector to make up his mind and beyond
that the legislature thinks that the matter
is so urgent that permission shall be deem-
ed to have been granted. Reading Sec-
tions 211 and 65 together it is clear that
the Commissioner must exercise his revi-
sional powers within a few months of the
order of the Collector. This is reasonable
time because after the grant of the per-
mission for building purposes the oc-
cupant is likely to spend money on start-
ing building operations at least within a
few months from the date of the permis-
sion. Further the Commissioner should
indicate his reasons, however briefly, so
that an aggrieved party may carry the
matter further if so advised. The Com-
missioner in these proceedings cannot
decide questions of title against occupant.

(Paras 11, 12, 13 and 14)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1536 (V 51) =
1964-7 SCR 103, Mithoo Shahani
v. Union of India 8

(1955) AIR 1955 Bom 1 (V 42) =
56 Bom LR 1084 (FB), State of
Bombay v. Chhaganlal Gangaram 9
(1947) AIR 1947 PC 200 (V 34) =
50 Bom LR 524, Govt. of the
Province of Bombay v. Hormusji
Manekji 9
(1944) AIR 1944 Bom 244 (V 31) =
46 Bom LR 413, Govt. of Bom-
bay v. Ahmedabad Sarangpur
Mills Co. 9
(1942) AIR 1942 Bom 256 (V 29) =
44 Bom LR 405, Govt. of Bombay
v. Mathurdas Laljibhai 9
(1940) L P A No. 40 of 1938, D/- 8-8-
1940 (Bom), Govt. of the Province
of Bombay v. Hormusji Manekji 9
(1934) AIR 1934 PC 9 (V 21) = 36
Bom LR 242, Secy. of State v.
Anant Krishnaji 9

Mr. R. H. Dhebar, Mrs. Urmila Kapoor
and Mr. S. P. Nayar, Advocates, for Ap-
pellant; Mr. Purshottam Trikamdas, Senior
Advocate, (Mr. I. N. Shroff, Advocate,
with him), for Respondent No. 1, Mr. N. S.
Bindra, Senior Advocate (Mr. K. L. Hathi,
Advocate of M/s. Hathi and Co. with
him), for Respondent No. 3.

The following Judgment of the Court
was delivered by

SIKRI, J.: This appeal by special leave
is directed against the judgment of the
High Court of Gujarat (Vakil J.) allowing
the application filed by Patel Raghav
Natha, respondent before us and herein-
after referred to as the petitioner, and
quashing the order dated October 12,
1961, passed by the Commissioner, Rajkot
Division. The Commissioner by this order
had set aside the order of the Collector,
dated July 2, 1960, granting permission
to the petitioner to use some land in Sur-
vey No. 417 for non-agricultural purposes.

2. In order to appreciate the conten-
tions raised before us it is necessary to
set out a few facts. The petitioner was a
resident of the State of Rajkot and at an
auction effected by the State he acquired
on or about September 22, 1938, agricul-
tural land bearing survey No. 417 which
in all measured about 12 acres and 12
gunthas. After some acquisitions by the
State out of this survey number he was
left with 2 acres and 10 gunthas of agri-
cultural land. On October 20, 1958, the
petitioner applied to the Collector for
permission to convert this land to non-
agricultural use, under Section 65 of the
Bombay Land Revenue Code, 1879, here-
inafter referred to as the Code. This
petition was first rejected by the Collector

but the Divisional Commissioner remanded the matter to the Collector. On remand, the then Collector of Rajkot, after holding an enquiry, granted permission to the petitioner to use the land for non-agricultural use by his order dated July 2, 1960. Pursuant to this order a sanad was issued by the Collector to the petitioner on July 27, 1960. It appears that the sanad was amended on November 3, 1960 and December 1, 1960. The sanad was in form M1 and a number of conditions were appended to the sanad. Condition 6 of the main sanad provided that "save as herein provided, the grant shall be subject to the provisions of the said Code." The special conditions originally included a condition that the land shall be used exclusively for constructing residential houses (condition 5) but this condition was altered in November, 1960.

3. It appears that the Municipal Committee of Rajkot had objected to the grant of permission before the Collector when a sketch of the land was sent to the Municipality. The objections as they appear from the order of the Collector granting the sanad were directed against the accuracy of the sketch, showing the northern and the western corners of the Ramkrishna Ashram, and regarding the boundaries and situation of the roads in Survey Nos 417 and 418. The Collector had overruled these objections.

4. The Municipal Committee approached the Commissioner to exercise powers under Section 211 of the Code. The Commissioner noted the objections of the Municipality and after reciting the objections and the arguments of the learned counsel for the petitioner and after inspecting the site, observed

"From this inspection the contentions of the Municipality as to the existence of the various roads as well as the nature of the Kharaba land have been proved beyond doubt.

In light of the above arguments as well as the site inspection and the papers of the case, I set aside the order of the Collector granting N.A. Permission. I consider, on weighing all evidence cited above, that the land does not belong to Shri Raghav Natha." It is this order which has been quashed by the High Court.

5. The following grounds were urged before the learned Judge—

(1) The Commissioner or the State Government had no authority under S 211 of the Code to revise the order of the

Collector so as to affect the agreement or sanad granted to him.

(2) The Commissioner's order is not a speaking order as no reasons are given by him for setting aside the Collector's order and, therefore, it should be quashed.

(3) The question of title to the land was not in controversy at all before the Collector and, therefore, it was not open to the Commissioner to permit the Municipality to agitate that question and the Commissioner had no jurisdiction to decide that question.

(4) In case the above points are not accepted, the order of the Commissioner is bad even on merits as the Commissioner had erred in law in allowing the questions to be agitated before him which were not agitated before the Collector and which involved considerations which were completely foreign to those which were actually before the Collector.

6. While dealing with ground No. 1 the learned Judge held that the Commissioner had no jurisdiction to pass an order which would nullify the sanad, and that the sanad was binding on both the parties till it was set aside in due course of law. On the second ground he held that there was some force in the submission. But he observed

"But at the same time if I had to decide this case on this contention raised, I may not have interfered only on this ground with the decision of the Commissioner."

On the third ground he found that it was true that the question of title was agitated by the Municipal Committee for the first time before the Commissioner, though it was primarily for the petitioner to show that he was an occupant within the meaning of Section 65 of the Code. But then the learned Judge decided not to enter into the merits of the case as he had come to the clear conclusion that the Commissioner had no authority to pass the order that he did under Section 211 of the Code.

7. The learned counsel for the State of Gujarat, Mr Dhebar, challenges the decision of the High Court that the Commissioner had no jurisdiction to pass the order dated October 12, 1961. The relevant provisions of the Code and the Land Revenue Rules, 1921, hereinafter referred to as the Rules, are as follows:

"The Bombay Land Revenue Code, 1879

S 48 (1) The land revenue leviable on any land under the provisions of this Act shall be assessed, or shall be deemed to

have been assessed, as the case may be, with reference to the use of the land—

- (a) for the purpose of agriculture,
- (b) for the purpose of building, and
- (c) for a purpose other than agriculture or building.

(2) Where land assessed for use for any purpose is used for any other purpose, the assessment fixed under the provisions of this Act upon such land shall, notwithstanding that the term for which such assessment may have been fixed has not expired, be liable to be altered and fixed at a different rate by such authority and subject to such rules as the State Government may prescribe in this behalf.

(3) Where land held free of assessment on condition of being used for any purpose is used at any time for any other purpose, it shall be liable to assessment.

(4) The Collector or a survey officer may, subject to any rules made in this behalf under S. 214, prohibit the use for certain purposes of any unalienated land liable to the payment of land revenue, and may summarily evict any holder who uses or attempts to use the same for any such prohibited purpose.

65. An occupant of land assessed or held for the purpose of agriculture is entitled by himself, his servants, tenants, agents, or other legal representatives, to erect farm-buildings, construct wells or tanks, or make any other improvements thereon for the better cultivation of the land, or its more convenient use for the purpose aforesaid.

But if any occupant wishes to use his holding or any part thereof for any other purpose the Collector's permission shall in the first place be applied for by the occupant.

The Collector, on receipt of such application,

(a) shall send to the applicant a written acknowledgment of its receipt, and

(b) may, after due inquiry, either grant or refuse the permission applied for:

Provided that, where the Collector fails to inform the applicant of his decision on the application within a period of three months, the permission applied for shall be deemed to have been granted; such period shall, if the Collector sends a written acknowledgment within seven days from the date of receipt of the application be reckoned from the date of the acknowledgment, but in any other case it shall be reckoned from the date of receipt of the application.

Unless the Collector shall in particular instances otherwise direct, no such application shall be recognized except it be made by the occupant.

When any such land is thus permitted to be used for any purpose unconnected with agriculture it shall be lawful for the Collector, subject to the general order of the State Government to require the payment of a fine in addition to any new assessment which may be leviable under the provisions of Section 48.

66. If any such land be so used without the permission of the Collector being first obtained, or before the expiry of the period prescribed by Section 65, the occupant and any tenant, or other person holding under or through him, shall be liable to be summarily evicted by the Collector from the land so used and from the entire field or survey number of which it may form a part and the occupant shall also be liable to pay, in addition to the new assessment which may be leviable under the provisions of Section 48 for the period during which the said land has been so used, such fine as the Collector may, subject to the general orders of the Provincial Government, direct.

Any tenant of any occupant or any other person holding under or through an occupant, who shall without the occupant's consent use any such land for any such purpose, and thereby render the said occupant liable to the penalties aforesaid shall be responsible to the said occupant in damages.

67. Nothing in the last two preceding sections shall prevent the granting of the permission aforesaid on such terms or conditions as may be prescribed by the Collector, subject to any rules made in this behalf by the Provincial Government." "Land Revenue Rules, 1921:

87. (a) Revision of non-agricultural assessment—

.....

(b) When land is used for non-agricultural purposes is assessed under the provisions of Rules 81 to 85, a sanad shall be granted in the Form M if the land is used for building purposes, in Form NI if the land is used temporarily for N-A purposes other than building, in Form N in all other cases.

Provided that if the land to be used for building purposes is situated within the limits of a municipal corporation constituted under the Bombay Municipal Corporation Act or the Bom-

bay Provincial Municipal Corporation Act, 1949 the sanad shall be granted in Form M-1;....."

The relevant extracts from the agreement (sanad) are given below:

"Whereas application has been made to the Collector (hereinafter referred to as 'the Collector' which expression shall include any officer whom the Collector shall appoint to exercise and perform his powers and duties under this grant) under Section 65 of the Bombay Land Revenue Code 1879 (hereinafter referred to as 'the said Code' which expression shall where the context so admits include the rules and orders thereunder) by inhabitant of Madhya Saurashtra being the registered occupant of survey No 417 in the village of in the Taluka (hereinafter referred to as the 'applicant' which expression shall where the context so admits include his heirs, executors, administrators and assigns) for permission to use for building purposes the plot of land (hereinafter referred to as the 'said plot') described in the first schedule hereto and indicated by the letters on the site plan annexed hereto, forming part of survey No. 417 and measuring acres 2 gunthas 17, be the same a little more or less

When used under Rule 51 for land already occupied for agricultural purposes within certain surveyed cities the period for which the assessment is leviable will be ordered to coincide with the expiry of 99 years' period running in that city.

Now this is to certify that permission to use for building purposes, the said plot is hereby granted subject to the provisions of the said Code, and on the following conditions, namely,—

(1) Assessment.....

(6) Code provisions applicable — Save except as herein provided the grant shall be subject to the provisions of this Code:

In witness whereof the Collector of has set his hand and the seal of his office on behalf of the Governor of Bombay, and the applicant has also hereunto set his hand, this day the of 19 .

Signature of applicant Signatures and designations of witnesses.

Signature of Collector Signature and designations of witnesses.

We declare that who has signed this notice is, to our personal knowledge, the person he represents himself to be, and that he has affixed his signature hereunto in our presence."

7A. It will be noticed that application is made under Sec. 65 of the Code and it is under Section 65 that the Collector either grants or refuses the permission applied for. It will be further noticed that if the Collector fails to inform the applicant of his decision on the application within a period of three months the permission applied for shall be deemed to have been granted, but if the Collector sends a written acknowledgment within seven days from the date of receipt of the application then the three months' period is reckoned from the date of acknowledgment, and in other cases this period is reckoned from the date of receipt of the application. The Collector having given permission under Section 65 he can prescribe conditions under Section 67 of the Code. Under Section 48 (2) where the land assessed for use, say for agricultural purposes, is used for industrial purposes, the assessment is liable to be altered and fixed at a different rate by such authority and subject to such rules as the State Government may prescribe in this behalf. The rates for non-agricultural assessment are fixed under Rules 81, 82, 82A, 82AA, 84 and 85 of the Rules. Rule 87 (b) provides that where land is assessed under the provisions of Rules 81 to 85, a sanad shall be granted. Under the proviso to Rule 87 (b) it is obligatory for the sanad to be granted in form MI.

8. Relying on *Shri Mithoo Shahani v. Union of India*, 1964-7 SCR 103=(AIR 1964 SC 1536) the learned counsel contends that there is a distinction between an order granting permission under Section 65 and the agreement contained in the sanad which is issued under R 87 (b). He urges that even if the sanad may not be revisable under Section 211 of the Code, the order granting permission under Section 65 is revisable under Section 211, and if this order is revised the sanad falls along with the order.

9. We need not give our views on this alleged distinction for two reasons, first, that this point was not debated before the High Court in this case or in earlier cases,** and secondly, because we have

** (1) *The Government of the Province of Bombay v. Hormusji Manekji*—(1940) LPA No. 40 of 1938, D/- 8-8-1940 (Bom).

come to the conclusion that the order of the Commissioner must be quashed on other grounds.

10. Section 211 reads thus:

"211. The State Government and any revenue officer, not inferior in rank to an Assistant or Deputy Collector or a Superintendent of Survey, in their respective departments, may call for and examine the record of any inquiry or the proceedings of any subordinate revenue officer, for the purpose of satisfying itself or himself, as the case may be, as to the legality or propriety of any decision or order passed, and as to the regularity of the proceedings of such officer.

The following officers may in the same manner call for and examine the proceedings of any officer subordinate to them in any matter in which neither a formal nor a summary inquiry has been held, namely,..... a Mamlatdar, a Mahalkari, an Assistant Superintendent of Survey and an Assistant Settlement Officer.

If in any case it shall appear to the State Government or to such officer aforesaid that any decision or order or proceedings so called for should be modified, annulled or reversed, it or he may pass such order thereon as it or he deems fit:

Provided that an Assistant or Deputy Collector shall not himself pass such order in any matter in which a formal inquiry has been held, but shall submit the record with his opinion to the Collector, who shall pass such order thereon as he may deem fit."

11. The question arises whether the Commissioner can revise an order made under Section 65 at any time. It is true that there is no period of limitation prescribed under Section 211, but it seems to us plain that this power must be exercised in reasonable time and the length of the reasonable time must be deter-

(2) Government of Bombay v. Mathurdas Laljibhai, 44 Bom LR 405 = (AIR 1942 Bom 256).

(3) The State of Bombay v. Chhaganlal Gangaram Lavar, 56 Bom LR 1084 = (AIR 1955 Bom I (FB)).

(4) Government of Bombay v. Ahmedabad Sarangpur Mills Co., AIR 1944 Bom 244.

(5) Secretary of State v. Anant Nulkar, 36 Bom LR 242 = (AIR 1934 PC 9).

(6) Province of Bombay v. Hormusji Manekji, 50 Bom LR 524 = (AIR 1947 PC 200).

mined by the facts of the case and the nature of the order which is being revised.

12. It seems to us that Section 65 itself indicates the length of the reasonable time within which the Commissioner must act under Section 211. Under Section 65 of the Code if the Collector does not inform the applicant of his decision on the application within a period of three months the permission applied for shall be deemed to have been granted. This section shows that a period of three months is considered ample for the Collector to make up his mind and beyond that the legislature thinks that the matter is so urgent that permission shall be deemed to have been granted. Reading Sections 211 and 65 together it seems to us that the Commissioner must exercise his revisional powers within a few months of the order of the Collector. This is reasonable time because after the grant of the permission for building purposes the occupant is likely to spend money on starting building operations at least within a few months from the date of the permission. In this case the Commissioner set aside the order of the Collector on October 12, 1961, i. e., more than a year after the order, and it seems to us that this order was passed too late.

13. We are also of the opinion that the order of the Commissioner should be quashed on the ground that he did not give any reasons for his conclusions. We have already extracted the passage above which shows that after reciting the various contentions he baldly stated his conclusions without disclosing his reasons. In a matter of this kind the Commissioner should indicate his reasons, however briefly, so that an aggrieved party may carry the matter further if so advised.

14. We are also of the opinion that the Commissioner should not have gone into the question of title. It seems to us that when the title of an occupant is disputed by any party before the Collector or the Commissioner and the dispute is serious the appropriate course for the Collector or the Commissioner would be to refer the parties to a competent court and not to decide the question of title himself against the occupant.

15. In the result the appeal is dismissed with costs.

GGM/D.V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 1302
(V 56 C 239)

(From Gujarat 1963-4 Guj LR 1001)

S M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ

State of Maharashtra, Appellant v.
Bhashankar Avalram Joshi and another,
Respondents

Civil Appeal No 647 of 1966, D/- 10-3-1969

(A) Constitution of India, Article 311 (2)
— Non-supply of copy of enquiry report
amounts to denial of reasonable opportunity.

The failure on the part of the competent authority to provide the plaintiff with a copy of the report of the Enquiry Officer amounts to denial of reasonable opportunity contemplated by Article 311 (2) AIR 1964 SC 364, Foll; (1963) 4 Guj LR 1001, Affirmed

(Para 6)

It is true that the question whether reasonable opportunity has or has not been afforded to the Government servant must depend on the facts of each case, but it would be in very rare cases indeed in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry Officer.

(Para 9)

(B) Bombay Reorganisation Act (1960), Sections 60 and 61 — Some element of relationship between public servant and Government is based on contract within Section 60 — Decree for arrears of salary more properly falls under S. 60.

Some elements of relationship between a public servant and Government are based on contract within the meaning of Section 60 of the Act. In particular the liability to pay salary, when it has been fixed, arises out of a contract to pay salary. Thus the decree of a Court for payment of arrears of salary is truly a liability in proceedings relating to a contract within Section 60 (2) (a) of the Act. It is true, that the words 'actionable wrong other than breach of contract' in Section 61 in this context are wide words and include something more than torts, but even so where a suit is brought by a Government servant for arrears of salary, the decree more properly falls under Section 60 of the Act rather than under Section 61. Case law discussed. (1963) 4 Guj LR 1001, Affirmed

(Paras 14, 17)

Cases Referred: Chronological Paras

- (1964) AIR 1964 SC 364 (V 51) =
1964-4 SCR 718, Union of India v H C. Goel 8
- (1956) 1956-1 All ER 807 =
1956-2 WLR 919, Inland Revenue Commissioners v Hambrook 14, 16
- (1954) AIR 1954 SC 245 (V 41) =
1954 SCR 786, State of Bihar v Abdul Majid 13
- (1953) 1953-2 QB 482 = 1953-2 All ER 490, Terrell v. Secy. of State for the Colonies 16
- (1951) AIR 1951 SC 23 (V 38) =
1951 SCR 1, State of Tripura v Province of East Bengal 17
- (1934) 1934 AC 176 = 103 LJPC 41, Reilly v R. 14, 16
- (1911) 1911 AC 413 = 80 LJKB 1067, Owner of S. S. Raphael v Brandy 14
- (1884) 9 AC 745 = 53 LJPC 85, R v Doutre 16
- (1869) 29th May 1869, The Times Bushe v. R. 16

M/s P. K. Chatterjee and S. P. Nayar, Advocates, for Appellant; Mr. I N Shroff, Advocate, for Respondent No. 1. M/s S K Dholakia and Vineet Kumar, Advocates, for Respondent No. 2.

The following Judgment of the Court was delivered by

SIKRI, J.: This appeal by special leave arises out of the suit filed by Bhashankar Avalram Joshi, hereinafter referred to as the plaintiff for a declaration that the order of dismissal, dated February 2/4, 1955, passed by the Inspector General of Prisons, Saurashtra, was illegal and void on the ground that it contravened the provisions of Article 311 (2) of the Constitution. The plaintiff also prayed for a decree for Rs 2,690/- being arrears of his pay from April 1, 1954, to May 7, 1956.

2. The plaintiff failed before the Civil Judge, Rajkot, but on appeal succeeded before the District Judge, Central Saurashtra, inasmuch as he declared the order dated February 2/4, 1955, illegal and void. The plaintiff appealed to the High Court claiming arrears of salary and the State of Bombay filed cross-objections praying that the suit be dismissed. The second appeal was heard by the High Court of Gujarat (Miabhoj J) who directed that the decree passed by the lower appellate court be varied so as to

show that the appellant (plaintiff) continued to be in Government service till date of the suit only and there will be a decree for Rs. 2,690/- being arrears of pay due to the appellant (plaintiff) upto the date of the suit. There will be a further provision in the decree that the liability arising out of the declaration that the appellant is in Government service is the liability of the State of Gujarat and that the liability for the payment of the arrears of pay is the liability of the State of Maharashtra." The State of Maharashtra filed an application for leave to appeal under the Letters Patent but this was dismissed. The appeal is now before us.

3. The learned counsel for the appellant, the State of Maharashtra, contends, first, that the High Court erred in holding that there had been a breach of Article 311 (2) of the Constitution, as, according to him, there was no duty to supply a copy of the report of the enquiry held against the plaintiff. Secondly he contends that the High Court erred in fastening the liability in respect of the arrears of pay on the State of Maharashtra.

4. Before we deal with the above points we may give a few facts. The plaintiff entered service in the Gondal State in 1927 as a jailor. The Gondal State merged with the United States of Saurashtra. On March 6, 1953, the plaintiff was appointed senior jailor, Surendranagar District Jail. On March 25, 1954, he was suspended, and at that time he was acting as accountant at Rajkot Central Jail. On March 27, 1954, he was served with a charge-sheet. In substance the charges were that while he was serving at Surendranagar he had committed certain acts of misappropriation of food stuffs meant for prisoners, maltreatment of prisoners and acceptance of illegal gratification from them. The plaintiff filed a written statement on September 4, 1954, and an enquiry was held by Mr. Gangopadhyay. The plaintiff appeared before that officer and cross-examined witnesses. He also examined himself and some witnesses. He was also allowed to appear through an Advocate in the enquiry proceedings. The Enquiry Officer made a report and on or about January 7, 1955 the following notice was issued to him calling upon him to show cause why he should not be dismissed from service:

"To

Shri Bhaishanker A. Joshi,
Accountant, Rajkot Central
Prison

(Under suspension)

Charges framed against you under this office No. C/14 dated 27th March 1954 and in particular the charge of having accepted illegal gratification from prisoner Ratilal Jivan have been established to the satisfaction of Government. You are hereby asked to show cause why the punishment of dismissal from service should not be inflicted upon you.

You should please submit your reply to this office, through the Superintendent, Rajkot Central Prison, within a week from the date of receipt of this letter without fail.

Sd/- M. J. Bhatt.

Inspector General of Prisons,
Government of Saurashtra."

The plaintiff filed a written statement. He was dismissed by the Inspector General of Prisons by his order dated February 2/4, 1955. This order was amended on February 9, 1955, in which it was stated that "the aforesaid order should be read so as to show that the plaintiff was dismissed from service on account of charge of accepting illegal gratification from prisoner Ratilal Jivan having been conclusively proved against him in the departmental inquiries conducted against him by the Government."

5. In the plaint the plaintiff alleged that copy of the enquiry report was never supplied to him, and consequently he had not been given reasonable opportunity within the meaning of Article 311 of the Constitution. The State of Bombay admitted that the plaintiff was not supplied with a copy of the report of the Enquiry Officer, but pleaded that the plaintiff had not asked for copy of the report and had not been prejudiced by the non-supply of the copy of the report.

6. The High Court held that the failure on the part of the competent authority to provide the plaintiff with a copy of the report of the Enquiry Officer amounted to denial of reasonable opportunity contemplated by Article 311 (2) of the Constitution.

7. It seems to us that the High Court came to a correct conclusion. The plaintiff was not aware whether the Enquiry Officer reported in his favour or against him. If the report was in his

favour, in his representation to the Government he would have utilised its reasoning to dissuade the Inspector General from coming to a contrary conclusion, and if the report was against him he would have put such arguments or material as he could to dissuade the Inspector General from accepting the report of the Enquiry Officer. Moreover, as pointed out by the High Court, the Inspector General of Prisons had the report before him and the tentative conclusions arrived at by the Enquiry Officer were bound to influence him, and in depriving the plaintiff of a copy of the report he was handicapped in not knowing what material was influencing the Inspector General of Prisons.

8 As observed by Gajendragadkar, J., as he then was, in *Union of India v. H C Goel*, 1964-4 SCR 718 at p 728 = (AIR 1964 SC 364) at p 368, "the enquiry report along with the evidence recorded constitute the material on which the Government has ultimately to act. That is the only purpose of the enquiry held by competent officer and the report he makes as a result of the said enquiry."

9 It is true that the question whether reasonable opportunity has or has not been afforded to the Government servant must depend on the facts of each case, but it would be in very rare cases indeed in which it could be said that the Government servant is not prejudiced by the non-supply of the report of the Enquiry Officer.

10 In the result we must overrule the first contention urged on behalf of the appellant, the State of Maharashtra.

11 The plaintiff is not concerned with the second contention but it is a dispute between the State of Maharashtra and the State of Gujarat. As is well known, the State of Bombay was reorganised into the above two States and the Bombay Reorganisation Act, 1960, contained various provisions for the apportionment of assets and liabilities between the two States. We are here concerned with Ss 60 and 61 of the Bombay Reorganisation Act, 1960, which read thus:

"60 (1) Where, before the appointed day, the State of Bombay has made any contract in the exercise of its executive power for any purposes of the State, that contract shall be deemed to have been made in the exercise of the executive power,—

(a) if such purposes are, as from that day, exclusively purposes of either the

State of Maharashtra or the State of Gujarat, of that State, and

(b) in any other case, of the State of Maharashtra;

and all rights and liabilities which have accrued, or may accrue, under any, such contract shall, to the extent to which they would have been rights or liabilities of the State of Bombay, be rights or liabilities of the State of Maharashtra or the State of Gujarat, as the case may be.

Provided that in any such case as is referred to in Clause (b), the initial allocation of rights and liabilities made by this sub-section shall be subject to such financial adjustment as may be agreed upon between the State of Maharashtra and the State of Gujarat, or, in default of such agreement, as the Central Government may by order direct.

(2) For the purposes of this section there shall be deemed to be included in the liabilities which have accrued or may accrue under any contract—

(a) any liability to satisfy an order or award made by any court or other tribunal in proceedings relating to the contract, and

(b) any liability in respect of expenses incurred in or in connection with any such proceedings.

(3) This section shall have effect subject to the other provisions of this Part relating to the apportionment of liabilities in respect of loans, guarantees and other financial obligations, and bank balances and securities shall, notwithstanding that they partake of the nature of contractual rights, be dealt with under those provisions.

61. Where, immediately before the appointed day, the State of Bombay is subject to any liability in respect of any actionable wrong other than breach of contract, that liability shall,—

(a) if the cause of action arose wholly within the territories which, as from that day, are the territories of the State of Maharashtra or the State of Gujarat, be a liability of that State, and

(b) in any other case, be initially a liability of the State of Maharashtra but subject to such financial adjustment as may be agreed upon between the States of Maharashtra and Gujarat or, in default of such agreement, as the Central Government may by order direct."

12 The learned counsel for the State of Maharashtra contends that the liability to pay arrears of pay was not a liability arising out of a contract but was a

liability in respect of an actionable wrong other than a breach of contract.

13. This Court in *State of Bihar v. Abdul Majid*, 1954 SCR 786 = (AIR 1954 SC 245) held "that the rule of English Law that a civil servant cannot maintain a suit against the Crown for the recovery of arrears of salary does not prevail in India and it has been negated by the provisions of the statute law in India." Mahajan, C. J., speaking for the Court, observed at p. 802 (of SCR) = (at p. 251 of AIR):

"As regards torts of its servants in exercise of sovereign powers, the company was not, and the Crown in India was not liable unless the act has been ordered or ratified by it. Be that as it may, that rule has no application to the case of arrears of salary earned by a public servant for the period that he was actually in office. The present claim is not based on tort but is based on quantum meruit or contract and the Court is entitled to give relief to him."

14. It may be that these observations are not conclusive on the point under consideration. It seems to us, however, that some elements of relationship between a public servant and Government are based on contract within the meaning of Section 60 of the Bombay Reorganisation Act, 1960. In particular, the liability to pay salary, when it has been fixed, arises out of a contract to pay salary. Authority is not lacking even in England where a special relationship exists between the Crown and its public servants. In *Owner of S. S. Raphael v. Brandy*, 1911 AC 413 (414) the head-note reads:

"A stoker on board a merchant ship, who was entitled to wages from the ship-owners, and also as a stoker in the Royal Naval Reserve to 6£ a year as a retainer, was injured by an accident on the ship which disabled him from continuing to serve in the Royal Naval Reserve:—

Held, that the stoker was entitled under the Workmen's Compensation Act, 1906, to compensation from the ship-owners not only in respect of his wages but also of the retainer, which must be taken into account as earnings under a concurrent contract of service." The Lord Chancellor in the course of the speech observed:

"A point was made before your Lordships which does not appear to have been made in the Court below, that there was no contract with the Crown at all here. The authorities cited go no further than to say that when there is an

engagement between the Crown and a military or naval officer the Crown is always entitled to determine it at pleasure, and that no obligation contrary to that would be recognized or valid in law.

It was then said that there were not here concurrent contracts. I agree with Fletcher Moulton, L. J. that this is almost a typical case of concurrent contracts, because the workman was being paid wages for his services on board a merchant ship, and at the same time he was earning his 6£ a year by virtue of his engagement with the Crown; and he was giving an equivalent for that, because he was keeping himself fit and doing the work which he stipulated to do." It is true that Lord Goddard, C. J., in *Inland Revenue Commissioners v. Hambrook*, 1956-1 All ER 807, at pp. 811-12 observed:

"If I may be bold enough to express a conclusion on a matter on which the Judicial Committee hesitated in *Reilly v. R.*, 1934 AC 176 (179) it is that an established civil servant is appointed to an office and is a public officer, remunerated by moneys provided by Parliament, so that his employment depends not on a contract with the Crown but on appointment by the Crown, though there may be as indicated in *Reilly v. R.*, 1934 AC 176 (179) exceptional cases, as for instance an engagement for a definite period where there is a contractual element in or collateral to his employment." But in the Court of Appeal nothing was said about these observations.

15. It will be remembered that the Privy Council had said in *Reilly v. R.*, 1934 AC 176 (179), that "their Lordships are not prepared to accede to this view of the contract, if contract there be. If the terms of the appointment definitely prescribe a term and expressly provide for a power to determine "for cause" it appears necessarily to follow that any implication of a power to dismiss at pleasure is excluded."

16. Even Lord Goddard C. J., in *Terrell v. Secretary of State for the Colonies*, 1953-2 QB 482, (499) observed that "the case (1934) AC 176, shows that there may be contractual rights existing before determination of a contract at will which are not inconsistent with a power to determine," and he stuck to this in *Hambrook's case*, 1956-1 All ER 807 by stating:

"Although it is clear that no action for wrongful dismissal can be brought by a discharged civil servant, I may be allow-

ed to say that I adhere to the opinion which I expressed in 1953-2 QB 482, 499 that he could recover his salary for the time during which he has served. He would claim on a quantum meruit and I am fortified in this view by 1934 AC 176, by *R. v. Doutre*, (1884) 9 AC 745, and by *Bushe v. R.*, 29th May, 1869, *The Times*, referred to in Robertson's book p 338."

17. We are here concerned with a choice between S 60 and S 61, which lay down two broad categories. It seems to us that the decree of the High Court decreeing payment of arrears of salary is truly a liability in proceedings relating to a contract within Section 60 (2) (a) of the Act. It is true, as held by this Court in the State of Tripura v. The Province of East Bengal, 1951 SCR 1 at p 44 = (AIR 1951 SC 23 at p 39) that the words 'actionable wrong other than breach of contract' in this context are wide words and include something more than torts, but even so where a suit is brought by a Government servant for arrears of salary, the decree more properly falls under Section 60 of the Act rather than under Section 61.

18. In the result the appeal fails and is dismissed with costs to the respondent, Barshankar Avalram Joshi. The State of Gujarat will bear its own costs in this appeal.

MOVJ/D V.C.

Appeal dismissed.

AIR 1969 SUPREME COURT 1306

(V 56 C 240)

(From Andhra Pradesh ILR

(1967) Andh Pra 361)

J M SHELAT AND V. BHARGAVA, JJ.
Praga Tools Corporation, Appellant v.
C V Imanuel and others, Respondents
Civil Appeal No 612 of 1966, D/-
19-2-1969

(A) Constitution of India Art. 226 — Mandamus — There must be legal right to performance of legal duty — Writ cannot issue to company which is not statutory or having any public duty or responsibility imposed by statute to restrain company from enforcing agreement arrived at between Union and Company. ILR (1967) Andh Pra 361, Affirmed — Court cannot also grant declaration about illegality of agreement in favour of petitioners. ILR (1967) Andh Pra 361, Reversed.

IM/IM/B125/69/D

Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Case law discussed. ILR (1967) Andh Pra 361, Affirmed (Para 6)

Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official body. (Para 6)

The company being a non-statutory body and one incorporated under the Companies Act there is neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus nor is there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. (Para 7)

Further, if a public authority purports to dismiss an employee otherwise than in accordance with mandatory procedural requirements or on grounds other than those sanctioned by the statute the courts would have jurisdiction to declare its act a nullity. But where it is held that a mandamus or an order in the nature of a mandamus cannot be issued against a company registered under the Companies Act, the court cannot also grant a declaration about the illegality of an agreement, in favour of the petitioners. ILR 1967 Andh Pra 361, Reversed AIR 1962 SC 486 and AIR 1962 SC 922, Dist. (Para 9)

The workmen should be left to have resort to remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. (Para 9)

(B) Companies Act (1956), Sections 2 (18) and 617 — Industrial Disputes Act (1947), Section 2 (j) — Company — Shares held by Union Government, State Government and private individuals, Union Government being largest shareholder nominating Company's directors — Held, that the Company being registered under the Companies Act and governed by the provisions of that Act, it was a separate legal entity and could not be said to be either a Government Corporation or an industry run by or under the authority of the Union Government.

(Para 1)

Cases Referred: Chronological Paras

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|---|---|
| (1965) 1965-1 QB 377=1964-3 WLR 680, Ragina v. Industrial Court | 6 |
| (1964) 1964 AC 40=1963-2 All ER 66, Ridge v. Baldwin | 8 |
| (1962) AIR 1962 SC 486 (V 49)=1962 Supp (1) SCR 381, Bidi, Bidi Leaves and Tobacco Merchants Association v. State of Bombay | 9 |
| (1962) AIR 1962 SC 922 (V 49)=1962 Supp (2) SCR 741, A. B. Abdul Kadir v. State of Kerala | 9 |
| (1961) 1961-1 QB 366=1961-2 WLR 111, Attorney General v. St. Ives R. D. C. | 8 |
| (1957) AIR 1957 SC 529 (V 44)=1957 SCR 738, Sohan Lal v. Union of India | 6 |
| (1957) 1957-1 WLR 594=1957-2 All ER 129, Mc Clelland v. Northern Ireland General Health Services Board | 8 |
| (1926) 1926 Ch. 66=95 LJ Ch. 110 Short v. Poole Corporation | 8 |
| (1897) 1897-1 QB 498=66 LJ QB 403, R. v. Lewisham Union | 6 |

Mr. S. V. Gupte, Senior Advocate (Mr. R. Thiagarajan, Advocate of M/s. Aiyar and Aiyar, with him), for Appellant; Mr. Janardan Sharma, Advocate, for Respondents 1 to 3.

The following Judgment of the Court was delivered by

SHELAT, J.:— The Praga Tools Corporation (hereinafter referred to as the company) is a company incorporated under the Indian Companies Act, 1913. At the material time, however, the Union Government and the Government of Andhra Pradesh between them held 56 per cent and 32 per cent of its shares respectively and the balance of 12 per cent shares were held by private individuals.

Being the largest shareholder, the Union Government had the power to nominate the company's directors. Even so, being registered under the Companies Act and governed by the provisions of that Act, the company is a separate legal entity and cannot be said to be either a Government corporation or an industry run by or under the authority of the Union Government.

2. At the material time there were two rival workmen's unions in the company, the Praga Tools Employees' Union and the Praga Tools Corporation Mazdoor Sabha (hereinafter referred to as the union and the sabha respectively). On July 1, 1961 a settlement was arrived at between the company and the said union under which the workmen inter alia agreed to observe industrial truce for a period of three years and not to resort to strikes, stoppage of work or go-slow tactics. On December 10, 1962 the company and the said union entered into a supplementary settlement under which the company agreed not to retrench or lay-off any of the workmen during the said period of truce on an assurance from the said union of co-operation and willingness of the workmen to carry out alternative tasks assigned to them even if they were in a slightly lower cadre without loss of emoluments. The said two settlements were arrived at and recorded in the presence of the Commissioner of Labour under Sections 2 (p) and 18 (1) of the Industrial Disputes Act, 1947 and were to be in force as aforesaid until July 1, 1964. On December 20, 1963, however, the company entered into an agreement with the said union to which the said sabha was not a party. The agreement recited that there were several disputes between the company and the union and that some of them were the subject-matter of conciliation proceedings and some were pending arbitration or adjudication. Clause (1) provided that the said agreements dated July 1, 1961 and December 10, 1962 to the extent that they were inconsistent with this agreement would stand automatically repealed or modified by this agreement. Clause (6) stated that there was an immediate, unavoidable need for reducing substantially the overhead expenditure of the company and for effecting economy and therefore notwithstanding the agreement dated December 10, 1962 "both the parties have prepared a list of the categories and persons who would be retrenched after careful consideration".

The said list was attached to the agreement as annexure VI. Clause (6) also provided that the agreement dated December 10, 1962 stood modified so as to allow the said retrenchment to take place immediately in accordance with law. The clause further provided that in order to mitigate the consequences of the proposed retrenchment the company had evolved a scheme of voluntary retirement with terminal benefits superior to those provided under the Industrial Disputes Act, but the scheme of voluntary retirement would be available to the workmen only for a period of 10 days from the date of the agreement. It further provided that the company and the said union had agreed that an attempt would be made to rehabilitate the retrenched persons by helping them to obtain alternative employment and the company had for that purpose contacted public sector and other industries and in particular the Heavy Engineering Corporation, Ranchi for absorption as far as possible of the retrenched personnel. The effect of this agreement was to enable the company, notwithstanding the two earlier settlements, to carry out retrenchment of 92 workmen mentioned in annexure VI thereto with effect from January 1, 1964.

3. Respondent 1 and 40 other workmen thereupon filed a writ petition under Article 226 in the High Court of Andhra Pradesh challenging the validity of the said agreement impleading therein the company, the said union and the Regional Assistant Commissioner as respondents. The petition claimed a writ of mandamus or an order in the nature of mandamus or any other order or direction restraining the respondents to implement or enforce the said agreement. The writ petition was in the first instance heard by a learned Single Judge of the High Court before whom the workmen raised the following contentions: (1) that the said agreement dated December 20, 1963 was invalid as it was entered into by the union in collusion with the company and was in violation of the said two earlier settlements, (2) that there could be no industrial dispute within the meaning of Section 2 (k) of the Act as the said two earlier settlements, not having been terminated under Section 19 (2), were in force, that therefore there could not be a valid condition under S. 12 and accordingly the fact of the conciliation officer having signed the impugned agreement gave no binding force to it, (3) that the retrenchment of the 92 work-

men was illegal and void as it was in breach of Section 25-F inasmuch as no notice thereof was given to the appropriate Government, and (4) that the company being under the management of the Union Government, the appropriate Government in regard to the dispute was the Central Government and not the State Government and consequently the impugned agreement which was signed by the conciliation officer appointed by the State Government was not valid and no retrenchment could validly be effected under the force of such agreement.

4. The learned Single Judge negatived these contentions holding that the company was neither an industry run by or under the authority of the Union Government nor under its management but being a company registered under the Companies Act the appropriate Government was the State Government. He also held that there was no proof of the said union having entered into the impugned agreement in collusion with the company. He further held that the union by its letter dated April 5, 1963, had raised an industrial dispute and had thereby requested that the question of retrenchment should be settled between the parties, that the said dispute with the consent of the company and the union was brought for conciliation before the conciliation officer and that the impugned agreement, having been brought about in the course of the said conciliation proceedings, was binding on all workmen including the petitioners in the writ petition despite the fact that they were members of the sabha and not of the union. In this view the learned Single Judge held that it was not necessary for him to decide the preliminary objection raised by the company that no writ petition for a mandamus could lie against it. He dismissed the writ petition on merits on the basis of the aforesaid findings given by him. 28 out of the said 41 workmen who had filed the writ petition filed a letters patent appeal against the said judgment. The Division Bench of the High Court which heard the appeal held, (1) that since the dispute relating to the company's right to retrenchment was already settled under Section 18 (1) by the said supplementary settlement of December 10, 1962, no industrial dispute could be said to exist or arise until the said settlement was duly terminated under Sec. 19 (2), that therefore there could be no valid conciliation proceedings in respect of the question of retrenchment and that the impugned

agreement permitting the company to retrench, though it bore the signature of the conciliation officer, was not a valid agreement; (2) that so long as the earlier settlements were not terminated they held the field, and (3) that the said letter dated April 5, 1963 relied on by the learned Single Judge as having raised an industrial dispute regarding retrenchment did not in fact contain or raise any such question. The Division Bench held that the said letter raised only the question of revision of wage-structure and other demands but not the question of retrenchment. The letter of July 29, 1963 of the conciliation officer to the company relied on by the company also referred to the demands contained in the said letter of April 5, 1963, namely, the revision of wage-structure, dearness allowance, promotion and other matters, but not the question of the company's right of retrenchment. The Division Bench therefore held that there was nothing on record to show that retrenchment was the subject-matter of any conciliation before the conciliation officer and therefore any agreement conferring on the company the right to retrench so long as the said earlier settlements were not terminated was invalid in spite of the conciliation officer having given his assent to and affixed his signature on it. The learned Judges, however, held that the company being one registered under the Companies Act and not having any statutory duty or function to perform was not one against which a writ petition for a mandamus or any other writ could lie. No such petition could also lie against the conciliation officer as on the facts of the case that officer did not have to implement the impugned agreement. The Division Bench, however, held that though the writ petition was not maintainable it could grant a declaration in favour of three workmen, namely, appellants 6, 16 and 25 before it, that the impugned agreement was illegal and void and dismissed the writ petition subject to the said declaration. The company challenges in this appeal by special leave the validity of this judgment making such a declaration.

5. Thus the only question which arises in this appeal is whether in the view that it took that the writ petition was not maintainable against the company the High Court could still grant the said declaration.

6. In our view the High Court was correct in holding that the writ petition

filed under Art. 226 claiming against the company mandamus or an order in the nature of mandamus was misconceived and not maintainable. The writ obviously was claimed against the company and not against the conciliation officer in respect of any public or statutory duty imposed on him by the Act as it was not he but the company who sought to implement the impugned agreement. No doubt, Article 226 provides that every High Court shall have power to issue to any person or authority orders and writs including writs in the nature of habeas corpus, mandamus, etc. or any of them for the enforcement of any of the rights conferred by Part III of the Constitution and for any other purpose. But it is well understood that a mandamus lies to secure the performance of a public or statutory duty in the performance of which the one who applies for it has a sufficient legal interest. Thus, an application for mandamus will not lie for an order of restatement to an office which is essentially of a private character nor can such an application be maintained to secure performance of obligations owed by a company towards its workmen or to resolve any private dispute. [See *Sohan Lal v. Union of India*, 1957 SCR 738 = (AIR 1957 SC 529)]. In *Regina v. Industrial Court*, 1965-1 QB 377, mandamus was refused against the Industrial Court though set up under the Industrial Courts Act, 1919 on the ground that the reference for arbitration made to it by a minister was not one under the Act but a private reference. "This Court has never exercised a general power" said Bruce, J., in *R. v. Lewisham Union*, 1897-1 QB 498, 501 "to enforce the performance of their statutory duties by public bodies on the application of anybody who chooses to apply for a mandamus. It has always required that the applicant for a mandamus should have a legal and a specific right to enforce the performance of those duties". Therefore, the condition precedent for the issue of mandamus is that there is in one claiming it a legal right to the performance of a legal duty by one against whom it is sought. An order of mandamus is, in form, a command directed to a person, corporation or an inferior tribunal requiring him or them to do a particular thing therein specified which appertains to his or their office and is in the nature of a public duty. It is, however, not necessary that the person or the authority on whom the statutory duty is imposed need be a public official or an official

body. A mandamus can issue, for instance, to an official of a society to compel him to carry out the terms of the statute under or by which the society is constituted or governed and also to companies or corporations to carry out duties placed on them by the statutes authorising their undertakings. A mandamus would also lie against a company constituted by a statute for the purposes of fulfilling public responsibilities [Cf Halsbury's Laws of England (3rd Ed.), Vol II, p 52 and onwards].

7 The company being a non-statutory body and one incorporated under the Companies Act there was neither a statutory nor a public duty imposed on it by a statute in respect of which enforcement could be sought by means of a mandamus, nor was there in its workmen any corresponding legal right for enforcement of any such statutory or public duty. The High Court, therefore, was right in holding that no writ petition for a mandamus or an order in the nature of mandamus could lie against the company.

8 The grievance of the company, however, is that though the High Court held rightly that no such petition was maintainable, it nevertheless granted a declaration in favour of three of the said workmen, a declaration which it could not issue once it held that the said writ petition was misconceived. The argument was that such a declaration, if at all, could only issue against public bodies or companies or corporations set up or controlled by statutes in respect of acts done by them contrary to or in breach of the provisions of such statutes. If a public authority purports to dismiss an employee otherwise than in accordance with mandatory procedural requirements or on grounds other than those sanctioned by the statute the courts would have jurisdiction to declare its act a nullity. Thus, where a Hospital Services' Board dismissed a clerk for reasons not authorised by the relevant conditions of service a declaration was granted to the applicant by the House of Lords [Mc Clelland v. Northern Ireland General Health Services Board, 1957-1 WLR 594]. Even where a statutory power of dismissal is not made subject to express procedural requirements or limited to prescribed grounds courts have granted a declaration that it was invalidly exercised if the authority has failed to observe rules of natural justice or has acted capriciously or in bad faith or for impliedly unauthorised purposes.

[See Ridge v. Baldwin, 1964 AC 40 and Short v Poole Corporation, 1928 Ch 66 at pp. 90 and 91]. Declarations of invalidity have often been founded on successful assertions that a public duty has not been complied with. See Attorney General v St. Ives R D C, 1961-1 QB 366. It is, therefore, fairly clear that such a declaration can be issued against a person or an authority or a corporation where the impugned act is in violation of or contrary to a statute under which it is set up or governed or a public duty or responsibility imposed on such person, authority or body by such statute.

9 The High Court, however, relied on two decisions of this Court as justifying it to issue the said declaration. The two decisions are *Bidi, Bidi Leaves and Tobacco Merchants' Association v. The State of Bombay*, 1962 Supp 1 SCR 381 = (AIR 1962 SC 486) and *A. B. Abdulkadir v. State of Kerala*, 1962 Supp (2) SCR 741 = (AIR 1962 SC 922). But neither of these two decisions is a parallel case which could be relied on. In the first case, the declaration was granted not against a company, as in the present case, but against the State Government and the declaration was as regards the invalidity of certain clauses of a notification issued by the Government in pursuance of power under Section 5 of the Minimum Wages Act, 1948 on the ground that the said clauses were beyond the purview of that section. In the second case also, certain rules made under the Cochin Tobacco Act of 1081 (M E) and the Travancore Tobacco Regulation of 1087 (M E) were declared void ab initio. These cases were therefore not cases where writ petitions were held to be not maintainable as having been filed against a company and despite that fact a declaration of invalidity of an impugned agreement having been granted. In our view once the writ petition was held to be misconceived on the ground that it could not lie against a company which was neither a statutory company nor one having public duties or responsibilities imposed on it by a statute, no relief by way of a declaration as to invalidity of an impugned agreement between it and its employees could be granted. The High Court in these circumstances ought to have left the workmen to resort to the remedy available to them under the Industrial Disputes Act by raising an industrial dispute thereunder. The only course left open to the High Court was therefore to dismiss it. No such de-

claration against a company registered under the Companies Act and not set up under any statute or having any public duties and responsibilities to perform under such a statute could be issued in writ proceedings in respect of an agreement which was essentially of a private character between it and its workmen. The High Court, therefore, was in error in granting the said declaration.

10. The result is that the appeal must be allowed and the said declaration set aside. In the circumstances of the case we make no order as to costs.

MVJ/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 1311 (V 56 C 241)

(From Kerala: ILR (1965) 2 Ker 141)

J. C. SHAH AND A. N. GROVER, JJ.

Mani Mani and others, Appellants v. Mani Joshua, Respondent.

Civil Appeal No. 683 of 1966, D/- 21-3-1969.

Succession Act (1925), Section 180 — Doctrine of election — Testator by his last will cancelling previous settlement which was acted upon in favour of his sons J and M and bequeathing some properties including items given to M by settlement — Residue bequeathed to M — A would be put to election, either to take under settlement or will — ILR (1965) 2 Ker 141, Reversed.

In order to raise a case of election under a will it must be clearly shown that the testator intended to dispose of the particular property over which he had no disposing power. This intention must appear on the face of the will either by express words or by necessary conclusion from the circumstances disclosed by the will. The presumption, however, is that a testator intends to dispose of his own property and general words will not usually be construed so as to include other property. In the case of a will one may even gather an intention by the testator to include property belonging to another in a gift of residue for it is necessary to construe a will as a whole. Case law discussed. (1862) 54 ER 1104 and (1886) 54 LT 239, Foll. (Para 9)

By a registered settlement deed in the year 1935 the father of the plaintiff J., settled certain properties in favour of his wife and sons J and M. Mutations were

effected of the properties so settled in favour of the donees. Later on he executed three Wills on different dates and deposited them with the office of Registrar. In the third Will which was his last Will and testament he made a mention of the two settlements and the two previous Wills and declared that the last Will would be final and operative. By that Will he left certain items of properties to J. These items included the properties which had been given to M and his mother by the settlement of 1935. The residue was bequeathed to M. There was no specific mention in the last Will to the properties which had been settled on J in 1935. J filed a suit claiming the properties settled on him in the year 1935. He asserted that he had a right under the Will to get the items bequeathed to him therein in addition to the properties settled on him in the year 1935 which could not form the subject matter of any bequest by reason of the said settlement.

Held on construction of the Will that the testator intended to include properties gifted to J, by the settlement of 1935 in the bequest which he made to M of the entire residue. J was thus put to election and could not claim those properties if he wished to take the benefit under the Will. The testator treated the entire properties which had formed the subject-matter of gift or otherwise as his and which could be disposed of by him as he liked. If the testator did not want to make any disposition of those properties which formed the subject-matter of gift in 1935 there was no reason why he should have given to J properties which had been gifted to M and his mother. ILR (1965) 2 Ker 141, Reversed.

(Paras 6, 9)

Cases Referred:	Chronological	Paras
(1945) 1945-2 All ER 264 = 173 LT		
198, Re Allen's Estate, Prescott v. Allen and Beaumont		9
(1886) 54 LT 239 = 34 WR 346, Re Booker; Booker v. Booker		9
(1864) 10 LT 255 = 33 LJ Ch 511, Master of Rolls in Miller v. Thurgood		9
(1862) 54 ER 1104 = 31 Beav 173, Whitley v. Whitley		9

Mr. S. V. Gupte, Sr. Advocate (Mr. A. S. Nambiar, Advocate with him), for Appellants; Mr. Sarjoo Prasad, Sr. Advocate (M/s. P. Kesava Pillai, M. R. K. Pillai and Miss Lily Thomas, Advocates with him), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Kerala High Court by which the suit instituted by the respondent for recovery of properties described in Schedule A of the plaint and for mesne profits etc was decreed in reversal of the decree of the trial Court, dismissing the suit.

2. Uthupu Mani who died in the year 1943 had three sons. The eldest son Uduppu died sometimes between 1929 and 1935. The second son Joshua is the respondent herein, the appellants being the third son Mani Mani and Mariamma their mother and the widow of Uthupu. Uthupu left some daughters also and appellant No 3 Mani Achamma is one of the daughters. The controversy in the suit out of which the appeal has arisen was confined to a residential house in an area of 10 cents in Kottayam town. This property along with several other properties originally belonged to Uthupu who made certain settlements followed by wills. The first settlement was made in the year 1102 ME corresponding to 1927 AD when Uduppu was alive and Mani Mani was not born. On October 9, 1935 by means of another registered document (Exh. A) called Udampady, Uthupu settled properties thus. Those comprised in A Schedule were given to Mariamma, in B Schedule to Joshua and in C Schedule to Mani. The Schedules contained the following properties—

“To Mariamma (A Schedule)

Building constructed as Hall and the Cart-shed on 2 cents

To Joshua (B Schedule)

Stored building and 30 cents garden land

To Mani Mani (C Schedule)

Four rooms facing West and 30 cents of garden land”

It appears and it has been so found that mutations were effected of the properties so settled in favour of the donees. Later on Uthupu executed a will which he put in an envelope and deposited it in the office of the District Registrar, Kottayam in January 1943. He executed a second will in April 1943 and kept it in custody of the District Registrar. He executed a third will (Exh. 3) on May 31, 1943 which was his last will and testament. In this will he made a mention of the two settlements and the two previous wills and declared that the last will would be final and operative. His other declarations and statements in the will (Exh. 3)

will be presently considered as the entire controversy in the present litigation centres on a correct assessment and appraisal of their true scope and effect. It may be mentioned that by this will he left five items of properties to Joshua. These items included the properties in C Schedule which had been given to Mani by the settlement of 1935 and the cart-shed on two cents of land contained in Schedule A which had been given to Mariamma by that settlement. There was no specific mention in the will (Exh. 3) to the B Schedule properties which had been settled on Joshua in 1935.

3. In 1935 Joshua filed a suit laying claim to the B Schedule properties settled on him in the year 1935. His case was founded principally on the allegation that B Schedule properties which had been settled on him in 1935 vested in him by virtue of the settlement and he was the owner thereof and that the five items of properties which were left by the will (Exh. 3) were quite independent of and separate from the aforesaid B Schedule properties. In other words he asserted that he had a right under the will to get the five items bequeathed to him therein in addition to the B Schedule properties which had been settled on him in the year 1935 and which could not form the subject-matter of any bequest by Uthupu by reason of the said settlement. The position taken up on behalf of Mariamma, Mani etc—the defendants—was that the plaintiff had accepted the benefit under the will by taking the five items of properties bequeathed to him thereby which included the properties originally allotted under the settlement of 1935 to Mariamma and Mani. He had thus exercised his right of election to take the properties under the will and was precluded from asserting any right to properties given to him under the settlement of 1935.

4. A number of issues were framed on the pleadings of the parties. The main question for consideration, however, was whether the settlement of 1935 had been given effect to and whether plaintiff's suit merited dismissal on account of the applicability of the doctrine of election embodied in Section 180 of the Indian Succession Act. The trial court held that the settlement of 1935 had been given effect to and mutations had been duly made in the revenue register in accordance with the settlement deed. It was found that the plaintiff had obtained title to and possession of the suit properties comprised

in B Schedule in the settlement of 1935. The suit was dismissed on the ground that the will (Exh. 3) clearly showed that the testator purported to cancel the arrangement by the deed of settlement of 1935 and had made bequests under the will to the plaintiff of some of the properties which had been settled on Mariamma and Mani in the year 1935. This attracted the rule contained in Section 180 of the Succession Act and since the plaintiff had elected to accept the benefit under the will he was not entitled to claim any right on the basis of the deed of settlement of 1935.

5. The High Court acceded to the argument pressed on behalf of Joshua who was the appellant before it that on a proper reading of the will it could not be held that the testator professed to dispose of the suit properties which had been gifted to the plaintiff by means of the settlement deed of 1935. The High Court was influenced by the fact that there was no specific mention of these properties in the will and according to it mere general words of disposition could not be taken to contain an intention to deal with the properties belonging to a third party, namely, the plaintiff. The following part of the Judgment may be reproduced:

"Having due regard to these passages in the various text-books based upon judicial decisions and which have been placed before me by Mr. T. S. Krishnamoorthy Iyer and Mr. M. U. Isaac in my view, the decision rendered by the learned Subordinate Judge that Section 180 of the Indian Succession Act applied and that the appellant has elected to take the benefit under the will and therefore he cannot claim any further benefits on the basis of Ex. A, cannot certainly be sustained. So far as I could see, there is no specific disposition of the property already given to the plaintiff under Ex. A, by the father in Ex. 3. No doubt the father has dealt with an item which was given under Ex. A to the first defendant and a part of the item given to the 2nd defendant under Ex. A in Ex. 3. If at all the question of the doctrine of election and the applicability of Section 180 of the Indian Succession Act comes into play, in my view, the election will really have to be made, not, by the plaintiff, but by really defendants one and two." As the applicability of the doctrine of the rule of election will depend on a correct and true reading of the will (Exh. 3) we proceed to notice the main recitals and

other prominent features to be found in it. The testator in the very beginning referred to the two settlements made by him in the years 1927 and 1935 and the two wills executed by him in the year 1943 which were deposited with the District Registrar, Kottayam. He said that by the first will which he had executed he had invalidated the two deeds of settlement. He then made the second will as he thought that some changes were necessary. The third will (Exh. 3) was made because he felt pity for Joshua whom he had apparently left no or very little property by his previous wills. This is what the testator said:

"But, since there originated in me an idea, on seeing the desperate look and repentant attitude of my son Joshua, that it is highly necessary to nullify certain historic statements made in the previous will and also to alter the conditions, such as share of my assets will not be given to Joshua and to his children in case he begets any, laid down by me owing to the ill-will I had towards Joshua, the eldest among the male children I have at present and towards the members of his wife's house because of certain reasons which I don't now purport to describe herein, this will is executed again afresh; and this alone will come into force after my life-time."

He further said that he had seven children alive at the time when the will was made namely two sons and five daughters out of whom two were married. He directed that after his death his wife Mariamma would take the entire income from his properties for meeting family expenses and payment of revenue dues etc. Then he made dispositions about payments in cash on the occasion of the marriages of his other daughters, with the exception of Achamma, who was described to be weak in health, and in his opinion, should not contract matrimony. An amount of Rs. 3,000 was to be deposited in her name which she was entitled to withdraw if she was married. During the period she remained unmarried she was entitled to take interest on that deposit for personal expenses. He gave other directions about arrangements for her residence etc. in case she remained unmarried. Then he proceeded to make the provision about bequest in these words:—

"Though I had provided in my previous will that my eldest son Joshua shall have only some right in the nature of a life

interest over my assets in respect of some petty items of profits, . . . Therefore I have forgiven him and I hereby allow him to enjoy for ever the immoveable properties described hereunder, and my younger son Mani Mani shall alone be the sole heir of the remaining entire assets belonging to me. But, my two sons shall become entitled to the properties allotted to them only after my two daughters are married and the deposit is made in Achamma's name and all the litigations in which I am a party are ended, and till that time my wife Mariamma shall take and conserve all the profits as described above in the status of an undivided family."

The only other declaration or statement in the will which deserves notice is the following —

"This will is executed by resolving as these and totally changing all the deeds registered by me prior to this and the Wills kept in custody, and this Will alone shall, unless I act otherwise, be and ought to be in force in future."

Now it is quite clear that the testator was somehow under the impression that he was competent to cancel and revoke not only the previous wills but also the two settlements including the one made in the year 1935. It appears that although by the registered deed of 1935 he had gifted certain properties to his wife and two sons he thought that he could undo what he had done by making a will by which he left virtually no property to Joshua since he was annoyed with him. That is apparently the reason why he clearly stated in the will (Ex 3) in the very beginning that he had executed a will "on 9th Makarom this year in accordance with law, invalidating the above two deeds".

6 He relented in favour of Joshua and that is the reason why he made the will (Exh 3) but his state of mind continued to be the same, namely, he considered that he was fully competent and entitled to cancel all previous settlements and wills and start, as if it were, on a clean slate. The detailed bequests which he made (Exh 3) indicate that he meant to dispose of the entire estate including the properties which had been the subject-matter of the settlement made in the year 1935. There are two strong indications in the will (Exh 3) of his having dealt with the entire property which he thought he could dispose of or in respect of which he could make bequests and

leave legacies on the footing that no title had passed to any of the donees under the settlement of 1935. The first is the recital both in the beginning and towards the concluding part of Exh 3 that he had cancelled the previous settlements and wills and that the only document which would govern the disposition of properties would be Exh 3. Even if it be assumed as has been suggested, by learned counsel for Joshua — respondent — that the declaration about invalidating the two deeds of settlement was confined to the first will executed in January 1943, the statement made towards the conclusion of the will (Exh 3) leaves no doubt that the testator sought to revoke not only the previous wills but also the registered deeds which clearly meant the deeds of settlement executed in 1927 and 1935 respectively. The second significant fact is that the testator purported to give to Joshua five items of property which included certain properties which had been given by the settlement of 1935 to Mariamma and Mani. If the testator did not want to make any disposition of those properties which formed the subject-matter of gift in 1935 there was no reason why he should have given to Joshua properties which had been gifted to Mariamma and Mani. All this could have happened only if the testator was treating the settlement of 1935 as non-existent having been revoked by him. We are satisfied that a correct reading of the will (Exh 3) yields the only result that the testator Uthupu treated the entire properties which had formed the subject-matter of gift or otherwise as his and which could be disposed of by him as he liked. The High Court was in error in disagreeing with the trial court on this matter.

7. The argument of learned counsel for the respondent is that the testator predominantly intended to make better provision for Joshua with whom he had been annoyed for various reasons and whom he had left comparatively less or no property by the wills executed prior to Exh 3. It is suggested that the testator could not have intended to have taken away what had already been gifted to Joshua in the year 1935 of which mutation had taken place and possession had passed. It is further pointed out that the testator did not specifically say that the properties which had been gifted to Joshua in 1935 were now being left by the will (Exh 3) to Mani. A great deal of reliance has been placed on the statement in

the text books on which the High Court relied and certain decisions for the view that no case for election can arise where the testator does not dispose of the properties in question specifically and has merely used general words of devise. In such circumstances, it has been stated, the testator should be taken to have disposed of only that property which was his own and which he was entitled to deal with and bequeath in law. It is urged that, in the present case, the testator had already made a valid and legal settlement in 1935 of the suit property. He could not have thus dealt with or bequeathed that property and in the absence of express and specific mention in Exh. 3 that he was doing so the rule of election would not be attracted.

8. The circumstances in which election takes place are set out in Section 180 of the Indian Succession Act. According to its provisions "where a person by his will professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will". The English law, however, applies the principle of compensation also to election. It means the electing legatee has to compensate the disappointed legatee out of the property given to him. As pointed out in the Indian Succession Act by N. C. Sen Gupta, p. 295, the rule which has been embodied in Section 180 does not recognise the principle of compensation. Under its provisions if the legatee has been given any benefit under the will and his own property has also been disposed of by that very will he must relinquish all his claims under the will if he chooses to retain his property. It is not disputed, in the present case, that if the testator has, by Exh. 3, disposed of the property which had been gifted to Joshua the rule embodied in Section 180 would become applicable and Joshua cannot take the property which had been gifted to him if he has chosen to retain the property bequeathed to him by the will. The question is whether the testator having omitted to state in Exh. 3 that he was giving away the properties which had been gifted to Joshua in the year 1935 to Mani to whom only a residuary bequest of the entire remaining assets had been made the principle of election will become inapplicable.

9. Our attention has been invited on behalf of Joshua to the following observation of the Master of Rolls in *Miller v. Thurgood*, (1864) 10 LT 255:

"If a testator, having an undivided interest in any particular property, disposes of it specifically, and gives to the co-owner of the property a benefit under his will, the question of election arises. But if he disposes of it, not specifically but only under general words, no question of election arises."

But as pointed out in para 1097, p. 592. Halsbury's Laws of England, Vol. 14, in order to raise a case of election under a will it must be clearly shown that the testator intended to dispose of the particular property over which he had no disposing power. This intention must appear on the face of the will either by express words or by necessary conclusion from the circumstances disclosed by the will. The presumption, however, is that a testator intends to dispose of his own property and general words will not usually be construed so as to include other property. In *Whitley v. Whitley*, (1862) 54 ER 1104 the wife of the testator was entitled to a share of the produce of the R. estate, which had been directed to be sold. By his will the testator gave all "his share, estate and interest" in the R. estate to his daughter and benefit out of his own estate to his widow. It was held that the will raised a case for election as against the widow. The Master of the Rolls (Sir John Romilly) said that the testator intended to dispose of the property by will which was not his but belonged to his wife and she having taken and enjoyed the benefit provided for her under his will must be considered as having elected. The property, must, therefore go as if it had been the testator's property. This case illustrates how the rule of election has been applied where, even though, general words had been used but by necessary conclusion from the circumstances disclosed by the will it was inferred that the testator intended to dispose of the property which belonged to his wife and not to him. According to the footnote in Halsbury's Laws of England, Vol. 14 (supra), in the case of a will one may even gather an intention by the testator to include property belonging to another in a gift of residue for it is necessary to construe a will as a whole. Reference has been made to *Re Allen's Estate*, *Prescott v. Allen and Beaumont*, 1945-2 All ER 264,

where a gift of the "residue of my property" was construed as the residue of the testator's ostensible property. A fairly strict approach in such cases has been indicated by Chutty, J., in *Re Booker, Booker v. Booker*, (1886) 54 LT 239, 242 in these words:

"A great safeguard in applying that doctrine is this—that you are not merely to strain words to make them include that which does not belong to the testator, but you must be satisfied beyond all reasonable doubt that it was his intention to include that which was not his own, and that you cannot impute to him after having read his will any other intention." It is thus necessary to look at the will and read it carefully which has been done by us and we have no manner of doubt that Uthupu, the testator, intended to include properties gifted to Joshua by the settlement of 1935 in the bequest which he made to Mani of the entire residue. Joshua was thus put to election and could not claim those properties if he wished to take the benefit under the will.

10. In the result the appeal is allowed and the judgment of the High Court is set aside and that of the trial court restored with costs in this Court.

LGC/D V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 1316

(V 56 C 242)

(From Allahabad)*

J. C. SHAH, V. RAMASWAMI AND
A N GROVER, JJ.

Raghunath and others (in both the Appeals), Appellants v. Kedarnath (in both the Appeals), Respondent.

Civil Appeals Nos. 457 and 458 of 1966, D/- 3-2-1969.

(A) Registration Act (1908), Sections 49, 17 — Transfer of Property Act (1882), Sections 54, 4 — Documents of which registration is necessary under T. P. Act but not under Registration Act — Documents fall within scope of Section 49 of Registration Act — AIR 1928 All 726 (FB) and AIR 1921 Mad 337 (FB) and AIR 1917 Bom 203, Held no longer good law

*(Second Appeals Nos. 4940 and 3660 of 1961, D/- 27-4-1964—All)

IM/IM/A590/69/D

in view of T. P. (Amendment) Supplementary Act (21 of 1929).

The decisions in AIR 1928 All 726 (FB) and AIR 1921 Mad 337 (FB) and AIR 1917 Bom 203 have been superseded by subsequent legislation i.e., by the enactment of Act 21 of 1929 which by inserting in S. 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882" has made it clear that the documents of which registration is necessary under the Transfer of Property Act (such as under Section 54, T. P. Act) but not under the Registration Act fall within the scope of Section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immovable property comprised therein, and do not affect any such immovable property. AIR 1928 All 726 (FB) and AIR 1921 Mad 337 (FB) and AIR 1917 Bom 203, Held no longer good law in view of T. P. (Amendment) Supplementary Act (21 of 1929). S. As. Nos. 4940 and 3660 of 1961, D/- 27-4-1964 (All), Affirmed. (Para 3)

(B) Civil P. C. (1908), Order 41, Rule 33, Order 42, Rule 1, Section 107 — Suit for redemption decreed by trial Court holding that plaintiff was entitled to redeem mortgage upon payment of certain sum — Appeal by defendant to District Judge allowed and plaintiffs suit dismissed — Second appeal by plaintiff to High Court — High Court framing issues and remanding case to District Judge — On remand, the lower appellate court holding in favour of plaintiff on the issues and directing preliminary decree under Order 34, Rule 7 to be modified in accordance with findings — Against this, both plaintiff and defendant filing appeals to High Court — High Court dismissing second appeal of defendants but allowing plaintiff's appeal and setting aside judgment of lower appellate court — High Court further remanding case to lower appellate court with the direction that "the defendants be asked to render accounts before they claim any payment from plaintiffs at the time of redemption of the mortgage" — Held that inasmuch as the plaintiff had not filed an appeal against the decree of trial court, the High Court was not legally justified in giving further relief to the plaintiff by remanding the case with a direction that defendants should be asked to render account than that granted by the trial court — S. As. Nos. 4940 and 3660 of 1961, D/- 27-4-1964 (All), Reversed. (Para 4)

Cases Referred: Chronological Paras
 (1964) Second Appeals Nos. 4940
 and 3660 of 1961, D/ 27-4-1964
 (All), Kedar Nath v. Raghunath II
 (1928) AIR 1928 All 726 (V 15) =
 ILR 50 All 986 (FB), Sohan Lal 2, 3
 v. Mohan Lal
 (1921) AIR 1921 Mad 337 (V 8) =
 ILR 44 Mad 55 (FB), Rama Sahu 3
 v. Gowro Ratho
 (1917) AIR 1917 Bom 203 (V 4) =
 ILR 41 Bom 550, Dawal v. 3
 Dharma

Mr. S. P. Sinha, Senior Advocate (Mr. S. Shaukat Hussain, Advocate with him), for Appellants (in both the Appeals); M/s. J. P. Goyal and G. Nabi Untoo, Advocates, for Respondent (in both the Appeals).

The following Judgment of the Court was delivered by

RAMASWAMI, J.: In the suit which is the subject-matter of these appeals the plaintiff alleged that one Dwarka Prasad took a loan of Rs. 1,700 from Madho Ram father of the defendants, and that on 27th July, 1922, Dwarka Prasad along with one Mst. Kunta, his maternal grandmother, executed a possessory mortgage deed of the disputed house for Rs. 1,700 in favour of Madho Ram. The terms of the mortgage deed were that the mortgagor was to pay interest of Rs. 12-12-0 per month out of which the rent amounting to Rs. 6 which was the agreed usufruct of the house in suit was to be adjusted and the mortgagor was to pay Rs. 6-12-0 per month in cash towards the balance of the interest. The parties agreed that the mortgage would be redeemable within twenty years after paying the principal amount and that portion of interest which was not discharged by the usufruct and other amounts. When Dwarka Prasad was unable to pay amount of Rs. 6-12-0 per month, he delivered possession of the house to Madho Ram who let out the house on a monthly rent of Rs. 25. The mortgagors Dwarka Prasad and Mst. Kunta died leaving Mst. Radha Bai as Dwarka Prasad's heir. Radha Bai sold the house in dispute to the plaintiff on 2nd February, 1953 and executed a sale deed. The plaintiff, therefore, became entitled to redeem the mortgage and asked the defendants to render accounts. The defendants contested the suit on the ground that Madho Ram was not the mortgagor nor were the defendants mortgagees. It was alleged that in the locality where the house was situated there was a custom of paying Hage-chaharum and

to avoid that payment, the original deed dated 27th July, 1922 was drafted and executed in the form of a mortgage though it was actually an outright sale. According to the defendants, the house was actually sold to Madho Ram and was not mortgaged. The defendants also pleaded that if the deed dated 27th July, 1922 was held to be a mortgage, the mortgagees were entitled to get the payment of Rs. 6,442-8-0 as interest, Rs. 2,315 as costs of repairs, etc. The trial Court held that the deed dated 27th July, 1922 was a mortgage deed, that Dwarka Prasad did not sell the house to Madho Ram and that the plaintiff was entitled to redeem the mortgage on payment of Rupees 1,709-14-0. The trial Court accordingly decreed the plaintiff's suit for redemption on payment of Rs. 1,709-14-0. Against the judgment of the trial Court the defendants preferred an appeal before the District Judge, Varanasi, who allowed the appeal and dismissed the plaintiff's suit. The plaintiff took the matter in second appeal to the High Court which framed an issue and remanded the case back to the lower appellate court for a fresh decision. The issue framed by the High Court was "Have the defendants become the owners of the property in dispute by adverse possession?" The High Court also directed the lower appellate court to decide the question of admissibility of Exts. A-25 and A-26. After remand the lower appellate court held that the deed dated 27th July, 1922 was a mortgage deed and not a sale-deed, and, therefore, the plaintiff was entitled to redeem the mortgage. The lower appellate court further held that the defendants had failed to prove that they had acquired title by adverse possession. The lower appellate court made the following order:—

"The appeal is allowed with half costs in this way that the suit is decreed for the redemption of the mortgage in question if the plaintiff pays within six months Rs. 1,700 as principal, Rs. 9.87 N. P. Prajawat paid before this suit and any Prajawat paid by the defendants during the pendency of this suit till the plaintiff deposits the entire sum due under this decree and the interest at the rate of Rs. 6-12-0 per month from 27th July, 1922 till the plaintiff deposits the entire sum due under this decree. The costs of the trial Court are made easy. Let the preliminary decree under Order 34, Rule 7, Civil P. C. be modified accordingly." Against the judgment and decree of the lower appellate court both the plaintiff

and the defendants filed appeals before the High Court. The plaintiff prayed that the decree of the lower appellate court should be set aside and the decree of the trial Court should be restored. The defendants, on the other hand, prayed that the decree of the lower court should be set aside and the plaintiff's suit should be dismissed with costs. By its judgment dated 27th April, 1964 the High Court dismissed the second appeal preferred by the defendants but allowed the plaintiff's appeal and set aside the judgment of the lower appellate court and restored the judgment of the trial Court. The High Court further remanded the case to the lower appellate court with the direction that "the defendants be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage". The present appeals are brought by special leave against the judgment of the Allahabad High Court dated 27th April, 1964 in Second Appeals Nos 4940 and 3660 of 1961.

2. In support of these appeals it was contended by Mr Sinha that the deed Ex. 4 dated 27th July, 1922 was a sale deed and not a mortgage deed. It was pointed out that there was a subsequent deed of sale dated 8th October 1922 Ex. A-26 which is named 'Titimma Bainama'. The contention was that the document Ex. 4 dated 27th July, 1922 must be construed along with Ex. A-26 which forms part of the same transaction and so construed the transaction was not a usufructuary mortgage but was an outright sale. We are unable to accept the argument put forward on behalf of the appellant. Exhibit A-26 dated 8th October, 1922 is not a registered document, and is hence not admissible in evidence to prove the nature of the transaction covered by the registered mortgage deed Ex. 4 dated 27th July, 1922. If Ex. 4 is taken by itself there is no doubt that the transaction is one of mortgage. The document Ex. 4 recites that in consideration of money advanced the executants "mortgage the said house 'Bhog Bhandak' bearing No 64/71 situate Mohalla Gola Dina Nath". Clause 2 provides a period of twenty years for redemption of the mortgage. Clause 6 of the document stipulates that the cost of repairs will be borne by the mortgagors. Clause 1 states

"That the said sum of Rupees Seventeen hundred half of which is Rupees Eight hundred and fifty will carry interest at the rate of twelve annas per cent

monthly. The sum of Rupees six will be deducted towards rent monthly from the interest which will accrue. The possession of the house has been delivered to the said mortgagee Mahajan (money lender). The mortgagors will pay the balance of Rupees six annas twelve month by month to the said mortgagee after deducting the rent of Rupees six after giving the possession of the said house and shop."

Clause 4 provides:

"That we will go on paying the said Mahajan the sum of Rupees six twelve annas the balance of the interest monthly. If the whole or part of the interest remains unpaid we will pay at the time of redemption. If this amount of interest is not paid the said house shall not be redeemed."

The reading of these terms clearly shows that Ex. 4 was a mortgage deed and not a sale deed. It was contended on behalf of the appellants that in order to avoid the payment of Hage-chaharum, the original deed dated 27th July, 1922 was drafted and executed in the form of a mortgage but it was actually meant to be an outright sale. In support of this argument reference was made to Ex. A-26 dated 8th October, 1922. As we have already said Ex. A-26 was required to be registered under Section 54 of the Transfer of Property Act. In the absence of such registration this document cannot be received in evidence of any transaction affecting the property in view of Sec. 49 of the Registration Act. It was, however, urged on behalf of the appellants that the effect of Section 4 of the Transfer of Property Act was not to make Section 49 of the Registration Act applicable to documents which are compulsorily registrable by the provisions of Section 54, paragraph 2 of the Transfer of Property Act. In support of this contention reliance was placed on the decision of the Full Bench of the Allahabad High Court in *Sohan Lal v. Mohan Lal*, ILR 50 All 986 = (AIR 1928 All 726 (FB)).

3. Section 4 of the Transfer of Property Act states

"The chapters and sections of this Act which relate to contracts shall be taken as part of the Indian Contract Act, 1872

And Ss 54, Paragraphs 2 and 3, 59, 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908" Section 54 of the Transfer of Property Act reads:

"Sale" is a transfer of ownership in exchange for a price paid or promised or part-paid and part-promised.

Such transfer, in the case of tangible immovable property of the value of one hundred rupees and upwards or in the case of a reversion or other intangible thing, can be made only by a registered instrument.

In the case of tangible immovable property of a value less than one hundred rupees, such transfer may be made either by a registered instrument or by delivery of the property."

Section 17 of the Registration Act states:

"17. (1) The following documents shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864 or the Indian Registration Act, 1866 or the Indian Registration Act, 1871, or the Indian Registration Act, 1877, or this Act came or comes into force, namely:

(a) instruments of gift of immovable property;

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property.

(c) non-testamentary instruments which acknowledge the receipt or payment of any consideration on account of the creation, declaration, assignment, limitation or extinction of any such right, title or interest; and

(d) leases of immovable property from year to year, or for any term exceeding one year, or reserving a yearly rent;

(e) non-testamentary instruments transferring or assigning any decree or order of a Court or any award when such decree or order or award purports or operates to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immovable property."

Section 49 of the Registration Act prior to its amendment in 1929 read:

"No document required by Section 17 to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered."

By section 10 of the Transfer of Property (Amendment) Supplementary Act, 1929, Section 49 was amended as follows:—

"No document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall—

(a) affect any immovable property comprised therein, or

(b) confer any power to adopt, or

(c) be received as evidence of any transaction affecting such property or conferring such power unless it has been registered.

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877, or as evidence of part performance of a contract for the purposes of S. 53-A of the Transfer of Property Act, 1882, or as evidence of any collateral transaction not required to be affected by registered instrument."

The inclusion of the words "by any provision of the Transfer of Property Act, 1882" by the Amending Act, 1929 settled the doubt entertained as to whether the documents of which the registration was compulsory under the Transfer of Property Act, but not under Section 17 of the Registration Act were affected by Sec. 49 of the Registration Act. Section 4 of the Transfer of Property Act enacts that "sections 54, paragraphs 2 and 3, 59; 107 and 123 shall be read as supplemental to the Indian Registration Act, 1908". It was previously supposed that the effect of this section was merely to add to the list of documents of which the registration was compulsory and not to include them in Section 17 so as to bring them within the scope of Section 49. This was the view taken by the Full Bench of the Allahabad High Court in *Sohan Lal's case*, ILR 50 All 986 = (AIR 1928 All 726 (FB)) (supra). The same view was expressed in a Madras Case *Rama Sahu v. Gowro Ratho*, ILR 44 Mad 55 = (AIR 1921 Mad 337 (FB)) and by MacLeod, C. J. in a Bombay case *Dawal v. Dharma*, ILR 41 Bom 550 = (AIR 1917 Bom 203). We are however absolved in the present case from exa-

mining the correctness of these decisions. For these decisions have been superseded by subsequent legislation i.e., by the enactment of Act 21 of 1929 which by inserting in Section 49 of the Registration Act the words "or by any provision of the Transfer of Property Act, 1882" has, made it clear that the documents in the supplemental list i.e., the documents of which registration is necessary under the Transfer of Property Act but not under the Registration Act fall within the scope of Section 49 of the Registration Act and if not registered are not admissible as evidence of any transaction affecting any immoveable property comprised therein, and do not affect any such immoveable property. We are accordingly of the opinion that Ex A-26 being unregistered is not admissible in evidence. In our opinion, Mr Sinha is unable to make good his argument on this aspect of the case.

4. Mr Sinha contended that in any event the High Court should not have remanded the case to the lower appellate court with a direction that the defendants should be asked to render accounts before they claim any payment from the plaintiff at the time of redemption of the mortgage. It was pointed out that the plaintiff did not file an appeal against the decree of the trial Court and in the absence of such an appeal the High Court was not legally justified in giving further relief to the plaintiff than that granted by the trial Court. In our opinion, there is justification for this argument. We accordingly set aside that portion of the decree of the High Court remanding the case to the lower appellate Court with a direction that the defendants should be asked to render accounts. Otherwise we affirm the decree of the High Court allowing the plaintiff's appeal with costs and setting aside the judgment and decree of the lower appellate court and restoring judgment and decree of the trial Court dated 31st October, 1956.

5. Subject to this modification we dismiss these appeals. There will be no order as to costs in this Court.

SSG/D V C.

Order accordingly.

AIR 1969 SUPREME COURT 1320

(V 56 C 243)

(From Bombay)*

S. M. SIKRI, R. S. BACHAWAT
AND K. S. HEGDE, JJ.Deccan Merchants Co-operative Bank
Ltd., Appellant v. M/s Dalchand Jugraj
Jam and others, RespondentsCivil Appeal No. 358 of 1967, D/- 29-8-
1968.

(A) Co-operative Societies — Maharashtra Co-operative Societies Act (32 of 1961), S. 91 (1) — Scope — Dispute touching the business of the Society — Word business is used in narrower sense — It means actual trading or commercial or similar business activity of the Society.

The word "business" in sub-sec (1) of Sec. 91 has been used in narrower sense and it means the actual trading or other similar business activity of the Society which the Society is authorised to enter into under the Act and the Rules and bye-laws. Five kinds of disputes are mentioned in sub-section (1); first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society, fourthly, disputes touching the management of a society, and fifthly, disputes touching the business of a society. It is clear that the word "business" in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. (Para 17)

(B) Co-operative Societies — Maharashtra Co-operative Societies Act (32 of 1961), S. 91 (1) — Dispute touching the business of society — Ascertainment — Co-operative Bank acquiring a building — Dispute between the tenant of a member of the Bank in the building is not one touching the business of the Bank — No reference can be made.

Although the nature of business which a society does can be ascertained from the objects of the society, it cannot be said that whatever the society does or is necessarily required to do for the purpose of carrying out its objects is part of its business. The word "touching" is very wide and would include any matter which relates to or concerns the business of a

* (Misc. Appln No. 312 of 1963, D/- 26-2-1965 — Bom)

society, but it is doubtful whether the word "affects" should also be used in defining the scope of the word "touching." The question whether a dispute touching the assets of a society would be a dispute touching the business of the Society would depend on the nature of the society and the rules and bye-laws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. Where the society is a co-operative Bank it cannot ordinarily be said to be engaged in business when it lets out properties owned by it. Therefore the dispute between a tenant and a member of the bank in a building which has subsequently been acquired by the Bank cannot be said to be a dispute touching the business of the Bank. AIR 1962 Bom 162 (FB), Ref. (Paras 11 and 18)

Further the word "dispute" covers only those disputes which are capable of being resolved by the Registrar or his nominee. It is very doubtful if the word "dispute" would include a dispute between a landlord society and a tenant when the landlord society has not been set up for the purpose of constructing or buying and letting out houses. In the presence of various rent Acts which give special privileges to tenants it would be difficult to state that such disputes were intended to be referred to the Registrar. (1879) 4 AC 182, Rel. on. (Para 23)

(C) Co-operative Societies — Maharashtra Co-operative Societies Act (32 of 1961), S. 91 (1) — Dispute between a Society and a member or a person claiming through a member — Claim should arise through a transaction entered into by a member with the Society as a member. AIR 1946 Nag 16 and AIR 1961 Andh Pra 40, Overruled.

Before a person can be said to claim through a member, the claim should arise through a transaction or dealing which the member entered into with the society as a member. If a member entered into a transaction with the society not as a member but as a stranger, then he must be covered, if at all, by the provisions of Sec. 91 (1) (a) or (c). But once it is held that the original transaction was entered into by the member with the society as a mem-

ber then any person who claims rights or title through that member must come within the provisions of Sec. 91 (1) (b). (1849) 154 ER 1281 & (1875) 10 CP 679 & (1897) 1 QB 257 & 1948-1 All ER 844 & AIR 1952 Bom 445 & AIR 1933 Mad 682 & (1956) 1 Mad LJ 36 & ILR (1964) 1 Ker 83, Approved; AIR 1946 Nag 16 & AIR 1961 Madh Pra 40, Overruled.

(Para 25)

(D) Co-operative Societies — Maharashtra Co-operative Societies Act (32 of 1961), S. 91 — Provisions do not affect provisions of S. 28 of Bombay Act 57 of 1947.

The Maharashtra Co-operative Societies Act was passed, in the main, to shorten litigation, lessen its costs and to provide a summary procedure for the determination of the disputes relating to the internal management of the societies. But under the Rent Act a different social objective is intended to be achieved and for achieving that social objective it is necessary that a dispute between the landlord and the tenant should be dealt with by the Courts set up under the Rent Act and in accordance with the special provisions of the Rent Act. This social objective does not impinge on the objective underlying the Act. The two Acts can be harmonised best by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Maharashtra Co-operative Societies Act should apply. In view of these considerations Sec. 91 of the Maharashtra Co-operative Societies Act does not affect the provisions of Section 28 of the Rent Act.

(Para 36)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1494 (V 54)=

1967-3 SCR 163, Thakur Jugal

Kishore Sinha v. Sitamurhi Cen-

tral Co-operative Bank Ltd. 33

(1964) ILR (1964) 1 Ker 83, Mammu

Keyi v. Thirurangudi Co-operative

Rural Bank Ltd. 29

(1962) AIR 1962 Bom 162 (V 49)=

63 Bom LR 985 (FB), Farkhundali

v. Potdar 19

(1961) AIR 1961 Madh Pra 40

(V 48)=1960 MPLJ 1209, Mishri-

mal v. Dist. Co-operative Growers'

Association Ltd. Balaghat 29

(1956) AIR 1956 SC 614 (V 43)=

1956 SCR 603, Shri Ram Narain

v. Simla Banking & Industrial Co.,

Ltd. 34

(1956) 1956-1 Mad LJ 36, Vegetols

Ltd. v. Wholesale Co-operative

Stores Ltd. 28

(1952) AIR 1952 Bom 445 (V 39)=

rative Housing Society Ltd. v.
 Ramibai Bhagwansing 28, 29
 (1948) 1948-1 All ER 844=1948-2
 KB 52, Judson v. Ellesmere Port
 Ex-servicemen's Club, Ltd 28
 (1946) AIR 1946 Nag 16 (V 33)=
 ILR (1945) Nag 677, Kisan Lal
 v Co-operative Central Bank Ltd.,
 Seoni 29
 (1933) AIR 1933 Mad 682 (V 20)=
 ILR 56 Mad 970, Krishna Ayyar
 v Secy Urban Bank Ltd., Calicut 27
 (1897) 1897-1 QB 257=66 LJQB 236,
 Palliser v Dale 28
 (1879) 4 AC 182, E C Mulkern
 v James Lord 24
 (1875) 10 CP 679=44 LJCP 353,
 Prentice v London 28
 (1849) 154 ER 1281=19 LJ Ex 20,
 Morrison v Glover 28

Dr B. R. Naik, M/s. P J Vaidya, K. R.
 Chaudhuri and K. Rajendra Chaudhuri,
 Advocates, for Appellant, Mr. S T Desai,
 Senior Advocate, (Mr F. Nariman, Advoca-
 cate, and M/s K. L. Hathu and Atiqur
 Rehman, Advocates of M/s. Hathu and
 Co., with him), for Respondent (No 1),
 M/s P K. Chatterjee and S P Nayar,
 Advocates, for Respondents (Nos 2 & 3).

The following judgments of the Court were delivered by

SIKRI, J (on behalf of himself and
 Hegde, J). Thus appeal by certificate
 granted by the High Court of Judicature
 at Bombay is directed against its judg-
 ment allowing the writ petition filed by
 the firm M/s Dalichand Jugraj Jain, first
 respondent before us — hereinafter re-
 ferred to as the petitioners — under Article
 226 of the Constitution, and setting
 aside the order of the Assistant Registrar
 (D), Co-operative Societies, Bombay, re-
 ferring the dispute between the petitioners
 and the Deccan Merchants Co-operative
 Bank Ltd., appellants before us herein-
 after referred to as the Bank.

2. We may mention that in the peti-
 tion filed before the High Court by the
 Petitioners there were four respondents,
 the first respondent was the Assistant Re-
 gistrar (D), Co-operative Societies, Bom-
 bay, the second respondent was the Regis-
 trar's nominee, the third respondent was
 the Bank and the fourth respondent was
 Waman Wasudeo Wagh — hereinafter
 referred to as the original owner. Be-
 fore us the Bank is the appellant, while
 the petitioners and the three other respon-
 dents before the High Court are the First,
 second, third and fourth respondents

3. The main point that arises in this
 appeal is whether the dispute between

the petitioners and the Bank can be re-
 ferred by the Registrar for arbitration
 under sub-s (1) of Section 91 of the Maha-
 rashtra Co-operative Societies Act, 1960
 (Mah. Act XXXII of 1961) hereinafter re-
 ferred to as the Act.

4. Before we set out the relevant pro-
 visions of the Act it is necessary to state
 the relevant facts out of which the dispute
 arose. The original owner on June 29,
 1961, executed an agreement by which he
 leased the entire ground-floor of building
 No 195—197 Shaikh Memon Street,
 Bombay, to the petitioners on a monthly
 rent of Rs. 250/-. Clause 6 of this agree-
 ment mentions that the property had been
 mortgaged to the Bank. The appellant
 was established as a Banking company
 in the year 1917 as a co-operative society
 under the Co-operative Societies Act,
 1912 (Central Act) and they are deemed
 to be registered under the Act. The ori-
 ginal owner was the Chairman of the
 Bank, and he had taken a loan from the
 Bank and as security for the due pay-
 ment of the loan taken by him he had
 deposited the title deeds of the said pro-
 perty with the Bank, and thus mortgag-
 ed the building to the Bank.

5. It appears that certain arbitration
 proceedings between the Bank and the
 original owner took place before the
 Registrar's nominee, Bombay Greater and
 Bombay, and a consent award was given
 between the parties on October 26, 1961,
 under which the original owner was order-
 ed to pay to the Bank a sum of
 Rs 6,00,000/- by certain instalments as
 therein provided. Clause 5 of the said
 consent award mentioned that the said
 immovable property at 195-197 Shaikh
 Memon Street, would continue as secu-
 rity for the claims of the Bank till entire
 satisfaction. It further appears that the
 original owner committed default in mak-
 ing payment of the amount under the
 consent award and thereupon, in execu-
 tion of the said award, an order was
 made on January 3, 1963, under Sec. 98
 of the Act, for the sale of the said pro-
 perty. As the property could not be sold
 for want of buyers, the Collector of Bom-
 bay made an order and issued a certi-
 ficate of transfer, dated May 13, 1963, under
 Section 100 of the Act, directing that the
 right, title and interest of the owner in
 the said property would be transferred to
 the Bank subject to the terms and con-
 ditions laid down in the schedule to the
 said certificate of transfer. In accord-
 ance with the directions given to the Re-
 venue Inspector, the Revenue Inspector

of the Collector of Bombay prepared a list of the tenants of the property on May 15, 1963, and furnished the same to the Bank. Physical possession of the property was also handed over to the Bank.

6. On June 5, 1963, the Bank addressed a letter to the petitioners stating that the Bank had come to know that they were occupying the entire ground floor of the building (situate at 195-197, Shaikh Memon Road, Bombay) transferred to the Bank under Section 100 of the Act, and further stating that their occupation was unauthorised and otherwise illegal and they had neither any right nor title nor interest to continue in occupation of the same. The Bank called upon them to quit, vacate and deliver vacant peaceful possession of the portion of the building in their occupation within 48 hours from the receipt of this notice failing which appropriate legal proceedings would be adopted.

7. The petitioners replied on June 24, 1963, challenging the transfer of the property to the Bank and also denying that they were in unauthorised or illegal occupation. Before this the Bank, on June 11, 1963, had applied to the District Deputy Registrar, Co-operative Societies, Bombay, under Sections 91-96 of the Act, praying that the dispute between the Bank and the petitioners be referred to arbitration. In this application seven parties were made respondents including the original owner and the petitioners. We are not concerned with the other five respondents.

8. It was stated in the application that the Bank, pursuant to the certificate issued by the Collector under Section 100 of the Act, had been put in possession of the building at No. 195-197 Shaikh Memon Street, Bombay, but the original owner, however, retained possession of part of the property in his possession or in the possession of the petitioners and the other five respondents. It was asserted that the seven respondents had no right, title or interest to the suit premises, and, at any rate, they are not tenants or sub-tenants of the suit premises either within the meaning of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, hereinafter referred to as the Rent Act, or the Transfer of Property Act. It was further stated that the other six respondents were claiming through the original owner who was a member of the Bank. It was further alleged that by virtue of the said certificate issued under Sec. 100 of the Act, the Bank was entitled to vacant

and peaceful possession of the suit premises by evicting the seven respondents. It was also alleged that the dispute fell within the ambit of Sections 91-96 of the Act and as such the same was capable of being referred for decision under Section 93 of the Act. It was inter alia prayed that the dispute be referred to the Registrar or to his nominee or to his Board of nominees under Sections 91 to 96 of the Act for decision and the respondents be ordered to vacate and deliver possession of the suit premises which was in their possession. Compensation, interest and costs were also claimed. On June 19, 1963, the Assistant Registrar passed the following order:

"After going through the plaint mentioned above, I, Shri G. V. Koimattur, Assistant Registrar C. S. (D) Bombay, am satisfied that a "dispute" within the meaning of Section 91 (1) of the Maharashtra Co-operative Societies Act 1960 exists in this case and the same is therefore referred for decision to Shri K. C. Mandivkar, Registrar's Nominee."

9. On July 2, 1963, the nominee passed an order summoning the parties to appear before him on July 23, 1963. On September 6, 1963 the petitioners filed the petition under Article 226 of the Constitution. After setting out the facts mentioned above and Section 91 of the Act, it was submitted by them in the petition that "the dispute which is alleged in the said application dated 11th June 1963, is not one which falls within the scope and ambit of the said Section 91 of the said Act and/or between the parties therein specified." It was further submitted that the dispute was not one which touches the business of the Bank and that the petitioners were not the persons claiming through a member of the Bank. It was also submitted that in view of Section 28 of the Rent Act, the dispute which had been referred by the Assistant Registrar to his nominee could only be determined by the Court of Small Causes, Bombay, and that the Assistant Registrar had no jurisdiction to refer the said dispute to his nominee for determination. The petitioners accordingly prayed for issue of a writ of certiorari or other appropriate writ against the Assistant Registrar or his nominee and quashing the order dated June 19, 1963. We need not mention the other reliefs claimed in the petition.

10. The answer to the points raised in the petition depends in the main on the proper interpretation of Section 91 of the

Act The relevant provisions of the Act are as follows

11. Section 91 runs

"91. (1) Notwithstanding anything contained in any other law for the time being in force, any dispute touching the constitution, elections of the office bearers, conduct of general meetings, management or business of a society shall be referred by any of the parties to the dispute, or by a federal society to which the society is affiliated, or by a creditor of the society, to the Registrar, if both the parties thereto are one or other of the following

(a) a Society, its committee, any past committee, any past or present officer, any past or present agent, any past or present servant or nominee, heir or legal representative or any deceased officer, deceased agent or deceased servant of the society, or the liquidator of the society;

(b) a member, past member or a person claiming through a member, past member or a deceased member of a society, or a society which is a member of the society,

(c) a person, other than a member of the society, who has been granted a loan by the society, or with whom the society has or had transactions under the provisions of Section 45, and any person claiming through such a person,

(d) a surety of a member, past member or a deceased member, or a person other than a member who has been granted a loan by the society under Section 45, whether such a surety is or is not a member of the society,

(e) any other society, or the Liquidator of such a society.

(2) When any question arises whether for the purposes of foregoing sub-section, a matter referred to for decision is a dispute or not, the question shall be considered by the Registrar, whose decision shall be final.

(3) Save as otherwise provided under sub-section (3) of Section 93, no court shall have jurisdiction to entertain any suit or other proceedings in respect of any dispute referred to in sub-section (1)

Explanation 1. — A dispute between the Liquidator of a society and the members of the same society shall not be referred to the Registrar under the provisions of sub-section (1).

Explanation 2 — For the purposes of this sub-section a dispute shall include—

(i) a claim for or against a Society for any debt or demand due to it from a member or due from it to a member, past

member or the nominee, heir or legal representative of a deceased member or servant or employee, whether such a debt or demand be admitted or not,

(ii) a claim by a surety for any sum or demand due to him from the principal borrower in respect of a loan by a society and recovered from the surety owing to the default of the principal borrower, whether such a sum or demand be admitted or not;

(iii) a claim by a society for any loss caused to it by a member, past member or deceased member, by any officer, past officer or deceased officer, by any agent, past agent or deceased agent, or by any servant, past servant or deceased servant, or by its committee, past or present, whether such loss be admitted or not,

(iv) a refusal or failure by a member, past member or a nominee, heir or legal representative of a deceased member, to deliver possession to a society of land or any other asset resumed by it for breach of conditions of the assignment"

12. Sub-section (1) of Section 93 provides that if the Registrar is satisfied that any matter referred to him or brought to his notice is a dispute within the meaning of Section 91, the Registrar shall, subject to the rules, decide the dispute himself, or refer it for disposal to a nominee, or a board of nominees, appointed by the Registrar. Section 96 provides that when a dispute is referred to arbitration, the Registrar or his nominee or board of nominees may, after giving a reasonable opportunity to the parties to the dispute to be heard, make an award on the dispute

13. This case was heard along with two other cases by the Bombay High Court and various questions were debated before it. The High Court held.

(1) that the Registrar or the Assistant Registrar is bound to hear the petitioners before making the orders referring the dispute to his nominee;

(2) that the petitioners were not heard by the Assistant Registrar before the order of reference was made but it was not necessary to remand the matter to the Assistant Registrar for deciding the question about the existence of a dispute within the meaning of Section 91 after hearing the parties as the questions raised were general questions which arose in many cases and the parties desired that the position in law might be clarified,

(3) that the jurisdiction of the Court would be determined at the time of the institution of the suit when the plaint is

filed and the plea of the defendant would not determine or change the forum;

(4) that the question whether a dispute within the meaning of Section 91 existed or not will have to be decided by reference to the averments made in the application for reference made under Rule 75 of the Rules;

(5) that the words "touching the business of the society" in Section 91 were very wide and would include any matter which relates to or concerns or affects the business of the society; in other words, the dispute need not directly arise out of the business of the society but it was enough if it had reference or relation to or concern with its business;

(6) that the dispute in regard to the possession of the premises occupied by the petitioners can be said to touch the business of the Bank;

(7) that the words "claiming through a member" must be given their ordinary meaning, that is, deriving title or rights through a member. At the same time weight must be attached to the word "member", and the title or rights claimed must be those to which a member was entitled or which he could claim by virtue of his being a member. The words "claiming through a member" therefore mean deriving such title or rights through a member as the member possessed or had acquired by reason of his being a member or in his capacity as a member; and

(8) that the petitioners cannot be said to be claiming through a member of the Bank as a member; consequently cl. (b) will not apply and the dispute between them and the Bank cannot be the subject-matter of a reference under sub-section (1) of Section 91.

14. The learned Counsel for the Bank, Dr. B. R. Naik, contends that:

(1) the High Court has acted in excess of jurisdiction and with material irregularity inasmuch as (a) it has entered into disputed questions of fact; (b) it has interfered with an interlocutory order, and (c) it has dealt with the case in spite of an alternative remedy being available to the petitioners under Section 154 of the Act;

(2) assuming, without admitting, the facts, the petitioners would be persons claiming through a member and accordingly the reference is good; and

(3) while making an order under Section 91 (2) of the Act the Registrar is concerned only with the averments in the plaint and not with the pleas of the defendant.

15. The learned Counsel for the petitioners, Mr. S. T. Desai, on the other hand, contends (1) that there is no dispute touching the business of the society; (2) that the petitioners were not claiming through a member as a member; (3) that the Rent Act (Bombay Rents, Hotel and Lodging House Rates Control Act, 1947) gives exclusive jurisdiction to the Court of Small Causes and accordingly the Registrar had no jurisdiction to refer the dispute to his nominee; and (4) that the petitioners should have been heard before the case was referred to the Registrar's nominee and, therefore, the reference is bad.

16. The principal questions which arise on the interpretation of Section 91 are two: (1) what is the meaning of the expression "touching the business of the society?" and (2) what is the meaning of the expression "a person claiming through a member" which occurs in Section 91 (1) (b)?

17. The answer depends on the words used in the Act. Although number of cases have been cited to us on similar expressions contained in various other Acts, both Indian and English, in the first instance, it is advisable to restrict the enquiry to the terms of the enactment itself, because the legislatures have been changing the words and expanding the scope of references to arbitrators or to the Registrars step by step. The sentence, namely, "notwithstanding anything contained in any other law for the time being in force" clearly ousts the jurisdiction of Civil Courts if the dispute falls squarely within the ambit of Section 91 (1). Five kinds of disputes are mentioned in sub-sec. (1); first, disputes touching the constitution of a society; secondly, disputes touching election of the office-bearers of a society; thirdly, disputes touching the conduct of general meetings of a society; fourthly, disputes touching the management of a society; and fifthly, disputes touching the business of a society. It is clear that the word "business" in this context does not mean affairs of a society because election of office-bearers, conduct of general meetings and management of a society would be treated as affairs of a society. In this sub-section the word "business" has been used in a narrower sense and it means the actual trading or commercial or other similar business activity of the society which the society is authorised to enter into under the Act and the Rules and its bye-laws.

18 The question arises whether the dispute touching the assets of a society would be a dispute touching the business of a society. This would depend on the nature of the society and the rules and bye-laws governing it. Ordinarily, if a society owns buildings and lets out parts of buildings which it does not require for its own purpose it cannot be said that letting out of those parts is a part of the business of the society. But it may be that it is the business of a society to construct and buy houses and let them out to its members. In that case letting out property may be part of its business. In this case, the society is a co-operative bank and ordinarily a co-operative bank cannot be said to be engaged in business when it lets out properties owned by it. Therefore, it seems to us that the present dispute between a tenant and a member of the bank in a building which has subsequently been acquired by the Bank cannot be said to be a dispute touching the business of the Bank, and the appeal should fail on this short ground.

19 The High Court had followed the observations of the Full Bench of the Bombay High Court in *Farkhundali v. Potdar*, 63 Bom LR 985=(AIR 1962 Bom 162) (FB), wherein it was observed

"The nature of business, which a society does, is to be ascertained from the objects of the society. But whatever the society does or is necessarily required to do for the purpose of carrying out its objects can be said to be part of its business. The word "touching" is also very wide and would include any matter which relates to, concerns or affects the business of the society."

20. The Full Bench was construing Section 54 of the Bombay Co-operative Societies Act, 1925 (Bombay Act VII of 1925), which, inter alia, provides

"54(1)(a) If any dispute touching the constitution or business of society arises between members or past members of the society or persons claiming through a member or past member or between members or past members or persons so claiming and any officer, agent or servant of the society past or present or between the society or its committee, and any officer, agent, member or servant of the society past or present, it shall be referred to the Registrar for decision by himself or his nominee."

21. The question before the Full Bench was whether it was open to an employee of a co-operative society to proceed against the society in respect of a

claim for wages either under the Payment of Wages Act, 1936, or under Section 54 of the Bombay Co-operative Societies Act, 1925.

22. While we agree that the nature of business which a society does can be ascertained from the objects of the society, it is difficult to subscribe to the proposition that whatever the society does or is necessarily required to do for the purpose of carrying out its objects can be said to be part of its business. We however, agree that the word "touching" is very wide and would include any matter which relates to or concerns the business of a society, but we are doubtful whether the word "affects" should also be used in defining the scope of the word "touching".

23. One other limitation on the word "dispute" may also be placed and that is that the word "dispute" covers only those disputes which are capable of being resolved by the Registrar or his nominee. It seems to us very doubtful that the word "dispute" would include a dispute between a landlord society and a tenant when the landlord society has not been set up for the purpose of constructing or buying and letting out houses. In the presence of various rent Acts which give special privileges to tenants it would be difficult to say that such disputes were intended to be referred to the Registrar. Of course, this result may also follow from the interpretation of the Rent Act and the Co-operative Societies Act by applying other principles of construction.

24. This was the line of reasoning adopted by the House of Lords in *E C Mulkern v. James Lord*, (1879) 4 AC 182 in holding that "proceedings in respect of accounts under a mortgage and sale of the property, which might include title to redemption or a judgment of foreclosure, were not such disputes, between the society and a member, as the statutes (Friendly Societies Act (10 Geo 4, S 56) read with Sec 4 of 6 and 7 Will, 4, c. 32) had contemplated.

25. The appeal must also fail on the ground that even if it is a dispute touching the business of the society within the meaning of Section 91 (1) of the Act, it is not a dispute between a society and a member or a person claiming through a member. It seems to us that before a person can be said to claim through a member, the claim should arise through a transaction or dealing which the member entered into with the society as a member. If a member entered into a transaction

with the society not as a member but as a stranger, then he must be covered, if at all, by the provisions of Section 91 (1) (a) or (c). But once it is held that the original transaction was entered into by the member with the society as a member then any person who claims rights or title through that member must come within the provisions of Section 91 (1) (b).

26. It has been held in various cases in England that disputes referable under similar Acts are only disputes between a society and a member of a society when he enters into a transaction with the society as a member. (See *Morrison v. Clover*, (1849) 154 ER 1231; *Prentice v. London*, (1875) 10 CP 679; *Palliser v. Dale*, (1897) 1 QB 257; *Judson v. Ellesmere Port Ex-servicemen's Club, Ltd.*, 1948-1 All ER 844.) Similar view was expressed by the Bombay High Court in *Shyam Co-operative Housing Society Ltd. v. Ramibai Bhagwansing*, 54 Bom LR 517 = (AIR 1952 Bom 445) where Chagla, C. J., observed:

"Now before a case can fall under Section 54 (of the Bombay Co-operative Societies Act VII of 1925), it is not sufficient that there should be a dispute touching the business of the society. What is further required is that the dispute must be between the society and its member, and proper emphasis has got to be laid upon the expression "member" used in this section. The dispute must be between the society and the member as a member or quae a member. It must be a dispute in which the member must be interested as a member. It must relate to a transaction in which the member must be interested as a member."

27. In *Krishna Ayyar v. Secy., Urban Bank Ltd.*, Calicut, ILR 56 Mad 970 = (AIR 1933 Mad 682) it was held that a dispute between a legal practitioner, who was a member, a director and the legal adviser of a co-operative bank, and the co-operative bank arising out of matters relating to the legal practitioner's acts as the Bank's Vakil was not a dispute within the Co-operative Societies Act (II of 1912) or the Madras Co-operative Societies Act (VI of 1932). In coming to this conclusion, the learned Chief Justice followed the law as stated in England. He observed:

"I think it is clear that both under the Building Societies Act and the Friendly Societies Act in England which contain somewhat similar provisions as regards the

settlement of disputes within the Society by the Registrar that, in order that such a dispute can be dealt with by the Registrar, it must be a dispute between the Society and a member in his capacity as member."

28. In *Vegetols Ltd. v. Wholesale Co-op. Stores Ltd.*, 1956-1 Mad LJ 36 Rajamannar, C. J., observed:

"Reading clauses (a), (b), (c) and (d) of sub-section (1) of Section 51, we think that by necessary intendment, the dispute should be between the society and member quae member. . . For a claim to fall within Section 51, it should be a claim by the society against a member as a member touching the business of a society. There may be a liability of a member to the society which is not a liability incurred by the member as member. Such a liability will be outside the scope of Section 51."

29. In *Mammu Keyi v. Thirurangadi Co-operative Rural Bank Ltd.*, ILR (1964) 1 Ker 83 it was held that a dispute between a society and the owner of a godown who happens to be a member of the society was not a dispute between the society and a member quae a member within the ambit of Section 51 of the Madras Co-operative Societies Act, 1932. In coming to this conclusion the learned Chief Justice followed 54 Bom LR 517 = (AIR 1952 Bom 445) and dissented from *Mishrimal v. District Co-operative Growers' Association Ltd.*, Balaghat, AIR 1961 Madh Pra 40. In the latter case the Madhya Pradesh High Court had followed the view taken by the Nagpur High Court in *Kisanlal v. Co-operative Central Bank Ltd.*, Seoni, AIR 1946 Nag 16. *Srivastava, J.*, in the Madhya Pradesh case, distinguished the English cases on the ground that there the difficulty was felt on account of the wide sweep of the wording in Section 22 of the Friendly Societies Act inasmuch as any dispute whether connected with the business of the society or not could be brought within its ambit. He observed that if the contention was accepted that the word "member" restricted the scope of the rule to transactions entered into by a member in the capacity of a member, then the words "touching the business of a society" would be rendered wholly superfluous. In the Nagpur case AIR 1946 Nag 16 the plaintiff joint Hindu family were members of the Co-operative Bank and they were also treasurers of the Bank. It does not appear whether the treasurer had to be a member of the Co-operative Bank or not. If

he had to be a member then the conclusion of the Nagpur High Court in this case that the dispute between the Co-operative Bank and the plaintiffs relating to their liability which arose out of their capacity as treasurers was referable to the Registrar seems to be correct. But if it was not necessary for the treasurer to be a member then we are doubtful whether the case was correctly decided. The Nagpur High Court was construing R. 28 of the Rules framed by the Provincial Government in exercise of the powers conferred on it by Section 43 of the Co-operative Societies Act, 1912. Rule 28 ran as follows:

"Any dispute touching the business of a co-operative society between members or past members of the society or persons claiming through a member or past member, or between a member or past member or persons so claiming and the committee or any officer, shall be referred to the Registrar

The reasoning of the Nagpur High Court does not appeal to us. Even if the expression "business of a co-operative society" occurring in the Rule is treated as not restricted to the dealings with the members of the society only but to include business which the co-operative societies under the law are empowered to transact, this does not mean that whenever a member enters into any transaction whatsoever with the society and a dispute arises out of that transaction then that dispute is a dispute between the society and a member of the society within the meaning of Rule 28. The High Court did not rest its conclusion on the words "or any officer" occurring in R. 28, although it referred to the meaning of the word "Officer". Therefore, we need not consider whether the decision can be sustained on that part of the Rule.

30. In our opinion, the view expressed by the Madras, Bombay and Kerala High Courts is preferable to the view expressed by the Madhya Pradesh and the Nagpur High Courts.

31. If this is the correct view, then was the lease or the tenancy rights obtained by the petitioners a right or title derived from a member as a member? It seems to us that when the original owner executed the lease, he was not acting as a member but as a mortgagor in possession, and, therefore, the Bank's claim does not fall within Section 91 (1) (b) of the Act.

32. This takes us to the point whether the Rent Act applies to the facts of this

case and, accordingly, the jurisdiction of the Registrar is ousted, and it is only the Court of Small Causes which has jurisdiction to eject the petitioners.

33. The scheme of the various Rent Acts and the public policy underlying them are clear, the policy is to give protection to the tenants. Various powers have been conferred on the authorities under the Rent Acts to grant protection to the tenants against ejectment and other reliefs claimed by the landlords. Section 28 of the Rent Act *inter alia* provides

"28 (1) Notwithstanding anything contained in any law and notwithstanding that by reason of the amount of the claim or for any other reason, the suit or proceeding would not, but for this provision, be within its jurisdiction,

(a) in Greater Bombay, the Court of Small Causes Bombay shall have jurisdiction to entertain and try any suit or proceeding between a landlord and a tenant relating to the recovery of rent or possession of any premises to which any of the provisions of this Part apply and to decide any application made under this Act and to deal with any claim or question arising out of this Act or any of its provisions, and subject to the provisions of sub-section (2), no other Court shall have jurisdiction to entertain any such suit, proceeding or application or to deal with such claim or question . . . This section expressly bars the jurisdiction of other Courts to entertain any suit, proceeding or application between a landlord and tenant relating to the recovery of possession of any premises and confers jurisdiction on the Courts mentioned in Section 28 to entertain the matter pending before the nominee of the Registrar. But it is said that the Registrar is not a Court within the meaning of Section 28 of the Act. This Court held in *Thakur Jugal Kishore Sinha v. Sitamurhi Central Co-operative Bank Ltd.*, 1967-3 SCR 163 = (AIR 1967 SC 1494) that the Assistant Registrar, Co-operative Societies, acting under Section 48 of the Bihar and Orissa Co-operative Societies Act, 1935, was functioning as a Court subordinate to the High Court for the purpose of Section 3 of the Contempt of Courts Act, 1952. It was urged before us that the Registrar is also a Court for the purposes of S. 28 of the Rent Act. We need not decide this question because it seems to us that the jurisdiction of the Registrar is ousted on broader considerations.

34. Both Section 91 of the Act and Section 28 of the Rent Act start by excluding

"anything contained in any other law". As observed by this Court in *Shri Ram Narain v. Simla Banking Industrial Co., Ltd.*, 1956 SCR 603 at p. 615=(AIR 1956 SC 614 at p. 622), "it is, therefore, desirable to determine the overriding effect of one or the other of the relevant provisions in these two acts, in a given case, on much broader considerations of the purpose and policy underlying the two Acts and the clear intent conveyed by the language of the relevant provisions therein." We may mention that the two Acts which this Court had to deal with in that case were the Banking Companies Act, 1949 (X of 1949) and the Displaced Persons (Debts Adjustment) Act, 1951 (LXX of 1951).

35. The preamble of the Rent Act states:

"Whereas it is expedient to amend and consolidate the law relating to the control of rents and repairs of certain premises, of rates of hotels and lodging houses and evictions."

Section 4 of the Rent Act exempts certain premises from its operation but it does not exempt premises belonging to co-operative societies. It is common ground that the Rent Act applies to the premises in question. Section 11 of the Rent Act deals with the fixing of standard rent and Section 12 provides that "a landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act", and it lays down procedure for the filing of a suit for the recovery of possession by landlord and for other matters. Section 13 provides that a landlord may recover possession of any premises under certain conditions. Section 28 provides for jurisdiction of the Courts to deal with the suits and proceedings. Section 29 provides for appeals.

36. If the matter is heard by the Registrar, none of these provisions would apply. We can hardly imagine that it was the intention of the legislature to deprive tenants in buildings owned by co-operative societies of the benefits given by the Rent Act. It seems to us that the Act was passed, in the main, to shorten litigation, lessen its costs and to provide a summary procedure for the determination

of the disputes relating to the internal management of the societies. But under the Rent Act a different social objective is intended to be achieved and for achieving that social objective it is necessary that a dispute between the landlord and the tenant should be dealt with by the Courts set up under the Rent Act and in accordance with the special provisions of the Rent Act. This social objective does not impinge on the objective underlying the Act. It seems to us that the two acts can be harmonised best by holding that in matters covered by the Rent Act, its provisions, rather than the provisions of the Act, should apply. In view of these considerations we are of the opinion that Section 91 of the Act does not affect the provisions of Section 28 of the Rent Act.

37. We may now refer to the incidental points raised by the learned Counsel for the appellant.

38. In our opinion, the High Court has jurisdiction to go into the disputed questions of fact and to quash an interlocutory order even though some sort of alternative remedy exists under Sec. 154 of the Act. Section 154 of the Act *inter alia* enables the State Government to call for and examine the record of any inquiry or the proceedings of any other matter of any officer subordinate to them. This remedy can hardly be treated as an alternative remedy for the purposes of deciding the questions raised by the petitioners.

39. It is not necessary to deal with the third point raised by the learned Counsel for the Bank, namely, that the Registrar when making an order under Section 91 (2) of the Act, is concerned only with the averments in the plaint. Even if it is so it does not disable the petitioners from raising the point that on the facts as presented by them the provisions of Sec. 91 of the Act did not apply to the dispute.

40. In the result the appeal fails and is dismissed with costs to respondents Nos. 1-2.

41. BACHAWAT, J.: I agree that the dispute concerning the property purchased by the Society from one of its members is not a dispute touching the business of the Society. I also agree that the Court of Small Causes has exclusive jurisdiction under Section 28 of the Rent Act to entertain a proceeding by a landlord for ejectment of a tenant. A dispute concerning the ejectment of a tenant by a

landlord is outside the purview of Section 91 of the Maharashtra Co-operative Societies Act. It has also been argued that as the lease under which the contesting respondent is claiming was not executed by the owner in his capacity as a member of the Society, there is no dispute between the Society and a person claiming through a member. On this last question, I express no opinion. Having regard to our findings on the other two points, the appeal must fail. I, therefore, agree to the order proposed by my learned brother.

GGM/DVC

Appeal dismissed

AIR 1969 SUPREME COURT 1330

(V 56 C 244)

(From Punjab)*

J C SHAH, V RAMASWAMI AND
A N GROVER, JJ

State Bank of India, Appellant v Chamandi Ram (dead) by his legal representative Gurbux Rai, Respondent

Civil Appeal No 449 of 1966, D/- 13-2-1969

(A) Hindu Law — Joint Hindu family — Coparcenership — Incidents — Joint Hindu family under Hindu law is not an individual but a body of individuals contemplated by Notification dated 15-2-52 issued by Government of Pakistan under S. 45 of Pakistan (Administration of Evacuee Property) Ordinance

A coparcenary under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a coparcener with his adoptive father as regards ancestral properties of latter. The incidents of co-parcenership under the Mitakshara law are, first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person, secondly, that such descendants can at any time work out their rights by asking for partition, thirdly, that till partition, each member has got ownership extending over the entire property, conjointly with the rest, fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common, fifthly, that no alienation of the property

is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. (1902) ILR 25 Mad 149 & (1883) ILR 7 Bom 467, Rel on (Para 7)

Having regard to the juristic nature of the Hindu joint family, according to the doctrine of Mitakshara, a Hindu joint family firm cannot be treated as an individual within the meaning of the notification dated 19th February, 1952, issued by Government of Pakistan under S 45 of the Pakistan (Administration of Evacuee Property) Ordinance (15 of 1949) but must be treated as a body of individuals whether incorporated or not within the meaning of that notification. (Para 7)

(B) Constitution of India, Art. 51 — Private International law — Involuntary assignment of debts — Joint Hindu family having cash deposits in a bank in Pakistan — Pakistan (Administration of Evacuee Property) Ordinance (15 of 1949), S 45 — Effect — Liability of the Bank in India in respect of such deposits is extinguished. Civil Revision 104-D of 1958, D/- 12-9-63, (Punjab at Delhi), Reversed.

A joint Hindu family firm had, prior to partition, a cash credit account with the then Imperial Bank of India. The firm had pledged goods as security for the repayment of the advances made in the said account. On partition of India, the joint Hindu family and its members became evacuees and the then Imperial Bank of India, sold the pledged goods in the year 1948 for the realisation of its dues in the said cash credit account and credited a certain sum left as surplus balance after the adjustment of the dues of the Imperial Bank of India in the said account. On October 15, 1949, the Pakistan Government promulgated Pakistan (Administration of Evacuee Property) Ordinance, 1949 (Ordinance No XV of 1949) whereby all property in Pakistan in which an evacuee had any right or interest vested in the Custodian of Evacuee property with retrospective effect from March 1, 1947. The karta of the firm applied under Section 13 of the Displaced Persons (Debts Adjustment) Act claiming the amount from State Bank of India contending that the said amount had not become evacuee property and that the liability of the Imperial Bank of India had not therefore ceased. On the question whether the liability of the Bank to the firm in India be deemed to be extinguished in view of the operation of the Pakis-

*(Civil Revn No. 104-D of 1958, D/- 12-9-1963 — Punjab at Delhi)

tan Evacuee Property Ordinance and in view of the fact that the amount in dispute had become vested in the Custodian of Evacuee Property, Pakistan with effect from March 1, 1947, by virtue of the provisions of the Ordinance

Held that under Private International law in such a case the question whether a given contractual right e.g., a debt, was transferred under such legislation and whether therefore payment to a custodian or administrator had the effect of discharging the debtor, depended on the situs of that right and not so much on the proper law of the contract from which the right arose. A distinction had to be made between (1) questions of assignability, which are governed by the proper law of the debt, and (2) question of attachment or garnishment (involuntary assignment) governed by the lex situs of the debt. If, for example an involuntary assignment occurred after a voluntary assignment had already been made, the lex situs determined whether the rights of the voluntary assignee had been postponed or defeated. If the voluntary assignment occurred first, the lex situs determined what rights, if any, the voluntary assignee had acquired. Assignment of tangible movables being governed by lex situs, the liability of the Bank ought to be held, to have been extinguished. (1891) 1 Ch 536 & 1954 AC 495, Ref.; Civil Revn. No. 104-D of 1958, D/- 12-9-1963, (Punjab at Delhi), Reversed. (Para 8)

Cases Referred: Chronological Paras

- (1954) 1954 AC 495 = 1954-2 WLR 1022, Arab Bank Ltd. v. Barclays Bank (Dominion Colonial and Overseas) 8
- (1902) ILR 25 Mad 149=11 Mad LJ 353, Sudarsanam Maistry v. Nar-simhulu Maistry 7
- (1891) 1891-1 Ch 536, Re: Queens-land Mercantile and Agency Co. 8
- (1883) ILR 7 Bom 467, Gan Savant Bal Savant v. Narayan Dhond Savant 7

Mr. Niren De, Attorney General for India and Mr. S. V. Gupte Senior Advocate, (Mr. H. L. Anand, Advocate, of M/s. Anand Das Gupta and Sagar and Mr. K. B. Mehta, Advocate with them), for Appellant; M/s. Bishambar Lal, M. R. Garg, H. K. Puri and Radha Kishan Makhija, Advocates, for Respondent.

The following Judgment of the Court was delivered by

RAMASWAMI, J.: M/s. Ghamandi Ram Gurbax Rai, a joint Hindu Family firm consisting of Ghamandi Ram, since deceased,

Gurbax Rai, Chaman Lal and Jagan Nath, used to carry on business in Bhawalpur State now forming part of West Pakistan before the partition of India. Shri Ghamandi Ram was the manager and karta of the said joint Hindu family firm during the material period. Before the partition of India, the joint Hindu family firm had a cash credit account in its name in the then Imperial Bank of India, Bhawalpur State now within Pakistan territory. The said firm had pledged goods as security for the repayment of the advances made in the said account. On the partition of India, the joint Hindu family and its members admittedly became evacuees and the then Imperial Bank of India, Bhawalpur State sold the pledged goods in the year 1948 for the realisation of its dues in the said cash credit account and credited a sum of Rs. 2,541/11/- left as surplus balance after the adjustment of the dues of the Imperial Bank of India in the said account. On October 15, 1949, the Pakistan Government promulgated Pakistan (Administration of Evacuee Property) Ordinance, 1949 (Ordinance No. XV of 1949) whereby all property in Pakistan in which an evacuee had any right or interest vested in the Custodian of of Evacuee Property with retrospective effect from March 1, 1947. The expression 'evacuee property' was defined by Section 2, sub-section (3) of the Ordinance to include any right or interest in joint Hindu family property. 'Cash deposits in Banks' were however excepted from the definition of the term 'property' by Section 2 (5) of the Ordinance. The Ordinance was amended in 1951 by the Pakistan (Administration of Evacuee Property) Amendment Act, 1951 (Act No. VI of 1951) whereby Section 2 (5) of the Ordinance was amended so as to bring cash deposits in Banks within the definition of the term 'property'. By notification dated February 19, 1952, the Pakistan Government exempted from the operation of the provisions of the said Ordinance 'cash deposits made at Banks by persons other than companies or associations or bodies of individuals whether incorporated or not.'

2. On May 9, 1953, Shri Ghamandi Ram (now deceased) as manager and karta of the joint Hindu family firm filed an application under Section 13 of the Displaced Persons (Debts Adjustment) Act, 1951 (Act No. 70 of 1951) before the Tribunal constituted under the said Act at Delhi claiming Rs. 3,165/11/- including

Rs 2,341/11/- on account of the said principal and interest at 6 per cent per annum on the ground that the said amount had not become evacuee property and the liability of the Imperial Bank of India had not therefore ceased. During the pendency of the proceedings before the Tribunal the appellant Bank was constituted under the provisions of the State Bank of India Act, 1955 (Act No. 23 of 1955) and succeeded to the entire rights and liabilities of the Imperial Bank of India. The appellant was accordingly substituted in the said proceedings for the Imperial Bank of India. By its order dated November 1, 1956, the Tribunal dismissed the application of the respondent on the ground that in terms of the law enforced in Pakistan the deposit in the Bank in the account of the firm had become an evacuee property and would be deemed to have vested in the Custodian with effect from March 1, 1947 and by virtue of the said vesting the liability of the Bank had ceased. The Tribunal further held that the only property in the pledged goods, which belonged to the firm, was the equity of redemption and that had vested in the Custodian being a 'property' within the meaning of the said Ordinance. The respondent took the matter in revision before the Punjab High Court being Civil Revision No 104-D of 1958. The application was allowed by Mr Justice D K. Mahajan by his judgment dated 12th September, 1963 on the ground that the amount claimed by the respondent was cash deposit made by an individual in terms of the notification dated February 19, 1952 and was thus beyond the purview of the provisions of the Ordinance. The learned Judge accordingly set aside the order of the Tribunal and granted a decree in favour of the respondent for the amounts claimed. This appeal is brought by special leave from the judgment of the Punjab High Court dated 12th September, 1963 in Civil Revision No 104-D of 1958.

3 Section 2 sub-section (3) of the Pakistan (Administration of Evacuee Property) Ordinance, 1949 (Ordinance No 15 of 1949) defines the term 'evacuee property' as meaning any property in which an evacuee has any right or interest, or which is held by or for him in trust, and includes—

"(a) any right or interest in joint Hindu family property which would accrue to the evacuee upon the partition of the same, or

(b) property obtained from an evacuee after the twenty-eighth day of February, 1947, until confirmed by the Custodian, but does not include—

(i) any movable property in the immediate physical possession of any evacuee, or

(ii) any property belonging to a joint stock company the head office of which was situated, before the fifteenth day of August 1947, in any place in the territories now comprising India, and continues to be so situated after the said date."

Section 2 sub-section (5) defines the term 'property' as follows —

'Property' means property of any kind, and includes any right or interest in such property and any debt or actionable claim,

but does not include a mere right to sue or a cash deposit in a bank."

Section 2 (5) of the Ordinance was amended by Pakistan (Administration of Evacuee Property) Amendment Act, 1951 (Act No. VI of 1951) in the following manner

"2 (b) in clause (5) the words 'or a cash deposit in Bank' shall be omitted".

Section 6 of the Ordinance states

"6 (1) All evacuee property shall vest and shall be deemed always to have vested in the Custodian with effect from the first day of March, 1947.

The notification of February 19, 1952 issued by the Pakistan Government in exercise of the powers conferred by Sec 45 of the Ordinance is in the following terms:

"In exercise of the powers conferred by Section 45 of the Pakistan (Administration of Evacuee Property) Ordinance XV of 1949, the Central Government in supersession of its Ministry's notification F 22 (151-P dated the 9th May, 1951 is pleased to exempt from the operation of the provisions of the said Ordinance cash deposits made at Banks by persons other than companies or associations or bodies of individuals whether incorporated or not."

Section 7 of the Ordinance states

"7. (1) Every person who is, or has at any time after the twenty-eighth day of February, 1947, been in possession, supervision or management of any evacuee property, shall be deemed to hold or to have held, as the case may be, such property on behalf of the Custodian.

(2) Every person who is in possession supervision or management of any evacuee property or property which he knows or has reason to believe is evacuee property

shall, as soon as may be but not later than sixty days from the commencement of this Ordinance, intimate to the Custodian in writing his willingness to surrender such property to the Custodian or to any person authorised by the Custodian in this behalf upon receipt of a notice from the Custodian that the property is evacuee property, and shall surrender the same if called upon by the Custodian or any person authorised as aforesaid.

(3) The provisions of sub-section (2) shall not apply to any person who is in possession, supervision or management of any evacuee property by virtue of an allotment made by a Rehabilitation Authority”.

4. Section 7 of the Ordinance was amended in 1951 in the following terms:—

“5. In sub-section (2) of Section 7 of the Ordinance for the words “sixty days from the commencement of this Ordinance” the words “such date as may be notified by the Central Government in the Official Gazette” shall be substituted, and the words “upon receipt of a notice from the Custodian that the property is evacuee property” shall be omitted”.

5. Section 11 of the Ordinance states:

“11. (1) Any amount due to any evacuee, or payable in respect of any evacuee property, shall be paid to the Custodian by the person liable to pay the same.

(2) Any person who makes a payment under sub-section (1) shall be discharged from further liability to pay to the extent of the payment made.

(3) Without prejudice to any penalty to which he may be liable under Section 29, any person who makes or has made any payment otherwise than in accordance with sub-section (1) or any law for the time being in force requiring payment of any such amount as is mentioned in sub-section (1) to be made to the Custodian shall not be discharged from his obligation to pay the amount due, and the right of the Custodian to enforce such obligation against such person shall remain unaffected”.

6. The first question involved in this appeal is whether upon a correct interpretation of the notification of the Pakistan Government dated February 19, 1952, the joint Hindu family firm “Ghamandi Ram Gurbax Rai” was ‘a body of individuals’ within the meaning of the notification and whether the amount in dispute had accordingly become vested in the Custodian of Evacuee Property, Pakistan with effect from March 1, 1947 by virtue

of the provisions of the Ordinance thereby divesting the said joint Hindu family firm of its interest therein.

7. According to the Mitakshara School of Hindu Law all the property of a Hindu joint family is held in collective ownership by all the coparceners in a quasi-corporate capacity. The textual authority of the Mitakshara lays down in express terms that the joint family property is held in trust for the joint family members then living and thereafter to be born (See Mitakshara, Chapter I. 1—27). The incidents of co-parcenership under the Mitakshara law are: first, the lineal male descendants of a person up to the third generation, acquire on birth ownership in the ancestral properties of such person; secondly that such descendants can at any time work out their rights by asking for partition; thirdly, that till partition each member has got ownership extending over the entire property conjointly with the rest; fourthly, that as a result of such co-ownership the possession and enjoyment of the properties is common; fifthly that no alienation of the property is possible unless it be for necessity, without the concurrence of the coparceners, and sixthly, that the interest of a deceased member lapses on his death to the survivors. A coparcenery under the Mitakshara School is a creature of law and cannot arise by act of parties except in so far that on adoption the adopted son becomes a co-parcener with his adoptive father as regards the ancestral properties of the latter. In *Sundarsanam Maistri v. Narasimhulu Maistri*, (1902) ILR 25 Mad 149 at p. 154. Mr. Justice Bhashyam Ayyangar stated the legal position thus:—

“The Mitakshara doctrine of joint family property is founded upon the existence of an undivided family, as a corporate body [Gan Savant Bal Savant v. Narayan Dhond Savant, (1883) ILR 7 Bom 467 and Mayne’s ‘Hindu Law and Usage’, 6th edition, paragraph 270] and the possession of property by such corporate body. The first requisite therefore is the family unit; and the possession by it of property is the second requisite. For the present purpose, female members of the family may be left out of consideration and the conception of a Hindu family is a common male ancestor with his lineal descendants in the male line, and so long as that family is in its normal condition viz., the undivided state—it forms a corporate body. Such corporate body, with its heritage, is purely a creature of law and cannot

be created by act of parties, save in so far that, by adoption, a stranger may be affiliated as a member of that corporate family"

Adverting to the nature of the property owned by such a family the learned Judge proceeded to state

"As regards the property of such family the 'unobstructed heritage' devolving on such family, with its accretions, is owned by the family, as a corporate body, and one or more branches of that family, each forming a corporate body within a larger corporate body, may possess separate 'unobstructed heritage' which, with its accretions, may be exclusively owned by such branch as a corporate body"

Having regard to the juristic nature of the Hindu joint family, according to the doctrine of Mitakshara, we are of the opinion that the Hindu joint family firm of Ghamandi Ram Gurbax Rai cannot be treated as an 'individual' within the meaning of the notification of the Pakistan Government dated 19th February, 1952, but the said firm must be treated as 'a body of individuals whether incorporated or not' within the meaning of that notification

8 We proceed to consider the next question arising in this appeal viz., whether the liability of the appellant to the respondent in India be deemed to be extinguished in view of the operation of the Pakistan Evacuee Property Ordinance and in view of our finding that the amount in dispute had become vested in the Custodian of Evacuee Property, Pakistan with effect from March 1, 1947 by virtue of the provisions of the Ordinance. It is not disputed that appellant had got garnishable assets in Pakistan out of which the Pakistan Government could realise the amount by attachment of the property of the appellant. The question is what is the rule of Private International Law in such a case of involuntary assignment of debts. The question has arisen in English Courts with regard to the legislation passed during or after a war by which the contractual rights of the enemies vested in the public authorities such as custodians or administrators of enemy property. It was held in English Courts that in such a case the question whether a given contractual right, e.g. a debt, is transferred under such legislation and whether therefore payment to a custodian or administrator has the effect of discharging the debtor, depends on the situs of that right and not so much on the proper law of the contract from which the

right arises (See Dicey Conflict of Laws, 8th Ed p 780). For example in Arab Bank Ltd v Barclays Bank (Dominion, Colonial and Overseas), 1954 AC 495, the appellant Bank had a credit balance on the current account with the respondent bank's branch in Jerusalem. The British Mandate over Palestine expired at midnight on May 14, 1948, and thereupon the Provisional Council of State and the Provisional Government of the State of Israel were constituted. War broke out between Israel and the Arab States, which rendered the further performance of the contract of current account impossible. From the date of the termination of the Mandate the appellant Bank's premises were situate in Arab-controlled territory and the respondent Bank's premises were situated in Israel territory. By legislation the State of Israel vested in an official called the 'Custodian of the Property of Absentees', the property in the State of Israel belonging to a class of persons and corporations which included the Arab Bank. The respondents paid the appellants' credit balances, amounting to some £ 583000 to the Custodian. In 1950 the appellant sued the respondents for this sum. It was held that the right to be paid the credit balance survived the outbreak of war, remaining in existence subject to the suspension of the appellant bank's right to recover it. Being locally situate in Israel, it became subject to the legislation of that State and vested in the custodian, and was not recoverable by the appellant bank from the respondent bank. The key to the problem lies in distinguishing between (1) questions of assignability, which are governed by the proper law of the debt, and (2) question of attachment or garnishment (involuntary assignment) governed by the *lex situs* of the debt. If, for example an involuntary assignment occurs after a voluntary assignment has already been made, the *lex situs* determines whether the rights of the voluntary assignee have been postponed or defeated. If the voluntary assignment occurs first, the *lex situs* determines what rights, if any, the voluntary assignee has acquired. A question of priorities arose in the case of *Re Queensland Mercantile and Agency Co., 1891-1 Ch 536*, the fact of which were as follows

"The Union Bank of Australia held debentures issued by the Queensland Company charging the shares in that company that were not fully paid up. The Bank was domiciled in England and the company in Queensland. After the

capital had been called up, but before it was paid by the shareholders, who thus became debtors of the company, the X Company domiciled in Scotland, began an action for negligence in Scotland against the Queensland Company, and immediately issued the Scottish process of arrestment against numerous shareholders who were domiciled in Scotland. The effect of this process according to Scottish law was to prevent the shareholders, pending a decision in the action of negligence, from paying the calls to the company". The question that fell to be decided was whether the Union Bank, as debentureholders, were entitled to be paid first out of the unpaid shares, according to the law of England and of Queensland; or whether the X Company in accordance with the law of Scotland, had a prior right over the shares to the extent of the damages that they might be awarded in the action of negligence. A question of priorities between two assignees was thus raised. The Union Bank contended that the question fell to be decided by the law of Queensland, since the Queensland company was a creditor in respect of the unpaid shares and any assignment by it must be tested by the law of its domicile. North, J., however, applied Scottish law. His reasoning was that since the debtors were resident in Scotland and therefore the unpaid calls which formed the subject-matter of the assignments were situated in that country, the assignments must rank in the order prescribed by Scottish Law. He assimilated choses in action to tangible movables, asserting that an assignment of the latter class of property was governed by the *lex situs*. In our opinion the same legal position prevails in India and therefore the liability of the appellant in this case to the respondent in India must be deemed to have been extinguished.

9. For these reasons we hold that this appeal should be allowed, the Judgment of the Punjab High Court dated 12th September, 1963 in Civil Revision No. 104-D of 1958 should be set aside and the judgment of the Tribunal under the Displaced Persons (Debts Adjustment) Act in case No. 74/11/13 of 1956/1952 should be restored dismissing the claim of the respondent. There will be no order with regard to costs in the High Court. But as directed by this Court on 30th October, 1964, while granting Special leave, appellant will pay the cost of respondents in this Court.

GGM/D.V.C.

Appeal allowed.

AIR 1969 SUPREME COURT 1335
(V 56 C 245)

(From Mysore: AIR 1968 Mys 150)

J. M. SHELAT AND V. BHARGAVA, JJ.
Town Municipal Council, Athani (In all the Appeals), Appellant v. Presiding Officer, Labour Court, Hubli and others etc., Respondents.

Civil Appeals Nos. 170 to 173 of 1968,
D/- 20-3-1969.

(A) Constitution of India, Article 136 — New point before Supreme Court — Question of limitation — Plea that application under Section 33C (2), Industrial Disputes Act was barred by limitation — Question raises a plea of want of jurisdiction — Question being a pure question of law which could be decided on the basis of facts on record in the case, the Supreme Court permitted it to be raised before it even though it was not put forward either in the High Court or before the Labour Court. (Para 4)

(B) Industrial Disputes Act (1947), Section 33C (2) — Application claiming computation of benefit for overtime work and work done on weekly off days at certain rates — Rates pleaded in application not disputed by employer — Jurisdiction of Labour Court to entertain application not barred by S. 20 (1), Minimum Wages Act — (Minimum Wages Act (1948), S. 20) — (Payment of Wages Act (1936), S. 15.)

Section 20 (1) of the Minimum Wages Act cannot be invoked in respect of an application in which the claim of the workmen is for computation of their benefit at a certain rate for overtime work and work done on weekly off days where the employer contesting the application does not raise a dispute in relation to the rate pleaded by the applicants but merely alleges that no rates at all had been prescribed by the Government. Hence no question of the jurisdiction of the Labour Court to entertain the application under S. 33C (2) of the Industrial Disputes Act being barred because of the provisions of S. 20 (1) of the Minimum Wages Act can arise at all in such a case. (Para 7)

The language used at all stages of the Minimum Wages Act leads to the clear inference that that Act is primarily concerned with fixing of rates — Rates of minimum wages, overtime rates, rate for payment for work on a day of rest and is not really intended to be an Act for enforcement of payment of wages for which provision is made in other laws,

JM/JM/B799/69/D

such as the Payment of Wages Act No. 4 of 1936, and the Industrial Disputes Act No 14 of 1947. The language used in Section 20 (1) shows that the Authority appointed under that provision of law is to exercise jurisdiction for deciding claims which relate to rates of wages, rates for payment of work done on days of rest and overtime rates. The purpose of Section 20 (1) seems to be to ensure that the rates prescribed under the Minimum Wages Act are complied with by the employer in making payments and, if any attempt is made to make payments at lower rates, the workmen are given the right to invoke the aid of the Authority appointed under Section 20 (1). In cases where there is no dispute as to rates of wages, and the only question is whether a particular payment at the agreed rate in respect of minimum wages, overtime or work on off-days is due to a workman or not, the appropriate remedy is provided in Section 15 of the Payment of Wages Act. In cases where section 15 of the Payment of Wages Act may not provide adequate remedy, the remedy can be sought either under Section 33C of the Industrial Disputes Act or by raising an industrial dispute under the Act and having it decided under the various provisions of that Act. (Para 6)

The power to make orders for payment of actual amount due to an employee under Section 20 (3) Minimum Wages Act cannot, be interpreted as indicating that the jurisdiction to the Authority under Section 20 (1) has been given for the purpose of enforcement of payment of amounts and not for the purpose of ensuring compliance by the employer with the various rates fixed under that Act. (Para 6)

(C) Limitation Act (1963), Article 137 — Application under other Acts — Application under Section 33C (2), Industrial Disputes Act — Article does not apply (1968) 70 Bom LR 104, Overruled — (Industrial Disputes Act (1947), S. 33C (2)).

Article 137 of the schedule to the Limitation Act, 1963 does not apply to applications under Section 33C (2) of the Industrial Disputes Act, so that no limitation is prescribed for such applications (1968) 70 Bom LR 104, Overruled, AIR 1953 SC 98 and AIR 1964 SC 752, Rel on

(Para 12)

In considering the scope of the parallel provision contained in Article 181 of the Limitation Act, 1908 it was held by the Supreme Court that that article had been

held by a long catena of decisions to be confined to application under the Civil P C and there was no reason to hold that the subsequent amendment of Articles 158 and 178 of that Act had the effect of altering that long acquired meaning of Article 181 on the sole and simple ground that after the amendment the reason on which the old construction was founded was no longer available. That view expressed by the Court must be held to be applicable, even when considering the scope and applicability of Article 137 in the new Limitation Act of 1963.

(Para 10)

When the Supreme Court held that all the articles in the third division to the schedule, including Article 181 of the Limitation Act of 1908 governed applications under the Code of Civil Procedure only, it clearly implied that the applications must be presented to a Court governed by the Code of Civil Procedure. At best, the amendments now made in the Act of 1963 enlarge the scope of the third division of the schedule so as also to include some applications presented to courts governed by the Code of Criminal Procedure. One factor at least remains constant and that is that the applications must be to courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than courts, such as a quasi-judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. (Para 11)

Cases referred: Chronological Paras

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| (1968) 70 Bom LR 104 = (1968) 2 Lab LJ 505, Manager M/s P. K. Porwal v Labour Court, Nagpur | 12 |
| (1964) AIR 1964 SC 752 (V 51) = 1964-3 SCR 709, Bombay Gas Co Ltd v Gopal Bhiva | 9 |
| (1953) AIR 1953 SC 98 (V 40) = 1953 SCR 351, Sha Mulchand & Co Ltd v. Jawahar Mills Ltd Salem | 8, 9, 10 |
| (1933) AIR 1933 PC 63 (V 20) = 60 Ind App 13, Hansraj Gupta v. Official Liquidator Dehra Dun. Mussoorie Electric Tramway Co. Ltd. | 9 |
| (1880) ILR 7 Bom 213, Bai Manekbai v. Manekji Kavaji | 9 |

Mr. B. Sen, Senior Advocate (M/s. S. N. Prasad and R. B. Datar, Advocates with him), for Appellant (In all the Appeals); Mr. Janardan Sharma, Advocate, for Respondents Nos. 4 to 14 (In C. A. No. 170 of 1968), Respondents Nos. 4 to 24 and 26 to 53 (In C. A. No. 171 of 1968), Respondent No. 4 (In C. A. No. 172 of 1968) and Respondents Nos. 4 to 17 (In C. A. No. 173 of 1968).

The following Judgment of the Court was delivered by

BHARGAVA, J.: These four connected appeals have been filed, by special leave, by the Town Municipal Council, Athani, and are directed against a common judgment of the High Court of Mysore in four writ petitions filed by the appellant under Article 226 of the Constitution, dismissing the writ petitions. The circumstances in which these appeals have arisen may be briefly stated.

2. Four different applications under Section 33C (2) of the Industrial Disputes Act No. 14 of 1947 (hereinafter referred to as "the Act") were filed in the Labour Court, Hubli, by various workmen of the appellant. Application (LCH) No. 139 of 1965 was filed by eleven workmen on 28th July, 1965, seeking computation of their claim for overtime work for the period between 1st April, 1955 and 31st December, 1957, and for work done on weekly off-days for the period between 1st April, 1955 and 31st December, 1960. The amount claimed by each workman was separately indicated in the application under each head. The total claim of all the workmen was computed at Rs. 62,420.82 P. according to the workmen themselves. The second application (LCH) No. 138 of 1965 was presented by 50 workmen on 23rd July, 1965, putting forward a claim for washing allowance at Rs. 36 each from 1st January, 1964 to 30th June, 1965, and cost of uniform at Rs. 40 each from 1st January, 1964 to 30th June, 1965 in respect of 18 of those 50 workmen. The third application (LCH) No. 101 of 1965 was filed by one workman alone on 19th April 1965, claiming a sum of Rs. 8,910.72 P. in respect of his overtime work and compensation for work done on weekly off-days. The fourth application (LCH) No. 140 of 1965 was filed on 26th July, 1965 by 14 workmen making a total claim of Rs. 17,302.60 P., for work done on weekly off-days during the period from 1st December, 1960 to 30th June, 1965. 13 of the workmen claimed that they were entitled to pay-

ment at Rs. 1,190 each, while one workman's claim was to the extent of Rupees 1,832.60 P. The Labour Court at Hubli entertained all these applications under Section 33C (2) of the Act, computed the amounts due to the various workmen who had filed the applications, and directed the appellant to make payment of the amounts found due. Thereupon, the appellant challenged the decision of the Labour Court before the High Court of Mysore by four different writ petitions under Article 226 of the Constitution. The order in Application (LCH) No. 139/1965 was challenged in Writ Petition No. 741 of 1966, that in Application (LCH) No. 138/1965 in Writ Petition No. 973 of 1966; that in Application (LCH) No. 101 of 1965 in Writ Petition No. 974 of 1966; and that in Application (LCH) No. 140/1965 in Writ Petition No. 975/1966. The principal ground for challenging the decision of the Labour Court was that all these amounts could have been claimed by the workmen by filing applications under Section 20 (1) of the Minimum Wages Act No. 11 of 1948; and, since that Act was a self-contained Act making provision for relief in such cases, the jurisdiction of the Labour Court under the general Act, viz., the Industrial Disputes Act, 1947 was taken away and excluded. It was further pleaded that the jurisdiction of the Labour Court to deal with the claims under Section 20 (1) of the Minimum Wages Act had become time-barred and such claims, which had become time-barred, could not be entertained by the Labour Court under Section 33C (2) of the Act. Some other pleas were also taken in the writ petitions which we need not mention as they have not been raised before us. The High Court did not accept the plea put forward on behalf of the appellant and dismissed the writ petitions by a common order dated 25th August, 1967. These four appeals are directed against that common order dismissing the four writ petitions. Civil Appeals Nos. 170, 171, 172 and 173 of 1968 are directed against the order governing Writ Petitions Nos. 741/1966, 973/1966, 974/1966 and 975/1966 respectively.

3. In these appeals in this Court also, the principal point urged by learned counsel for the appellant was the same which was raised before the High Court in the Writ Petitions, viz., that the jurisdiction of the Labour Court to deal with the claims of the workmen under Section 33C (2) of the Act was barred by the fact that the same relief could have been

claimed by the workmen under S 20 (1) of the Minimum Wages Act. In the course of the arguments, however, learned counsel conceded that he could not press this point in Civil Appeal No 171 of 1968 arising out of Writ Petition No 973 of 1966 which was directed against the order of the Labour Court in Application (LCH) No 138 of 1965, because the claim in that application before the Labour Court was confined to washing allowance and cost of uniform which are items not governed by the Minimum Wages Act at all. His submissions have, therefore, been confined before us to the other three appeals in which the claim of the workmen was for computation of their benefit in respect of overtime work and work done on weekly off-days.

4 It may be mentioned that the objection to the jurisdiction of the Labour Court was raised on behalf of the appellant not only in the writ petitions before the High Court but even before the Labour Court itself when that Court took up the hearing of the applications under Section 33C (2) of the Act. However, the ground for challenging the jurisdiction of the Labour Court was confined to the point mentioned by us above. It was not contended either before the Labour Court or in the writ petitions before the High Court that the applications were not covered by the provisions of Sec 33C (2) of the Act. The plea taken was that, even though the applications could be made under Section 33C (2) of the Act, the jurisdiction of the Labour Court to proceed under that provision of law was barred by the provisions of the Minimum Wages Act. Mr. B Sen, appearing on behalf of the appellant, wanted permission to raise the question whether these applications before the Labour Court were at all included within the scope of Section 33C (2) of the Act, but, on the objection of learned counsel for the respondents, the permission sought was refused. As we have mentioned earlier, the jurisdiction of the Labour Court on this ground was not challenged either before the Labour Court itself or before the High Court. No such ground was raised even in the special leave petition, nor was it raised at any earlier stage by any application. It was sought to be raised by Mr Sen for the first time in the course of the arguments in the appeals at the time of final hearing. We did not consider it correct to allow such a new point to be raised at this late stage. However, another new point, which had not been

raised before the Labour Court and in the writ petitions before the High Court, was permitted to be argued, because it was raised by a separate application, presented before the hearing, seeking permission to raise it. The new question sought to be raised is that, even if the applications under Section 33C (2) of the Act were competent and not barred by the provisions of the Minimum Wages Act, they were time-barred when presented under Article 137 of the Schedule to the Limitation Act No 36 of 1963. The question of limitation was incidentally mentioned before the Labour Court as well as the High Court, relying on the circumstance that applications under S. 20 (1) of the Minimum Wages Act could only have been presented within period of six months from the date when the claims arose. At that stage, reliance was not placed on Article 137 of the Schedule to the Limitation Act, but, well before the final hearing, a written application was presented on behalf of the appellant seeking permission to raise this plea of limitation in these appeals. Notice of that application was served on the respondents well in time, so that, by the time the appeals came up for hearing, they knew that this point was sought to be raised by the appellant. A question of limitation raises a plea of want of jurisdiction and, in these cases, this question could be decided on the basis of the facts on the record, being a pure question of law. It is in this background that we have permitted this question also to be raised in these appeals, though it was not put forward either in the High Court or before the Labour Court. Thus, we are concerned in these appeals with the two aspects relating to the exclusion of the jurisdiction of the Labour Court to entertain applications under Section 33C (2) of the Act because of the provisions of the Minimum Wages Act, and the plea that the applications under Section 33C (2) of the Act were time-barred or at least part of the claims under the applications were time-barred in view of Article 137 of the schedule to the Limitation Act, 1963.

5 On the first question, both the Labour Court and the High Court held that the contention raised on behalf of the appellant that the jurisdiction of the Labour Court was excluded because of Section 20 (1) of the Minimum Wages Act has no force, on the assumption that the claims made in these applications under Section 33C (2) of the Act could

have been presented before the Labour Court under Section 20 (1) of the Minimum Wages Act. In our view, this assumption was not justified. As we shall indicated hereinafter, the claims made by the workmen in the applications under Section 33C (2) of the Act could not have been made before the Labour Court under Section 20 (1) of the Minimum Wages Act, so that it is not necessary for us to decide the general question of law whether an application under Section 33C (2) of the Act can or cannot be competently entertained by a Labour Court if an application for the same relief is entertainable by the Labour Court under Section 20 (1) of the Minimum Wages Act.

6. The long title and the preamble to the Minimum Wages Act show that this Act was passed with the object of making provision for fixing minimum rates of Wages in certain employments. The word "wages" has been given a wide meaning in its definition in Section 2 (h) of that Act and, quite clearly, includes payment in respect of overtime and for work done on weekly off-days which are required to be given by any employer to the workmen under the provisions of that Act itself. Section 13 (1), which deals with weekly off-days, and Section 14 (1), which deals with overtime, are as follows:—

"13. (1) In regard to any scheduled employment minimum rates of wages in respect of which have been fixed under this Act, the appropriate Government may—

(a) fix the number of hours of work which shall constitute a normal working day, inclusive of one or more specified intervals;

(b) provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such days of rest;

(c) provide for payment for work on a day of rest at a rate not less than the overtime rate."

"14. (1) Where an employee, whose minimum rate of wages is fixed under this Act by the hour, by the day or by such a longer wage-period as may be prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or for part of an hour so worked in excess at the overtime rate fixed under this Act or under any law of

the appropriate Government for the time being in force, whichever is higher."

In order to provide a remedy against breach of orders made under Sections 13 (1) and 14 (1), that Act provides a forum and the manner of seeking the remedy in Section 20 which is as follows:—

"20. (1) The appropriate Government may, by notification in the Official Gazette, appoint any Commissioner for Workmen's Compensation or any officer of the Central Government exercising functions as a Labour Commissioner for any region, or any officer of the State Government not below the rank of Labour Commissioner or any other officer with experience as a Judge of a Civil Court or as a stipendiary Magistrate to be the Authority to hear and decide for any specified area all claims arising out of payment of less than the minimum rates of wages or in respect of the payment of remuneration for days of rest or for work done on such days under clause (b) or clause (c) of sub-section (1) of Sec. 13 or of wages at the overtime rate under Section 14, to employees employed or paid in that area.

(2) Where an employee has any claim of the nature referred to in sub-section (1), the employee himself, or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf, or any Inspector, or any person acting with the permission of the Authority appointed under sub-section (1), may apply to such Authority for a direction under sub-section (3):

Provided that every such application shall be presented within six months from the date on which the minimum wages or other amount became payable:—

Provided further that any application may be admitted after the said period of six months when the applicant satisfies the Authority that he had sufficient cause for not making the application within such period.

(3) When any application under sub-section (2) is entertained, the Authority shall hear the applicant and the employer, or give them an opportunity of being heard, and after such further inquiry, if any, as it may consider necessary, may, without prejudice to any other penalty to which the employer may be liable under this Act, direct—

(i) in the case of a claim arising out of payment of less than the minimum rates of wages, the payment to the employee of the amount by which the minimum

wages payable to him exceed the amount actually paid, together with the payment of such compensation as the Authority may think fit, not exceeding ten times the amount of such excess,

(u) in any other case, the payment of the amount due to the employee, together with the payment of such compensation as the Authority may think fit, not exceeding ten rupees,

and the Authority may direct payment of such compensation in cases where the excess or the amount due is paid by the employer to the employee before the disposal of the application

(4) If the Authority hearing any application under this section is satisfied that it was either *malicious* or *vexatious*, it may direct that a penalty not exceeding fifty rupees be paid to the employer by the person presenting the application

(5) Any amount directed to be paid under this section may be recovered—

(a) if the Authority is a Magistrate, by the Authority as if it were a fine imposed by the Authority as a Magistrate, or

(b) if the Authority is not a Magistrate, by any Magistrate to whom the Authority makes application in this behalf, as if it were a fine imposed by such Magistrate

(6) Every direction of the Authority under this section shall be final

(7) Every Authority appointed under sub-section (1) shall have all the powers of a Civil Court under the Code of Civil Procedure, 1908, for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents, and every such Authority shall be deemed to be a Civil Court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 "

We have mentioned these provisions of the Minimum Wages Act, because the language used at all stages in that Act leads to the clear inference that that Act is primarily concerned with fixing of rates — rates of minimum wages, overtime rates, rate for payment for work on a day of rest — and is not really intended to be an Act for enforcement of payment of wages for which provision is made in other laws, such as the Payment of Wages Act No 4 of 1936, and the Industrial Disputes Act No 14 of 1947. In Section 20 (1) of the Minimum Wages Act also, provision is made for seeking remedy in respect of claims arising out of payment of less than the minimum rates of

wages or in respect of payment of remuneration for days of rest or for work done on such days under clause (b) or clause (c) of sub-section (1) of Section 13 or of wages at the overtime rate under Section 14. This language used in Section 20 (1) shows that the Authority appointed under that provision of law is to exercise jurisdiction for deciding claims which relate to rates of wages, rates for payment of work done on days of rest and overtime rates. If there be no dispute as to rates between the employer and the employees, Section 20 (1) would not be attracted. The purpose of Section 20 (1) seems to be to ensure that the rates prescribed under the Minimum Wages Act are complied with by the employer in making payments and, if any attempt is made to make payments at lower rates, the workmen are given the right to invoke the aid of the Authority appointed under Section 20 (1). In cases where there is no dispute as to rates of wages, and the only question is whether a particular payment at the agreed rate in respect of minimum wages, overtime or work on off-days is due to a workman or not, the appropriate remedy is provided in the Payment of Wages Act. If the payment is withheld beyond the time permitted by the Payment of Wages Act even on the ground that the amount claimed by the workman is not due, or if the amount claimed by the workman is not paid on the ground that deductions are to be made by the employer, the employee can seek his remedy by an application under Section 15 (1) of the Payment of Wages Act. In cases where S 15 of the Payment of Wages Act may not provide adequate remedy, the remedy can be sought either under Section 33C of the Act or by raising an industrial dispute under the Act and having it decided under the various provisions of that Act. In these circumstances, we are unable to accept the submission made by Mr Sen on behalf of the appellant that Section 20 (1) of the Minimum Wages Act should be interpreted as intended to cover all claims in respect of minimum wages or overtime payment or payment for days of rest even though there may be no dispute as to the rates at which those payments are to be claimed. It is true that, under Section 20 (3), power is given to the Authority dealing with an application under Section 20 (1) to direct payment of the actual amount found due, but this, it appears to us, is only an incidental power granted to that Authority, so that the

directions made by the Authority under Section 20 (1) may be effectively carried out and there may not be unnecessary multiplicity of proceedings. The power to make orders for payment of actual amount due to an employee under Section 20 (3) cannot, therefore, be interpreted as indicating that the jurisdiction to the Authority under Section 20 (1) has been given for the purpose of enforcement of payment of amounts and not for the purpose of ensuring compliance by the employer with the various rates fixed under that Act. This interpretation, in our opinion, also harmonises the provisions of the Minimum Wages Act with the provisions of the Payment of Wages Act which was already in existence when the Minimum Wages Act was passed. In the present appeals therefore, we have to see whether the claims which were made by the workmen in the various applications under Section 33C (2) of the Act were of such a nature that they could have been brought before the Authority under Section 20 (1) of the Minimum Wages Act inasmuch as they raised disputes relating to the rates for payment of overtime and for work done on weekly off-days.

7. We have examined the applications which were presented before the Labour Court under Section 33C (2) of the Act in these appeals and have also taken into account the pleadings which were put forward on behalf of the appellant in contesting those applications and we are unable to find that there was any dispute relating to the rates. It is true that, in their applications, the workmen did plead the rates at which their claims had to be computed; but it was nowhere stated that those rates were being disputed by the appellant. Even in the pleadings put forward on behalf of the appellant as incorporated in the order of the Labour Court, there was no pleading that the claims of the workmen were payable at a rate different from the rates claimed by them. It does appear that, in one case, there was a pleading on behalf of the appellant that no rates at all had been prescribed by the Mysore Government. That pleading did not mean that it became a dispute as to the rates at which the payments were to be made by the appellant. The only question that arose was whether there were any rates at all fixed under the Minimum Wages Act for overtime and for payment for work done on days of rest. Such a question does not relate to a dispute as to the rates en-

forceable between the parties, so that the remedy under Section 20 (1) of the Minimum Wages Act could not have been sought by the applicants in any of these applications. No question can, therefore, arise of the jurisdiction of the Labour Court to entertain these applications under Section 33C (2) of the Act being barred because of the provisions of the Minimum Wages Act. The first point raised on behalf of the appellant thus fails.

8. In dealing with the second question relating to the applicability of Article 137 of the schedule to the Limitation Act, 1963 to applications under Section 33C (2) of the Act, we may first take notice of two decisions of this Court on the scope of the parallel provision contained in Article 181 of the First Schedule to the Indian Limitation Act No. 9 of 1908. Article 181 of that Schedule laid down that the period of limitation for an application, for which no period of limitation was provided elsewhere in the schedule or by Section 48 of the Code of Civil Procedure, 1908, would be three years, and the time from which the period would begin to run would be when the right to apply accrued. The scope of this article was considered first by this Court in *Sha Mulchand & Co. Ltd. v. Jawahar Mills Ltd.*, Salem, 1953 SCR 351=(AIR 1953 SC 98) where the Court had to consider the question whether this article would govern an application made by the Official Receiver under Section 38 of the Indian Companies Act for rectification of the register of a limited company. The Court noted the fact that the advocate appearing in the case relied strongly on Art. 181 of the Limitation Act and, thereafter, took notice of the fact that that article had, in a long series of decisions of most, if not all, of the High Courts, been held to govern only applications under the Code of Civil Procedure. The Court also dealt with the argument advanced that the reason for holding that Article 181 was confined to applications under the Code was that the article should be construed *eiusdem generis* and that, as all the articles in the third division of the schedule to the Limitation Act related to applications under the Code, Article 181, which was the residuary article, must be limited to applications under the Code. That reasoning, it was pointed out, was no longer applicable because of the amendment of the Limitation Act by the introduction of Articles 158 and 178 which governed applications under the Arbitration Act and not thus under the Code. The Court then

considered the views expressed by the various High Courts in a number of cases and held —

"It does not appear to us quite convincing, without further argument, that the mere amendment of Articles 158 and 178 can ipso facto alter the meaning which as a result of a long series of judicial decisions of the different High Courts in India, came to be attached to the language used in Article 181. This long catena of decisions may well be said to have, as it were, added the words 'under the Code' in the first column of that article. If those words had actually been used in that column, then a subsequent amendment of Articles 158 and 178 certainly would not have affected the meaning of that article. If, however, as a result of judicial construction, those words have come to be read into the first column as if those words actually occurred therein, we are not of opinion, as at present advised, that the subsequent amendment of Articles 158 and 178 must necessarily and automatically have the effect of altering the long acquired meaning of Article 181 on the sole and simple ground that after the amendment the reason on which the old construction was founded is no longer available."

9 This earlier decision was relied upon by this Court in *Bombay Gas Co. Ltd v Gopal Bhava*, 1964-3 SCR 709 at pp 722-23=(AIR 1964 SC 752 at p 758), where the Court had to deal with the argument that applications under Section 33C of the Act will be governed by three years' limitation provided by Article 181 of the Limitation Act. The Court, in dealing with this argument held,—

"In our opinion, this argument is one of desperation. It is well settled that Article 181 applies only to applications which are made under the Code of Civil Procedure, and so, its extension to applications made under Section 33C (2) of the Act would not be justified. As early as 1880, the *Bombay High Court* had held in *Bai Manekbai v Manekji Kavaji*, (1880) ILR 7 Bom 213, that Article 181 only relates to applications under the Code of Civil Procedure in which case no period of limitation has been prescribed for the application, and the consensus of judicial opinion on this point had been noticed by the Privy Council in *Hansraj Gupta v Official Liquidators, Dehra Dun Mussoorie, Electric Tramway Co., Ltd*, 60 IA 13 at p 20=(AIR 1933 PC 63 at p 64). An attempt was no doubt made in the case

of 1953 SCR 351=(AIR 1953 SC 98), to suggest that the amendment of Arts 158 and 178 ipso facto altered the meaning which had been attached to the words in Article 181 by judicial decisions, but this attempt failed, because this Court held "that the long catena of decisions under Article 181 may well be said to have, as it were, added the words 'under the Code' in the first column of that Article. Therefore, it is not possible to accede to the argument that the limitation prescribed by Article 181 can be invoked in dealing with applications under Section 33C (2) of the Act."

10. It appears to us that the view expressed by this Court in those cases must be held to be applicable, even when considering the scope and applicability of Article 137 in the new Limitation Act of 1963. The language of Article 137 is only slightly different from that of the earlier Article 181 inasmuch as, when prescribing the three years' period of limitation, the first column giving the description of the application reads as "any other application for which no period of limitation is provided elsewhere in this division". In fact, the addition of the word "other" between the words "any" and "application" would indicate that the legislature wanted to make it clear that the principle of interpretation of Article 181 on the basis of ejusdem generis should be applied when interpreting the new Article 137. This word "other" implies a reference to earlier articles, and, consequently, in interpreting this article, regard must be had to the provisions contained in all the earlier articles. The other articles in the third division to the schedule refer to applications under the Code of Civil Procedure, with the exception of applications under the Arbitration Act and also in two cases applications under the Code of Criminal Procedure. The effect of introduction in the third division of the schedule of reference to applications under the Arbitration Act in the old Limitation Act has already been considered by this Court in the case of *Sha Mulchand & Co. Ltd*, 1953 SCR 709=(AIR 1953 SC 98) (supra). We think that, on the same principle, it must be held that even the further alteration made in the articles contained in the third division of the schedule to the new Limitation Act containing references to applications under the Code of Criminal Procedure cannot be held to have materially altered the scope of the residuary Article 137 which deals with other applications. It is not possible to hold that the intention of

the legislature was to drastically alter the scope of this article so as to include within it all applications, irrespective of the fact whether they had any reference to the Code of Civil Procedure.

11. This point, in our opinion, may be looked at from another angle also. When this Court earlier held that all the articles in the third division to the schedule, including Article 181 of the Limitation Act of 1908 governed applications under the Code of Civil Procedure only, it clearly implied that the applications must be presented to a Court governed by the Code of Civil Procedure. Even the applications under the Arbitration Act that were included within the third division by amendment of Articles 158 and 178 were to be presented to Courts whose proceedings were governed by the Code of Civil Procedure. At best the further amendment now made enlarges the scope of the third division of the schedule so as also to include some applications presented to courts governed by the Code of Criminal Procedure. One factor at least remains constant and that is that the applications must be to courts to be governed by the articles in this division. The scope of the various articles in this division cannot be held to have been so enlarged as to include within them applications to bodies other than Courts, such as a quasi-judicial tribunal, or even an executive authority. An Industrial Tribunal or a Labour Court dealing with applications or references under the Act are not courts and they are in no way governed either by the Code of Civil Procedure or the Code of Criminal Procedure. We cannot, therefore, accept the submission made that this article will apply even to applications made to an Industrial Tribunal or a Labour Court. The alterations made in the article and in the new Act cannot, in our opinion, justify the interpretation that even applications presented to bodies, other than courts, are now to be governed for purposes of limitation by Art. 137.

12. Reliance in this connection was placed by learned Counsel for the appellant primarily on the decision of the Bombay High Court in *Manager, M/s. P. K. Porwal v. Labour Court at Nagpur*, (1968) 70 Bom LR 104. We are unable to agree with the view taken by the Bombay High Court in that case. The High Court ignored the circumstance that the provisions of Article 137 were sought to be applied to an application which was presented not to a Court but to a Labour Court dealing

with an application under Section 33C (2) of the Act and that such a Labour Court is not governed by any procedural code relating to civil or criminal proceedings. That Court appears to have been considerably impressed by the fact that in the new Limitation Act of 1963, an alteration was made in the long title which has been incorrectly described by that Court as preamble. Under the old Limitation Act, no doubt, the long title was "An Act to consolidate and amend the law for the limitation of suits and for other purposes", while, in the new Act of 1963, the long title is "An Act to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith". In the long title, thus, the words "other proceedings" have been added; but we do not think that this addition necessarily implies that the Limitation Act is intended to govern proceedings before any authority, whether executive or quasi-judicial, when, earlier, the old Act was intended to govern proceedings before civil courts only. It is also true that the preamble which existed in the old Limitation Act of 1908 has been omitted in the new Act of 1963. The omission of the preamble does not, however, indicate that there was any intention of the legislature to change the purposes for which the Limitation Act has been enforced. The Bombay High Court also attached importance to the circumstance that the scope of the new Limitation Act has been enlarged by changing the definition of "applicant" in Section 2 (a) of the new Act so as to include even a petitioner and the word "application" so as to include a petition. The question still remains whether this alteration can be held to be intended to cover petitions by a petitioner to authorities other than Courts. We are unable to find any provision in the new Limitation Act which would justify holding that these changes in definition were intended to make the Limitation Act applicable to proceedings before bodies other than Courts. We have already taken notice of the change introduced in the third division of the schedule by including references to applications under the Code of Criminal Procedure, which was the only other aspect relied upon by the Bombay High Court in support of its view that applications under Section 33C of the Act will also be governed by the new Art. 137. For the reasons we have indicated earlier, we are unable to accept the view expressed by the Bombay High Court; and we

hold that Article 137 of the schedule to the Limitation Act, 1963 does not apply to applications under Section 33C (2) of the Act, so that the previous decision of this Court that no limitation is prescribed for such applications remains unaffected.

13 The appeals fail and are dismissed with costs. One hearing fee.

MKS/DVC

Appeals dismissed

questions of law and fact it would have conveyed its intention by appropriate words as has been done under various other statutes. A wrong decision on facts by a competent court is also a decision according to law. (Para 6)

At the same time the power conferred under the 1st proviso to Sec 75 (1) of the Act is not co-extensive with that given to the High Court under Sec 100 (1) (a) of the Code of Civil Procedure. A decision being "contrary to law" as provided in Sec 100 (1) (a) of the Code of Civil Procedure is not the same thing as a decision being not "according to law" as prescribed in the 1st proviso of Sec 75 (1) of the Act. The latter expression is wider in ambit than the former. The power given to the High Court under the 1st proviso to Sec 75 (1) of the Act is similar to that given to it under S 25 of the Provincial Small Cause Courts Act. (Paras 4 & 7)

Though it may not be possible to give an exhaustive definition of the expression "according to law" instances in which the High Court may interfere under the provision can be given. They are cases in which the Court which made the order had no jurisdiction or in which the Court has based its decision on evidence which should not have been admitted, or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at. AIR 1938 Bom 223 & AIR 1963 SC 693, Rel on, AIR 1963 SC 920, Explained.

(Para 7)

(B) Provincial Insolvency Act (1920), S. 53 — Mortgage impeached as not supported by consideration — Onus is on party challenging its validity to prove absence of consideration — But where mortgages do not stand by the recitals as to the manner in which consideration was paid it is for them to prove the passing of consideration. (Para 20)

Cases Referred Chronological Paras

(1965) AIR 1963 SC 920 (V 52) =
1965-1 SCR 254, Official Receiver,
Kanpur v Abdul Shakur

AIR 1969 SUPREME COURT 1344

(V 56 C 246)

(From Madras)*

S M SIKRI, R S BACHAWAT AND
K S HEGDE, JJ.

Malini Ayyappa Naicker (dead) by his legal representative etc., Appellants v Seth Manghraj Udhavdas firm by Managing Partner, Chathurbhuj Chhabildas (dead) by his legal representatives and others, etc., Respondents

Civil Appeals Nos 845 and 846 of 1963, D/- 13-2-1969

(A) Provincial Insolvency Act (1920), S. 75 (1) first Proviso and S 53 — Powers of High Court — Findings of fact by District Court — High Court cannot de novo examine those findings. Civil Revn. Petns. Nos 981 and 982 of 1956, D/- 17-1-1958 (Mad), Reversed — (Civil P. C. (1908), S 100 (1) (a)) — (Provincial Small Cause Courts Act (1887), S 25) — (Words and Phrases — Decision "contrary to law" and 'decision not according to law' — Dis-finction).

The findings of the District Court in an appeal against a decision under Sec 53, that the impugned mortgages were fully supported by consideration and that they were genuine transactions are findings of fact which are not open to review by the High Court acting under the first proviso to Sec. 75 (1) of the Act. In so far as the High Court in Civil Revn Petns. Nos 981 and 982 of 1956, D/- 17-1-1958 (Mad), reviewed the finding, decision of High Court reversed. (Para 19)

Quite clearly the legislature did not confer on the High Court under the 1st Proviso to Section 75 (1) of the Act an appellate power nor did it confer on it a jurisdiction to reappreciate the evidence on record. If the legislature intended to confer power on it to re-examine both

* (Civil Revn Petns Nos 981 and 982 of 1956, D/- 17-1-1958 — Mad)

(1963) AIR 1963 SC 698 (V 50)=
1962 Supp 1 SCR 933, Hari Shan-
kar v. Rao Girdhari Lal Chow-
dhury

8, 9

(1938) AIR 1938 Bom 223 (V 25)=
40 Bom LR 125, Bell & Co., Ltd.
v. Waman Hemraj

7

Mr. S. V. Gupte, Senior Advocate, (Mr. R. Thiagarajan, Advocate, with him), for Appellants (In both the Appeals); Mr. Naunit Lal, Advocate, for Respondents Nos. 1 (c) and 17 (In C. A. No. 845 of 1963) and Respondents Nos. 1 (c) and 16 (In C. A. No. 846 of 1963).

The following Judgment of the Court was delivered by

HEGDE, J.: These appeals arise from an insolvency proceeding wherein one Ponnayya Konar and his sons were adjudicated as insolvents. In the said proceeding the petitioning creditor sought to get annulled two mortgages one for Rs. 15,000 (Exh. A-1) executed by the insolvents in favour of Ayyappa Naicker, the appellant in Civil Appeal No. 845 of 1963 and the other for Rs. 10,000 (Exh. A-2), the subject-matter of Civil Appeal No. 846 of 1963, in favour of one Srinivasa Naicker, the father-in-law of the aforementioned Ayyappa Naicker. The said *Srinivasa Naicker is dead* and the appeal is being prosecuted by his legal representatives. Both those mortgages are dated November 4, 1950 and they were registered on November 6, 1950. The Insolvency Court held that those mortgages were not supported by consideration and that they were executed with a view to screen some of the properties of the insolvents from their creditors. It accordingly annulled those mortgages under Section 53 of the Provincial Insolvency Act (hereinafter referred to as the Act). In appeal the learned District Judge reversed the findings of the trial Court. He came to the conclusion that those mortgages were fully supported by consideration and that they were genuine transactions. The High Court acting under the 1st proviso to Section 75 (1) of the Act reversed the judgment of the learned District Judge and restored that of the Insolvency Court. These appeals have been brought against the decision of the High Court after obtaining special leave from this Court.

2. The learned Counsel for the appellants challenged the decision of the High Court primarily on two grounds. According to him the High Court while acting under the 1st proviso to Section 75 (1)

of the Act had no power to disturb the findings of fact reached by the appellate Court. Next he contended that the conclusions of the High Court are unsustainable on the evidence on record. The learned Counsel for the contesting respondents supported the decision of the High Court.

3. The two principal questions that arise for decision in these appeals are (1) Was the High Court within its jurisdiction in interfering with the findings of the learned District Judge that the impugned transactions are bona fide transactions and that they were supported by consideration and (2) Are the conclusions reached by the High Court correct on the facts and circumstances of the case? It would be convenient to take up first, the question as to the scope of the powers of the High Court under the 1st proviso to Section 75 (1) of the Act. That section reads:

"The debtor, any creditor, the receiver or any other person aggrieved by a decision come to or an order made in the exercise of insolvency jurisdiction by a Court subordinate to a District Court may appeal to the District Court, and the order of the District Court upon such appeal shall be final:

Provided that the High Court, for the purpose of satisfying itself that an order made in any appeal decided by the District Court was according to law, may call for the case and pass such order with respect thereto as it thinks fit:

Provided further, that any such person aggrieved by a decision of the District Court on appeal from a decision of a Subordinate Court under Section 4 may appeal to the High Court on any of the grounds mentioned in sub-section (1) of Section 100 of the Code of Civil Procedure, 1908."

4. According to Shri S. V. Gupte, learned Counsel for the appellants, the jurisdiction of a High Court under the 1st proviso to Section 75 (1) is a very limited one, the same being not more than that conferred on it by sub-section (1) of Section 100 of the Code of Civil Procedure. In support of his contention he invited our attention to the scheme of Section 75 (1) of the Act. He urged that sub-section (1) of Section 75 prescribes that the decision of the District Court in appeal is final and the finality conferred on the decision of the District Court is subject to a very limited scrutiny by the High Court. We were further told that

the power conferred on the High Court under the 1st proviso to Section 75 (1) is only a revisional power, which power in its very nature is narrower in compass than an appellate power. According to him the power conferred under the 1st proviso to Section 75 (1) of the Act is co-extensive with that given to the High Court under Section 100 (1) (a) of the Code of Civil Procedure.

5. On the other hand Mr Naunit Lal, learned Counsel for the respondent urged that the High Court under the 1st proviso to Section 75 (1) of the Act has an extensive power and that power is very much wider than the power conferred on it under Section 100 (1) (a) of the Code of Civil Procedure, the power of the High Court under the 1st proviso to Section 75 (1) of the Act to call for the case to satisfy itself that the order made by the District Court was according to law and pass such other order in respect thereto as it thinks fit includes within itself the right to examine whether the District Court had taken into consideration all the material evidence and whether it had properly assessed that evidence.

6. We are of the opinion that the extreme contentions advanced on either side cannot be accepted. Quite clearly the legislature did not confer on the High Court under the 1st proviso to Section 75 (1) of the Act an appellate power nor did it confer on it a jurisdiction to re-appreciate the evidence on record. While exercising that power the High Court is by and large bound by the findings of fact reached by the District Court. If the legislature intended to confer power on it to re-examine both questions of law and fact it would have conveyed its intention by appropriate words as has been done under various other statutes. A wrong decision on facts by a competent court is also a decision according to law. For these reasons we cannot accept the contention of Mr Naunit Lal that the power conferred under the 1st proviso to Section 75 (1) of the Act enables it to de novo examine the findings of fact reached by the District Court.

7. A decision being "contrary to law" as provided in Section 100 (1) (a) of the Code of Civil Procedure is not the same thing as a decision being not "according to law" as prescribed in the 1st proviso of Section 75 (1) of the Act. The latter expression is wider in ambit than the former. It is neither desirable nor possible to give an exhaustive definition of the expression "according to law." The power

given to the High Court under the 1st proviso to Section 75 (1) of the Act is similar to that given to it under Sec 25 of the Provincial Small Cause Courts Act. Explaining the scope of the latter provision, Beaumont, C J (as he then was) in *Bell and Co. Ltd v Waman Hemraj*, 40 Bom LR 125 = (AIR 1938 Bom 223) observed

"The object of Section 25 is to enable the High Court to see that there has been no miscarriage of justice, that the decision was given according to law. The section does not enumerate the cases in which the Court may interfere in revision, as does Section 115 of the Code of Civil Procedure, and I certainly do not propose to attempt any exhaustive definition of the circumstances which may justify such interference, but instances which readily occur to the mind are cases in which the Court which made the order had no jurisdiction or in which the Court has based its decision on evidence which should not have been admitted or cases where the unsuccessful party has not been given a proper opportunity of being heard, or the burden of proof has been placed on the wrong shoulders. Wherever the Court comes to the conclusion that the unsuccessful party has not had a proper trial according to law, then the Court can interfere. But, in my opinion, the Court ought not to interfere merely because it thinks that possibly the Judge who heard the case may have arrived at a conclusion which the High Court would not have arrived at."

8. The said statement of the law was accepted as correct by this Court in *Harl Shankar v Rao Girdhari Lal Chowdhury*, 1962 Supp 1 SCR 933 = (AIR 1963 SC 698). We think the same applies squarely to the 1st proviso to Section 75 (1) of the Act.

8A. In support of his contention Mr. Gupte placed considerable reliance on the decision of this Court in *Official Receiver Kanpur v Abdul Shakur*, 1965-1 SCR 254 = (AIR 1965 SC 920) wherein this Court held that the High Court in exercise of its power under the 1st proviso to Section 75 (1) of the Act is incompetent to disturb the findings of fact reached by the District Court and further the question whether a statutory presumption was rebutted by the rest of the evidence on record was also a question of fact which again was not open to be reviewed by the High Court. Shah, J. who spoke for the Court observed thus at p. 259 (of SCR) = (at p 923 of AIR)

"The District Court inferred from the facts found that the statutory presumption under Section 118 of the Negotiable Instruments Act had been weakened and the burden which lay upon the insolvent was discharged and it was not open to the High Court exercising jurisdiction under Section 75 (1) proviso 1, nor even under proviso 2 of the Provincial Insolvency Act to set aside the judgment of the District Court, for it is well settled that the question whether a statutory presumption is rebutted by the rest of the evidence is a question of fact."

9. It may be remembered that Shah, J. was also a party to the decision in *Hari Shankar's case*, 1962 Supp 1 SCR 933 = (AIR 1963 SC 698) (supra). We see no conflict between the two decisions. The former decision enumerates some of the circumstances under which the High Court can interfere while considering whether the decision under review was made according to law. All that it laid down in *Abdul Shakur's case* is that the High Court is not competent to disturb a finding of fact reached by the District Court even if in reaching that finding it was required to take into consideration a statutory presumption.

10. We shall now proceed to examine the facts of this case bearing in mind the principles set out above.

11. We shall first set out the undisputed facts. The respondent Ponnayya Konar was a well to do person. He had one rice mill at Kivalur and another at Sirkali. He also had landed properties in Sirkali and Tuticorin. He was having money dealings with the family of Srinivasa Naicker from about the year 1925. Under the original of Exh. B-1, a registered deed of Othi dated 28th September, 1925, he had borrowed a sum of Rs. 30,000 from Rangappa Naicker, the father of Srinivasa Naicker. On October 5, 1930, the said deed was renewed by the execution of a simple mortgage deed by Ponnayya Konar and his sons in favour of Rangappa Naicker. Under the registered mortgage deed dated 13th January, 1942 (Exh. B-4 is its copy), the insolvents had borrowed from Ayyappa Naicker Rs. 20,000 out of which he discharged some of the debts due to Rangappa Naicker. Ayyappa Naicker was himself a rich man. Under the partition deed entered into in his family on October 30, 1936 (Exh. B-3) he got a cash of Rs. 52,000 and lands measuring 250 acres. The debt due to Ayyappa Naicker under the deed

dated 13th January 1942 was discharged by payment of Rs. 5,000 and interest on 3rd April, 1948 and Rs. 15,000 and interest on the 28th March, 1949, as can be seen from Exhs. B-5 and B-6.

12. The case of the mortgagees is that when Exhs. A-1 and A-2 were executed they were unaware of the fact that the insolvent had got into financial difficulties by then. The learned District Judge has accepted this plea and the learned Judge of the High Court has not come to a contrary conclusion.

13. There was no relationship between the insolvents and the mortgagees. In fact they belong to different communities. The insolvents are Hindus and the mortgagees are Christians. They also live at different places. The insolvents were residing at Sirkali and the mortgagees at Tuticorin, a place which is at a considerable distance from Sirkali.

14. According to the mortgagees the circumstances under which Exhs. A-1 and A-2 came to be executed are as follows:—

In about the beginning of 1950 Ponnayya Konar approached Srinivasa Naicker for a loan of Rs. 30,000. Srinivasa Naicker told him that he and his son-in-law Ayyappa Naicker together would lend him a sum of Rs. 25,000 on the mortgage of his properties at Tuticorin. But as they did not have the entire sum of Rs. 25,000 in their hands at that time, a sum of Rs. 10,000 was paid to Ponnayya Konar on April 28, 1950 and a promissory note was taken for that amount (Exh. A-11). In the beginning of September, 1950 Ponnayya Konar sent his son Arulappan with the letter (Exh. B-7) to get some more money. Accordingly another sum of Rs. 5,000 was paid on September 8, 1950 and the pronote (Exh. A-12) was taken from Arulappan. They agreed to pay the balance amount promised to be advanced at the time of the execution of the mortgage deeds. The mortgage deeds were got written up and executed on 4th November, 1950. Therein it was recited that they were executed for cash consideration. It was thought that the mortgagees would be able to pay the balance amount before the registration of the documents on November 6, 1950. But by that time they were not able to get together the entire amount that remained to be paid. On the date of the registration Ayyappa Naicker paid to the mortgagees only a sum of Rs. 4,500, another sum of Rs. 500 was adjusted towards the interest due on the sum of Rs. 15,000 previously advanced in April and September.

The remaining sum of Rs. 5,000 was paid in two instalments, a sum of Rs. 1700 through Amurthan, the 3rd son of Pon-nayya Konar on January 7, 1951 and the remaining sum of Rs. 3,300 again through Amurthan on February 10, 1951.

15. In the insolvency proceedings on the application of the petitioning creditor, a commissioner to search the house of the insolvents and seize their books of account and other relevant records was appointed. After search the commissioner seized from the house of the insolvents several account books (ledgers as well as day books) as well as A-11 and A-12 which were found punched and defaced. Exhibits A-11, A-12 as well as several of the entries in the ledger and day books were marked by consent in the proceedings from which these appeals have arisen. Hence their genuineness is not open to question.

16. It is most unlikely that those documents were got up by the insolvents and kept in their house depending on the off chance of a Court commissioner searching their house and seizing them, so that they may serve as corroborating evidence in support of the impugned mortgages. If Exhs A-11 and A-12 as well as the entries in the account books were intended to support the claim under Exhs. A-1 and A-2, the most natural course would have been to draw up the mortgage deeds in such a way as to take assistance from them. In that case the mortgage deeds would not have recited that they were executed for cash consideration. Further Exhs A-11 and A-12 would have been left in the possession of the mortgagees. We are convinced that the version put forward by the mortgagees is substantially true. The original agreement between the parties was to take mortgagees of the Tubcorin properties for cash consideration. The intermediate steps taken were necessitated by the fact that mortgagees were not able to get together in one lump the required amount. The promissory notes Exhs A-11 and A-12 were taken as stop gap arrangements. The recitals in the mortgage deeds accord with the original agreement between the parties. That was likely to be the reason why the promissory notes Exhs. A-11 and A-12 were returned to the parties. The entries in the account books of the insolvents reflect the transactions as they took place. If they were bogus entries made to support Exhs. A-1 and A-2, a receipt of Rs 25,000 in cash on 4th November 1950 would have been shown therein. The

learned District Judge correctly thought that the account entries in question had a great deal of intrinsic value. On the other hand the insolvency court and the High Court unnecessarily allowed themselves to be influenced by the apparent contradiction appearing between the recitals in Exhs. A-1 and A-2 and those in Exhs. A-11, A-12 and the account entries.

17. One other circumstance which had weighed with the High Court in holding that Exhs. A-1 and A-2 do not represent genuine transactions is that in their pleadings the mortgagees have stuck to their case that cash consideration passed under Exhs. A-1 and A-2 and this the Court thought was a deliberately false plea. The learned District Judge had carefully considered this circumstance but was of opinion that the same was of no consequence. We think that the High Court had attached undue importance to that circumstance. The issue before the parties at the time of the pleadings was whether the mortgages in question were supported by consideration or not and not the manner in which that consideration was paid. In their plea the mortgagees were merely adhering to the tenor of the mortgage deeds. From the facts stated earlier, it is clear that the mortgagees at all stages proceeded on the basis that Exhs A-1 and A-2 were executed for cash consideration, the other steps taken by them being merely incidental.

18. The last and by far the most important circumstance that appears to have influenced the High Court was the failure of the mortgagees to produce their account books. This circumstance was carefully considered by the District Judge. He held that the adverse inference that could be drawn from that circumstance was rebutted by the other evidence available in the case. It was open to him to do so. His finding on this point is also a finding of fact and by no means a wholly unreasonable finding. The High Court could not have interfered with the same.

19. From the above discussion it follows that generally speaking—we shall come to the details of consideration presently—the findings of the District Court as regards the payment of consideration under Exhs A-1 and A-2 are findings of facts and they were not open to review by the High Court.

20. This takes us to the various items of consideration said to have passed under Exhs A-1 and A-2 and the proof thereof. The District Court has held that the en-

tire consideration mentioned in those documents has passed. We have now to see whether its finding in respect of the various items of consideration is supported by legal evidence. The challenge to the payment of consideration under Exhs. A-1 and A-2 made by the petitioning creditor includes a challenge to the passing of the various items of consideration said to have passed. Ordinarily the burden of proving that a document impeached under Section 53 of the Act is not supported by consideration is on the party who challenges its validity. That is so because the party who stands by the document can take advantage of the admission made by the insolvent in the document in question. But in this case the mortgagees themselves do not stand by the recitals in the documents as regards the manner in which consideration was paid. Therefore it is for them to prove the passing of consideration. Hence we have to see how far they have succeeded in proving the same.

21. We shall first take up Exh. A-2, mortgage deed executed in favour of Srinivasa Naicker. It is said that the consideration payable under that mortgage was paid in the following manner:

Rs. 5,000 under promissory note Exh. A-11;

Rs. 1,700 paid in cash on 7th January, 1951 and

Rs. 3,300 also paid in cash on 10th February, 1951.

The receipt of the aforementioned sums is entered in the day book and ledger of the insolvents. The relevant entries amount to an admission on the part of the insolvents of having received the amounts mentioned therein. We have earlier considered the authenticity of those account books. The evidence of the mortgagees as regards the payment of consideration is strongly corroborated by the entries in the insolvent's account books. It was open to the learned District Judge to rely on them. Hence his finding as regards the validity of the mortgage under Exh. A-2 must be held to be final.

22. So far as the consideration for Exh. A-1 is concerned it is said to have been made up of—

(i) a sum of Rs. 10,000 advanced under Exh. A-11;

(ii) Rs. 500 the interest due under Exhs. A-11 and A-12; and

(iii) Rs. 4,500 paid on 6th November, 1950.

23. The receipts of the various sums mentioned above excepting the sum of

Rs. 4,500 said to have been paid on 6th November 1950, are entered in the day book and the ledger of the insolvents. Hence to that extent the finding of the learned District Judge is unassailable. So far as the payment of Rs. 4,500 said to have been made on November 6, 1950 is concerned no corresponding entry in the day book or the ledger had been proved. This important circumstance was not noticed by the learned District Judge. He proceeded on the basis that the account entries support the payment of that item as well. The evidence of Ayyappa Naicker as regards that payment is necessarily interested. The only other evidence on that point is that of P. W. 2, the Registrar who registered Exhs. A-1 and A-2. He is a relation of the insolvents. He did not endorse that payment in Exh. A-1, though he knew that he was required to do so under the rules. We are also surprised how he could have remembered that fact after several years. Had the learned District Judge's attention been drawn to the fact that there is no documentary evidence in proof of the payment of that item it is highly doubtful whether he would have held in favour of the mortgagees as regards the payment of that item. After going through the evidence bearing on the point we are not satisfied that the payment of that amount is satisfactorily proved.

In the result Civil Appeal No. 846 of 1963 is allowed and the judgment and decree of the High Court is set aside and that of the District Court restored. Civil Appeal No. 845 is allowed in part i. e., the mortgage Exh. A-1 is held to be valid to the extent of Rs. 10,500 and interest thereon. In the circumstances of the case we direct the parties to bear their own costs in all the courts.

MKS/D.V.C.

Order accordingly.

AIR 1969 SUPREME COURT 1349
(V 56 C 247)

(From Allahabad)*

J. C. SHAH AND A. N. GROVER, JJ.

R. S. Lala Praduman Kumar, Appellant
v. Virendra Goyal (dead) by his Legal
Representatives and others, Respondents.

Civil Appeal No. 648 of 1966, D/ 11-3-1969.

*(S. A. No. 3310 of 1964, D/- 4-12-1964
—All.)

IM/JM/B764/69/R

(A) Transfer of Property Act (1882), Section 114 — Covenant of forfeiture of tenancy for non-payment of rent — Nature of — Passing of decree for ejectment of tenant by trial Court — No bar to jurisdiction of appellate Court to grant relief against forfeiture — (Civil P. C. (1908), Section 107)

The covenant of forfeiture of tenancy for non-payment of rent is regarded by the Courts as merely a clause for securing payment of rent, and unless the tenant has by his conduct disentitled himself to equitable relief the Courts grant relief against forfeiture of tenancy on the tenant paying the rent due, interest thereon and costs of the suit. (Para 7)

In terms, Section 114 makes payment of rent at the hearing of the suit in ejectment a condition of the exercise of the Court's jurisdiction but an appeal being a rehearing of the suit, in appropriate cases it is open to the appellate Court at the hearing of the appeal to relieve the tenant in default against forfeiture. Passing of a decree in ejectment against the tenant by the Court of First Instance does not take away the jurisdiction of the appellate Court to grant equitable relief. Case law referred (Para 7)

Failure of the tenants to avail themselves of the opportunity does not operate as a bar to the jurisdiction of the appellate Court. The Appellate Court, may, having regard to the conduct of the tenant decline to exercise its discretion to grant him relief against forfeiture. The question is not one of jurisdiction but of discretion. AIR 1953 SC 228, Rel on

(Para 8)

(B) Transfer of Property Act (1882), Section 114 — Relief against forfeiture of tenancy for non-payment of rent — Discretion used in favour of tenants by lower appellate Courts—Appeal by Special leave — Ordinarily Supreme Court will not interfere with the order — (Constitution of India, Article 136). (Para 9)

Cases Referred Chronological Paras
(1963) 1963 All LJ 132 = I.L.R. (1962)

2 All 420, Budhi Ballabh v Jal Kishan Kandpal 7

(1958) AIR 1958 Mad 232 (V 45) =

70 Mad LW 1006, Janab Vallathi v Smt K. Kedarval Thayammal 7

(1953) AIR 1953 SC 228 (V 40) =

1953 SCR 1009, Namdeo Lokman Lodhi v Narmadabai 8

(1953) AIR 1953 Bom 129 (V 40) =

I.L.R. (1953) Bom 435, Bhagwant Rambhau Khese v. Ramchandra Kesho Pathak 7

(1949) AIR 1949 Mad 841 (V 36) =

1949-1 Mad LJ 586, Chulukuri

Tripura Sundaramma v Chulu-

kuri Venkateswarlu alias Ram-

chandram 7

(1944) AIR 1944 Nag 229 (V 31) =

I.L.R. (1944) Nag 877, Shrikashan Lal

v Ramnath Janki Prasad Ahir 7

Mr Sarjoo Prasad, Senior Advocate (Mr J P Goyal, Advocate with him), for Appellant, M/s R K Garg and A N Goyal, Advocates, for Respondent No 1; M/s R K Garg, D P. Singh and S C. Agarwala, Advocates of M/s Ramamurthi and Co., and Mr Uma Dutt and Miss S Chakravarti, Advocates, for Respondent No 2

The following Judgment of the Court was delivered by

SHAH, J. Under a deed dated October 28, 1949, Virendra Goyal, the first respondent herein, obtained permanent tenancy rights in 28 plots of land of the ownership of Lala Praduman Kumar. The tenant agreed to pay Rs 250 per annum as advance rent on the first day of January of each year, and in default of payment of rent for two consecutive years the tenancy rights were to stand forfeited. Goyal transferred his tenancy rights to Lala Hukam Chand Pursuant to the lease several tenements were raised on the land demised.

2. The tenant failed to pay the rent accrued due for two years. The appellant then served a notice on January 4, 1960, terminating the tenancy and instituted an action in the Court of the City Munsiff, Saharanpur, against Virendra Goyal and Lala Hukam Chand for a decree in ejectment and for an order for payment of Rs. 545/11/- as rent and compensation.

3. Several contentions were raised in their written statement by the defendants one of which alone is material. The tenants prayed that they should be given relief against forfeiture of their tenancy rights under Section 114 of the Transfer of Property Act. In the Trial Court the tenants deposited an amount of Rs 1,099-34. The Trial Judge held that the conditions relating to deposit in Court of rent in arrear, interest thereon, and costs of the suit were not complied with and decreed the plaintiffs claim. In appeal to the District Court the tenant offered to pay the balance of the amount of the rent due together with costs of the suit and appeal and interest at the rate of 6 per cent per annum or such other rate

as the Court may direct and deposit in Court Rs. 2,082-50 in the aggregate. The learned District Judge was of the view that the amount paid by the tenants was in excess of the amount due by them and observed:

".....the appellants have deposited much more amount than is due to the respondent as arrears of rent, the costs of the suit and of the appeal and the interest. There is no reason why benefit of section 114 of the Transfer of Property Act be not given to the appellants when they are ready and willing to pay much more amount than is actually due to the respondent. The fact is that there are valuable constructions over the plots and defendants' dispossession would put them to a great loss. It is for this reason that they are prepared to pay the amount that may be demanded from them. I, therefore, find that the appellants are entitled to the benefit of Section 114 of the Transfer of Property Act and are relieved against the forfeiture."

4. The second appeal against this decision was summarily dismissed by the High Court of Allahabad.

5. In appeal to this Court counsel for the appellant contends:

(1) that jurisdiction under Section 114 of the Transfer of Property Act to relieve against forfeiture for non-payment of rent may only be exercised by the Court of First Instance and not by the Court of Appeal;

(2) that the Trial Court gave an opportunity to the tenants to pay the amount of rent due together with interest and costs, but the tenants failed to avail themselves of the opportunity. In the circumstances the appellate Court had no jurisdiction to grant another opportunity to the tenants to make the requisite payment and grant relief against forfeiture of the tenancy.

(3) that in any event discretion was, in the circumstances, not properly exercised by the District Court.

6. In our view, there is no substance in any of the contentions.

7. Section 114 of the Transfer of Property Act provides:—

"Where a lease of immoveable property has determined by forfeiture for non-payment of rent, and the lessor sues to eject the lessee, if at the hearing of the suit, the lessee pays or tenders to the lessor the rent in arrear, together with interest thereon and his full costs of the suit, or gives such security as the Court thinks sufficient for making such payment with-

in fifteen days, the Court may, in lieu of making a decree for ejectment, pass an order relieving the lessee against the forfeiture; and thereupon the lessee shall hold the property leased as if the forfeiture had not occurred".

The covenant of forfeiture of tenancy for non-payment of rent is regarded by the Courts as merely a clause for securing payment of rent, and unless the tenant has by his conduct disentitled himself to equitable relief the Courts grant relief against forfeiture of tenancy on the tenant paying the rent due, interest thereon and costs of the suit. Jurisdiction to relieve against forfeiture for non-payment of rent may be exercised by the Court if the tenant in a suit in ejectment at the hearing of the suit pays the arrears of rent together with interest thereon and full costs of the suit. In terms Section 114 makes payment of rent at the hearing of the suit in ejectment a condition of the exercise of the Courts' jurisdiction but an appeal being a rehearing of the suit in appropriate cases it is open to the appellate Court at the hearing of the appeal to relieve the tenant in default against forfeiture. Passing of a decree in ejectment against the tenant by the Court of First Instance does not take away the jurisdiction of the appellate Court to grant equitable relief. This is the view taken by the High Courts in India: See *Chilukuri Tripura Sundaramma v. Chilukuri Venketeswarlu alias Ramchandram*, AIR 1949 Mad 841, *Janab Vallathi v. Smt. K. Kederval Thayammal*, AIR 1958 Mad 232, *Shrikishanlal v. Ramnath Jankiprasad Abir*, ILR (1944) Nag 877 = (AIR 1944 Nag 229), *Budhi Ballabh v. Jai Kishan Kandpal*, 1963 All LJ 132. The High Court of Bombay in cases arising under the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947, has also expressed the same opinion in *Bhagwan Rambhau Khese v. Ramchandra Kesho Pathak*, AIR 1953 Bom 129.

8. We do not think that there is any bar to the exercise of jurisdiction by the appellate court merely because in the Court of First Instance relief against forfeiture was claimed by the tenants and they failed to avail themselves of the opportunity of paying the amount of rent together with interest thereon and costs of the suit. Failure to avail themselves of the opportunity does not operate as a bar to the jurisdiction of the appellate Court. The Appellate Court may, having regard to the conduct of the tenant, decline to exercise its discretion to grant

him relief against forfeiture. The question is not one of jurisdiction but of discretion. This Court in *Namdeo Lokman Lodhi v. Narmadabai*, 1953 SCR 1009 = (AIR 1953 SC 228) has observed at p. 1025 (of SCR) = (at p 234 of AIR).

"in exercising the discretion (under Section 114 of the Transfer of Property Act) each case must be judged by itself, the delay, the conduct of the parties and the difficulties to which the landlord has been put should be weighed against the tenant.

It is a maxim of equity that a person who comes in equity must do equity and must come with clean hands if the conduct of the tenant is such that it disentitles him to relief in equity, then the court's hands are not tied to exercise it in his favour"

9 The District Court has observed that valuable constructions had been put upon the land leased and the tenants had deposited an amount very much larger than the amount due to the landlord. Having regard to the circumstances the District Court was of the view that discretion should be exercised in favour of the tenants. The High Court summarily dismissed the appeal. The High Court must be taken to have confirmed the view of the District Court. In the appeal with special leave, this Court will not ordinarily interfere with an order made in exercise of the discretion of the Courts below, specially when there is no evidence that the tenants were guilty of conduct disentitling them to relief against forfeiture for non-payment of rent.

10. The appeal therefore fails and is dismissed with costs.

D.R.R.

Appeal dismissed.

AIR 1969 SUPREME COURT 1352
(V 56 C 248)

(From Patna (1966) ILR 45 Pat 121)

J C SHAH AND A. N. GROVER, JJ

Commissioner of Income-tax, Bihar and Orissa, Appellant v. M/s Kirkend Coal Co., Respondent.

Civil Appeal No. 2456 of 1960, D/- 12-3-1969

(A) Income-tax Act (1922), Sections 23, 26, 44 — Dissolution of firm — Continuance of its business by newly constituted firm — Case falls under S. 26 and not under Section 44 — Newly constituted firm can be legally assessed to penalty under Section 23 for default of original firm (1966) ILR 45 Pat 121, Reversed.

IM/JM/B771/69/D

Section 44 applies only to those cases in which there has been discontinuance of the business of a firm and not to cases in which the business is continued after the reconstitution of the firm or there is succession to the business. Cases of reconstitution of the firm or succession to the business of the firm are covered by Section 28 (1) and (2) (1966) ILR 45 Pat 121, Reversed. (Para 8)

Where there is dissolution of firm but its business is carried on by newly constituted firm, then the newly constituted firm as successor in interest of the original firm, for the default of the original firm, can be legally assessed to penalty under Sec. 28. The expression 'person' in Section 28 for the purpose of that section includes a firm registered and unregistered. And the imposition of penalty being a process of assessment, the Income Tax Officer in imposing penalty can proceed against a firm if there is reconstitution of the firm by virtue of Section 28. If there is discontinuance of the business penalty can be imposed against the partners of the firm. AIR 1941 Mad 255 (SB) and AIR 1964 SC 1095 and AIR 1961 SC 609 and AIR 1962 SC 970, Rel. on. (Para 9)

(B) Income-tax Act (1922), Section 66 — Reference under — Questions not raised and argued before Tribunal cannot be answered in reference.

In reference under Section 66, only the question which was either raised or argued before the Tribunal may be answered, even if the language of the question framed by tribunal may apparently include an inquiry into other matters which could have been but were not, raised or argued. Hence where the question, whether under the terms of Sec 26 read with Section 23, penalty may be imposed upon the new partners for the failure of the partners of the firm constituted in the year of account relevant to the assessment year, was never investigated but before the Tribunal and High Court the case was argued on the footing of applicability of Section 44 alone, then in reference, such question cannot be answered. (Para 10)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1095 (V 51) =
1964-51 ITR 823, Shivram Poddar
v. Income Tax Officer, Central II
Calcutta
(1962) AIR 1962 SC 970 (V 49) =
1962-44 ITR 739, Commr. of In-
come Tax, Madras v. S. V. Angidi
Chettiar

(1961) AIR 1961 SC 609 (V 48) =
1961-41 ITR 425, C. A. Abraham
v. Income Tax, Officer, Kottayam 7
(1941) AIR 1941 Mad 255 (V 28) =
1941-9 ITR 1 (SB), S. M. S. Karu-
ppiah Pillai v. Commr. of Income
Tax, Madras 5

Mr. D. Narasaraju, Senior Advocate,
(M/s. S. K. Aiyar, R. N. Sachthey and
B. D. Sharma, Advocates with him), for
Appellant; Mr. C. K. Daphtary, Senior
Advocate, (M/s. Narain Rao, V. D.
Narayan and D. Goburdhun, Advocates,
with him), for Respondent.

The following Judgment of the Court
was delivered by

SHAH, J.: In determining the taxable
income of the respondent firm for the
assessment year 1948-49 the Income-tax
Officer added to the income returned a
sum of Rs. 1,60,000 as 'undisclosed re-
ceipts'. The order was confirmed in ap-
peal by the Appellate Assistant Commis-
sioner, and by the Tribunal. The Income-
tax Officer had in the meantime commen-
ced a proceeding for the levy of penalty
and in exercise of the power under Sec-
tion 28 (1) (c) of the Indian Income-tax Act,
1922 he directed the respondent firm to
pay Rs. 60,000 as penalty. The Appellate
Assistant Commissioner in appeal confirm-
ed the order. The Income-tax Appellate
Tribunal rejected the contention of the
respondent that the order imposing
penalty upon the firm after the original
firm was dissolved was without jurisdic-
tion

2. The Tribunal referred at the in-
stance of the respondent firm the following
question to the High Court of Patna for
opinion.

"Whether on the facts and in the cir-
cumstances of the case the imposition of
penalty under Section 28 (1) (c) of the
Indian Income-tax Act, upon the petitioner
firm (respondent) as constituted at the
time of levy of penalty was legal and
valid?"

3. The High Court called for a sup-
plementary statement of the case and pur-
suant thereto the Tribunal submitted a
statement on the specified points raised
by the order of the High Court that:

(1) The firm which carried on the busi-
ness during the calendar year 1947 was
dissolved on July 7, 1951 when Butto
Kristo Roy, one of the partners, died.

(2) During the previous year 1947 there
was no instrument of partnership in exis-
tence, but the terms of the oral partner-
ship were the same as set out in the
partnership deed dated October 17, 1949.

(3) The business of the firm was conti-
nued with effect from July 8, 1951 by
the new firm as successor to the business
of the old firm. The terms of the part-
nership were the same as set out in the
deed dated October 17, 1949 and the
partners and their shares were also the
same except that Baidyanath Roy took
the place of Butto Kristo Roy.

(4) With effect from April 28, 1952 the
business was carried on by a partnership
constituted by Baidyanath Roy and Bijali
Kanti Roy under an instrument dated
August 27, 1952. There was no dissolu-
tion of the firm, which was carrying on
the business; there was only a change in
the constitution of the old firm from April
28, 1952.

The High Court held that penalty could
be legally levied only upon the original
firm constituted in the account year rele-
vant to the assessment year 1948-49 and
not upon the new firm constituted under
the deed dated April 27, 1952.

4. The Tribunal and the High Court
approached the problem before them on
the assumption that the source of the
power of the Income-tax Officer to impose
a penalty was in Section 44 of the Indian
Income-tax Act, 1922. In so assuming, in
our judgment, they were in error. Sec-
tion 44 of the Indian Income-tax Act, 1922,
as it stood at the relevant date, in so far
as it is material provided:

"Where any business, profession or
vocation carried on by a firm . . .
has been discontinued . . . every
person who was at the time of such dis-
continuance . . . a partner of such
firm . . . shall in respect of the
income, profits and gains of the firm .
. . . be jointly and severally liable to
assessment under Chapter IV and for the
amount of tax payable and all the provi-
sions of Chapter IV shall, so far as may
be, apply to any such assessment."

The section is fairly plain: it applies to
cases of discontinuance of the business of
a firm and not where there is dissolution
of the firm but not discontinuance of its
business.

5. In S. M. S. Karuppih Pillai v.
Commissioner of Income-tax, Madras,
1941-9 ITR 1=(AIR 1941 Mad 255) (SB),
in dealing with the effect of Sec. 44 of
the Indian Income-tax Act, 1922, before
it was amended by Act 7 of 1939, a Full
Bench of the Madras High Court ob-
served:

"This section (S. 44) only applies when
there has been discontinuance of the busi-

ness, * * The section says that if a business is discontinued the partner shall nevertheless be jointly and severally liable for the profits which had been earned"

6 In *Shivram Poddar v Income-tax Officer, Central II, Calcutta*, 1964-51 ITR 823 = (AIR 1964 SC 1095), this Court examined the scheme of Section 44 (before it was amended by the Finance Act of 1958) and its inter-relation with the provisions of Sections 25 (1), (2), 26 (1), (2) and 28 (1) (c) in some detail. The Court observed

"Section 44 operates in two classes of cases where there is discontinuance of business, profession or vocation carried on by a firm or association, and where, there is dissolution of an association. It follows that mere dissolution of a firm without discontinuance of the business will not attract the application of Section 44 of the Act * * *

The reason for this distinction appears from the scheme of the Income-tax Act in its relation to assessment of the income of a firm. A firm whether registered or unregistered is recognised under the Act as a unit of assessment [Sections 3 and 2 (2)], and its income is computed under Clauses (3) and (4) of Section 23 as the income of any other unit. Section 25 (1) relates to assessment in cases of a discontinued business—whether the business is carried on by a firm or by any other person * * *. Then there is the special provision relating to assessment when at the time of making an assessment it is found that a change has occurred in the constitution of a firm, or a firm has been newly constituted. Section 26 (1) The date on which the change has occurred is immaterial it may be in the year of account, in the year of assessment or even after the close of the year of assessment. The Income-tax Officer has under Section 26 (1) to assess the firm as constituted at the time of making the assessment, but the income, profits and gains of the previous year have, for the purpose of inclusion in the total income of the partners, to be apportioned between the partners who were entitled to receive the same. Sub-section (2) of Section 26 relates to assessment in the case of succession to a person (which expression includes a firm) carrying on a business by another person in such capacity. * * * Discontinuance of business has the same connotation in Section 44 as it has in Section 25 of the Act, it does not cover mere change in ownership or in the con-

stitution of the unit of assessment. Section 44 is, therefore, attracted only when the business of a firm is discontinued, i.e., when there is complete cessation of the business and not when there is a change in the ownership of the firm or in its constitution, because by reconstitution of the firm, no change is brought in the personality of the firm, and succession to the business and not discontinuance of the business results * * *. But the Income-tax Act recognises a firm for purposes of assessment as a unit independent of the partners constituting it, it invests the firm with a personality which survives reconstitution. A firm discontinuing its business may be assessed in the manner provided by Section 25 (1) in the year of account in which it discontinues its business, it may also be assessed in the year of assessment. In either case it is the assessment of the income of the firm. Where the firm is dissolved, but the business is not discontinued, there being change in the constitution of the firm, assessment has to be made under S 26 (1) and if there be succession to the business, assessment has to be made under Section 26 (2). The provisions relating to assessment on reconstituted or newly constituted firms, and on succession to the business are obligatory. Therefore, even when there is change in the ownership of the business carried on by a firm on reconstitution or because of a new constitution, assessment must still be made upon the firm. When there is succession the successor and the person succeeded have to be assessed each in respect of his actual share. This scheme of assessment furnishes the reason for omitting reference to dissolution of a firm from Section 44 when such dissolution is not accompanied by discontinuance of the business".

7 Two other cases decided by this Court may be briefly noticed. In *C. A. Abraham v Income-tax Officer, Kottayam*, 1961-41 ITR 425 = (AIR 1961 SC 609), there was discontinuance of the business of the firm consequent upon dissolution of the firm. Section 44 was held applicable, and it was held that imposition of penalty being a process of assessment the Income-tax Officer was not incompetent to levy penalty after discontinuance of the business. In *Commissioner of Income-tax, Madras v. S. V. Angidi Chettiar*, 1962-44 ITR 739 = (AIR 1962 SC 970) this Court held that the Income-tax Officer could exercise under Section 44 read with Section 28 power to impose penalty

upon the firm which discontinued its business on dissolution caused by the death of one of the partners.

8. Section 44 therefore only applied to those cases in which there had been discontinuance of the business and not to cases in the business continued after reconstitution of the firm, or there was succession to the business. Cases of reconstitution of the firm or succession to the business of the firm are covered by Sections 26 (1) and (2).

9. "Assessment" in Chapter IV of the Income-tax Act, 1922, includes a proceeding for imposition of penalty. Section 28 of the Act authorises the Income-tax Officer, if satisfied, in the course of any proceeding under the Act that any person has, inter alia, concealed the particulars of his income or deliberately furnished inaccurate particulars of such income, to direct that such person shall pay by way of penalty, a sum of money not exceeding the amount specified therein in addition to the income-tax and super-tax payable by such person. The expression "person" includes for the purpose of Section 28, a firm registered or unregistered. If there is reconstitution of the firm, by virtue of Section 26, the Income-tax Officer will in imposing the penalty proceed against the firm. If there is discontinuance of the business penalty will be imposed against the partners of the firm.

10. Before the Tribunal and the High Court the case was argued on the footing that Section 44 alone was applicable. Whether under the terms of Section 26 read with Section 28, penalty may be imposed upon the new partners for the failure of the partners of the firm constituted in the year of account relevant to the assessment year 1948-49 was never investigated. The question raised by the Tribunal is in terms sufficiently comprehensive to embrace an enquiry whether partners of the firm in existence on July 30, 1954, were liable to be assessed to penalty as successors in interest of the partners of the original firm in existence in the year of account relating to the assessment year 1948-49. But in a reference under Section 66 of the Indian Income-tax Act, 1922 only the question which was either raised or argued before the Tribunal may be answered, even if the language of the question framed by the Tribunal may apparently include an enquiry into other matters which could have been, but were not, raised or argued.

11. The appeal fails and is dismissed. In the circumstances of the case there will be no order as to costs in this Court.
BNP/D.V.C. Appeal dismissed.

AIR 1969 SUPREME COURT 1355 (V 56 C 249)

(From: Andhra Pradesh)*

J. C. SHAH AND A. N. GROVER, JJ.

S. Jhansi Lakshmi Bai and others, Appellants v. Pothana Appa Rao and others, Respondents.

Civil Appeal No. 445 of 1966, D/- 17-3-1969.

(A) Constitution of India, Art. 136 — Concurrent findings of Courts below that the will was executed when the testator was in sound and disposing state of mind — In appeal with special leave Supreme Court does not ordinarily allow question about due execution of will to be canvassed unless there are exceptional circumstances — Held, that there was no exceptional circumstance which would justify departure from the rule. (Para 3)

(B) Succession Act (1925), S. 105 — Will — Legatee dying during lifetime of testator — Express intention to exclude lapse not necessary.

Section 105 enacts that a legacy shall lapse and form part of the residue of the testator's property if the legatee does not survive the testator except where it appears by the will that the testator intended that the legacy shall on the legatee not surviving him go to some other person. It cannot be said that the intention of the testator that a legacy shall not lapse may be given effect to only if the testator expressly directs that if the legatee dies during his lifetime the legacy shall go to some other person, and that intention to exclude lapse cannot be inferred. Section 105 (1) does not say, nor does it imply, that the testator must have expressly envisaged the possibility of lapse in consequence of the legatee dying during his lifetime and must have made a provision for that contingency. (1895) 2 Ch. 348, (1918) 2 Ch 304, Applied; LR (1872) 14 Eq Cas 343, Distinguished. (Para 11)

(C) Succession Act (1925), S. 105 — Will — Bequest of properties for two purposes, namely, celebrating marriage of S and constructing a temple — No allo-

* (L. P. A. No. 2 of 1963, D/- 9-3-1964 → AP)

cation of amounts separately — Death of S during lifetime of testator — Held, that there was no joint bequest and it should be presumed that the fund was to be utilised in equal moieties for two purposes — Failure of one of the purposes by death of S before testator's death would result in a moiety of the amount devised falling into the residue. L. P. A. No 2 of 1963, D/- 9-3-1964 (AP), Reversed; 23 Ind App 37 (43), Applied.

(Para 6)

Cases Referred: Chronological Paras

(1918) 1918-2 Ch 304=87 LJ Ch 597

In re, Dunstan, Dunstan v Dunstan

13

(1896) 23 Ind App 37=ILR 23 Cal

670 (PC), Jogeswar Naram Deo v. Ram Chand Dutt

7

(1895) 2 Ch 348=64 LJ Ch 567, In

re, Lowman, Devenish v Pester

12

(1888) ILR 11 Mad 258, Vydipada v Nagammal

7

(1872) 14 Eq 343=41 LJ Ch 475,

Browne v. Hope

9

Mr M C. Chagla, Senior Advocate, (Mr T Satyanarayana, Advocate, with him), for Appellants, Mr. P. Ram Reddy, Senior Advocate, (Mr. K. Jayaram, Advocate, with him), for Respondents

The following Judgment of the Court was delivered by

SHAH, J.: One Appanna died on March 12, 1953, leaving him surviving no wife or lineal descendant. Subba Rao claiming to be the father's sister's son of Appanna instituted suit No 64 of 1953 in the Court of the Subordinate Judge, Eluru, for partition and separate possession of his half share in the properties described in Schs A, B, C, D & E. The plaintiff claimed that Appanna died intestate, and that he and his brother Venugopala Rao were the nearest heirs entitled to the entire estate of Appanna. To this suit were impleaded Pothana Apparao (husband of the sister of Mangamma wife of Appanna), his children, certain relations of Mangamma and the tenants on the lands in suit. Venugopala Rao was impleaded as the 24th defendant. The suit was defended by Pothana Apparao and others contending, inter alia, that Appanna had made and executed a will on July 14, 1948, devising his property in favour of various legatees and the plaintiff's suit for a share in the property was on that account not maintainable. The Trial Court held that Appanna of his free will and while in a sound state of mind had executed the will on July 14, 1948,

whereby he disposed of his properties described in Schs. A, B, C, D & E, but the Court held that the disposition of the property in Schs. C & E lapsed because Mangamma who was a legatee of the properties died before the testator, and that the direction in the will that whatever remained out of the Sch. E property after the lifetime of Mangamma shall pass to Venkataswamy and Seshagurao defendants Nos. 3 & 2 respectively or their descendants was void and incapable of taking effect. The learned Judge accordingly passed a decree in favour of the plaintiff and the 24th defendant for possession of properties described in Schs C & E.

2. In appeal to the High Court of Andhra Pradesh, Chandrasekhara Sastry, J., allowed the appeal filed by Pothana Apparao and his two sons Venkataswamy and Seshagurao, and dismissed the claim of the plaintiffs in respect of Schs C & E properties. An appeal under the Letters Patent filed by the plaintiffs against the judgment of Chandrasekhara, J., was dismissed.

3. It has been concurrently found by all the Courts that when he was in a sound and disposing state of mind Appanna executed on July 14, 1948, the will set up by the defendants. In an appeal with special leave this Court will not ordinarily allow a question about due execution to be canvassed, and our attention is not invited to any exceptional circumstances which may justify a departure from the rule.

4. The only question which survives for consideration relates to the true effect of the dispositions made by the will in respect of Sch C and Sch. E properties. The relevant provisions of the will may first be set out.

"I am now about forty years of age I do not have male or female issue. My wife is alive. * * * and with the fear that I may not survive I have made the following provisions in respect of my immovable and movable properties to be given effect to.

I have given power to my wife Mangamma to sell the immovable property mentioned in the C Schedule hereunder and utilise the amount for celebrating the marriage and other auspicious functions of Tholeti Narasimha Rao's daughter Seetharatnam mentioned in the B Schedule and for constructing a Ramamandiram in Rajavaram village in my name.

"The immovable property mentioned in the E Schedule hereunder shall be enjoyed by my wife Mangamma with all powers of disposition by way of gift, sale, etc. Whatever remains out of the said E Schedule mentioned immovable property after her lifetime, (the said property) shall pass either to the said Venkataswamy and Seshagiri or their descendants. * * * In the event of my wife taking a boy in adoption the property mentioned in the E Schedule hereunder shall pass to the said adoptee with all powers of disposition by way of gift, sale etc., after her lifetime. * * *

If, for any reason, the properties and rights do not pass to the individuals mentioned in the aforesaid paras, such properties and rights shall be enjoyed by my wife Mangamma with absolute rights."

5. Appanna had directed his wife Mangamma to sell the properties described in Sch. C and to utilise the proceeds for two purposes, "celebrating the marriage and other auspicious functions" of Seetharatnam, and "for constructing a Ramamandiram in Rajavaram village" in his name. But the marriage of Seetharatnam was celebrated during the lifetime of Appanna, and expenses in that behalf were defrayed by Appanna and no expenses remained to be incurred after the death of Appanna. Mangamma had no beneficial interest in Sch. C property. She was merely appointed to sell the property and to utilise the proceeds for the purposes specified in the will. The Trial Judge clearly erred in holding that the estate lapsed because Mangamma died during the lifetime of Appanna. In the view of Chandrasekhara Sastry, J., since there was a joint bequest for two purposes, and one of the purposes for which the Sch. C properties were devised was accomplished by Appanna the bequest in its entirety must enure for the remaining purpose i.e., constructing a Ramamandiram, and the plaintiffs' claim for possession of the C Schedule properties must fail. The learned Judges of the High Court agreed with that view.

6. But there was no "joint bequest" of the properties. In the absence of allocation of the amounts to be utilised for "celebrating the marriage and other auspicious functions" of Seetharatnam and for constructing a Ramamandiram, it must be presumed that the fund was to be utilised in equal moieties for the two purposes. Failure of one of the purposes will result in a moiety of the amount devised falling into the residue.

7. In *Jogeswar Narain Deo v. Ram Chund Dutt*, (1896) 23 Ind App 37 at p. 43 (PC) a devise under the will of a Hindu testator who had given a four-anna share of his estate to his daughter and her son for their maintenance with power of making alienation thereof by sale or gift fell to be construed. The Judicial Committee held that on a true construction of the will each took an absolute interest in a two-anna share in the estate. In dealing with the contention that there was a joint estate granted to the daughter and her son the Judicial Committee observed:

"..... Mr. Branson * * * maintained, upon the authority of *Vydinada v. Nagammal*, (1888) ILR 11 Mad 258 that, by the terms of the will the Rani and the appellant became, in the sense of English law, joint tenants of the four-annas share of Silda, and not tenants in common; and that her alienation of her share before it was severed and without the consent of the other joint tenant, was ineffectual. The circumstances of that case appear to be on all fours with the circumstances which occur here, and, if well decided, it would be a precedent exactly in point. There are two substantial reasons why it ought not to be followed as an authority. In the first place, it appears to their Lordships that the learned Judges of the High Court of Madras were not justified in importing into the construction of a Hindu will an extremely technical rule of English conveyancing. The principle of joint tenancy appears to be unknown to Hindu law, except in the case of coparcenery between the members of an undivided family."

That principle applies here. The fund was devised for the construction of a Ramamandiram at Rajavaram village and for "celebrating the marriage and other auspicious functions" of Seetharatnam. Since no part of the fund was needed for the benefit of Seetharatnam, the legacy failed pro tanto and fell into the residue. Under the will Mangamma was made the owner of the residue, but by her death during the lifetime of Appanna the residuary bequest lapsed and vested as on intestacy in the plaintiff and the 24th defendant. The devise of a moiety of the fund to be applied for the construction of a Ramamandiram however stands good and the trust must be carried out. Mangamma is dead, but on that account the charitable trust is not extinguished. The Trial Court must give appropriate directions for utilisation of that moiety for

constructing a temple according to the direction of Appanna in the will

8 The testator gave to his wife Mangamma an absolute interest in the E Schedule properties, for she was invested with all powers of disposition "by way of gift, sale etc." The will then proceeded to direct that whatever remained out of the E Schedule properties after her death shall pass to Venkataswamy and Seshagunrao. If Mangamma had survived Appanna, probably the devise in favour of Venkataswamy and Seshagunrao may have failed, but that question does not arise for consideration

9 Section 105 of the Indian Succession Act, 1925, which applies to the wills of Hindus provides

"(1) If the legatee does not survive the testator, the legacy cannot take effect, but shall lapse and form part of the residue of the testator's property, unless it appears by the will that the testator intended that it should go to some other person."

(2) • • • • •

Mr Chagla for the plaintiffs contends that the estate in the E Schedule properties devised in favour of Mangamma lapsed, for, there was nothing in the will which expressly provided that in the event of Mangamma dying during the testator's lifetime, the devise in favour of Venkataswamy and Seshagunrao shall be accelerated. Counsel relies upon the judgment of Wickens, V C, in *Browne v Hope*, (1872) 14 Eq 343 and contends that a legacy does not lapse, if the testator does two things — he, in clear words, excludes lapse, and he clearly indicates the person who is to take the legacy in case the legatee should die in his lifetime. In *Browne's case*, (1872) 14 Eq 343 the testator gave, by his will, the residue of his estate to trustees to pay and transfer the same to seven named legatees in equal shares as tenants in common, and their respective executors, administrators and assigns, and he declared that such shares shall be vested interests in each legatee immediately upon the execution thereof, and that the shares of the married women shall be for their separate use. It was held that the share of one of the legatees — a married woman — who died after the date of the will, but before the testator, did not belong to her husband, who was her legal personal representative, and it lapsed.

10 Counsel says that the rule of interpretation as enunciated by Vice Chancellor Wickens is incorporated in Section 105

of the Indian Succession Act, 1925. He submits that a legacy will not lapse only if the testator by express direction excludes lapse, and indicates clearly the person who shall take the legacy if the legatee dies during his lifetime.

11. We are concerned to construe the provisions of Section 105 of the Indian Succession Act. That section enacts that a legacy shall lapse and form part of the residue of the testator's property if the legatee does not survive the testator except where it appears by the will that the testator intended that the legacy shall on the legatee not surviving him go to some other person. We are unable to agree that the intention of the testator that a legacy shall not lapse may be given effect to only if the testator expressly directs that if the legatee dies during his lifetime the legacy shall go to some other person, and that intention to exclude lapse cannot be inferred. Section 105 (1) does not say, nor does it imply that the testator must have expressly envisaged the possibility of lapse in consequence of the legatee dying during his lifetime and must have made a provision for that contingency.

12 In *In re, Lowman, Devenish v. Pester*, (1895) 2 Ch 348 a testator, who under a settlement was absolutely entitled to a moiety of the proceeds of a certain real estate under a trust for sale, by his will devised that the real estate by its proper description, together with certain real estate of his own, to trustees, to the use of H, for life, with remainder to trustees to preserve the contingent remainders, with remainder to the use of the first and other sons of H successively in tail male, with remainder to the use of the first and other sons of his niece E successively in tail male, with remainder to the use of the first and other sons of his niece M successively in tail male, with remainder to the use of the first and other sons of his niece F successively in tail male, with remainder over. H survived the testator and died a bachelor. M also survived the testator and died unmarried. E was still alive but unmarried and seventy years of age. F had two sons, the eldest of whom died before the testator. It was held that when there are in a will successive limitations of personal estate in favour of several persons absolutely, the first of those persons who survives the testator takes absolutely, although he would have taken nothing if any previous legatee had survived and had taken the effect of the

failure of an earlier gift is to accelerate, not to destroy, the later gift.

13. This rule was applied in *In re, Dunstan; Dunstan v. Dunstan*, (1918) 2 Ch 304. A testatrix by her will gave freeholds absolutely to A, subject to the bequest that whatever out of the freeholds should remain after A's death shall be given to a named charity. It was held that if A had survived the testatrix the gift to the charity would have been repugnant and void, and A would have taken the freeholds absolutely. But since A died in the lifetime of the testatrix, the doctrine of repugnancy did not apply, and the gift to charity was accelerated and took effect.

14. Mangamma died during the lifetime of the testator: thereby the estate in Sch. E properties granted to Venkata-swamy and his brother Seshagirirao was accelerated. The plaintiffs are therefore not entitled to any share in Sch. E properties.

15. The decree of the High Court is modified. It is declared that there is intestacy in respect of a half share in the fund arising by sale of Sch. C properties, and the plaintiff and the 24th defendant are entitled to take that half share in the fund. It is directed that the Trial Court will issue appropriate directions for application of the other half of the fund arising by sale of Sch. C properties for constructing Ramamandiram at Rajavaram village as directed by the testator in his will. Subject to this modification the appeal will be dismissed. The appellant will pay 3/4th of the costs of the contesting respondents in this Court.

MVJ/D.V.C. Appeal partly allowed.

AIR 1969 SUPREME COURT 1359 (V 56 C 250)

(From Andhra Pradesh: AIR
1962 Andh Pra 29)

S. M. SIKRI, R. S. BACHAWAT AND
V. RAMASWAMI, JJ.

Voleti Venkata Ramarao, Appellant v. Kesaparagada Bhaskararao and others, Respondents.

Civil Appeal No. 757 of 1963, D/- 15-4-1969.

Hindu Law — Adoption — Adoption by widow under authority from husband — Adoption made in 1904 — Adoptee re-

IM/IM/C59/69/D

cognised by every member of the family as the adopted son of deceased husband— Reversioner challenging validity of adoption after a lapse of fifty years on the ground that the widow was a minor at the time of adoption — All parties to the adoption and all those who could give evidence in support of its validity not alive at the time of suit — Burden lies heavily on reversioner to rebut the strong presumption in favour of validity of the adoption which arises in the case by showing that the widow was a minor at the time of adoption and therefore was not competent to make the adoption. AIR 1925 PC 201, Rel. on — (Evidence Act (1872), Sections 101-104 and 114).

(Para 4)

Cases Referred: Chronological Paras
(1925) AIR 1925 PC 201 (V 12) =

53 Mad LJ 858, Venkata Seetha-
ramachandra Rao v. Kanchumathi
Raju

4

Mr. M. C. Chagla, Senior Advocate, (Mr. R. Thiagarajan, Advocate for Mr. T. Satyanarayana, Advocate, with him), for Appellant; M/s. M. Suryanarayana-murthy and K. Jayaram, Advocates, for Respondents (Nos. 1, 4 to 6, 9 to 11, 13, 17, 25, 26, 29, 39, 42, 45, 47, 55 to 57, 59, 63 and 64).

The following Judgment of the Court was delivered by

BACHAWAT, J.: This disputes relates to the succession to the immoveable properties of late Bhaskara Rao, a Brahmin karnam, who died on November 29, 1903 without issue, but leaving a widow. The suit was instituted on April 15, 1953 by the appellant claiming to be the nearest heir of Bhaskara Rao for recovery of possession of the properties. The case of the contesting defendants is that Bhaskara Rao executed a will on November 29, 1903 authorising his widow Seshamma to adopt a son, that pursuant to such authority she adopted Rajeswararao in or about May, 1904 that Rajeswara died in 1950 and that the first defendant is his adopted son. The courts below concurrently found in favour of the defendants on all the points. They held that (1) Bhaskara Rao duly executed the will dated November 29, 1903; (2) his widow Seshamma in fact adopted Rajeswararao in or about May 1904 and the requisite ceremonies of adoption were performed. These findings of fact are no longer challenged.

2. The trial court held that at the time of adoption Seshamma was about 14 years of age. The High Court held that having

regard to the lapse of time there was a strong presumption that Seshamma had attained the usual age of discretion at the time of the adoption, that the presumption had not been rebutted and that the adoption was valid.

3 Mr. M. C Chagla argued that in May 1904 Seshamma had not attained the age of discretion and was not competent to make the adoption. He relied on the following passage in Mulla's Principles of Hindu law, 13th Ed., Art. 465, page 491 —

"A minor widow may adopt in the same circumstances as an adult widow, provided she has attained the age of discretion and is able to form an independent judgment in selecting the boy to be adopted. According to Bengal writers the age of discretion is reached at the beginning of the sixteenth year, according to Benaras writers, at the end of the sixteenth year. The former view was taken in a recent Madras case."

4. Now there is no clear evidence on the question of Seshamma's age in May 1904. The plaint said that she was then 10 years of age. One of the written statements said that she was about 15 years old. Exhibit A-2 an extract from the register of deaths suggests that she was then aged about 14 years. In Ex A-7 dated March 25, 1907, Ex. B-5 dated May 2, 1907 Ex. B-110 dated April 25, 1909, Ex. B-7, dated November 1, 1911, Ex. B-22 dated November 15, 1911, Exs A-II and A-12 dated November 17, 1911, she was described as a minor. But Ex. B-138 dated August 9, 1910 described her as a major. The evidence of DW 2 suggests that she was about 15 years old at the time of adoption. The evidence of DW 3 fixes her age at about 17 years in or about 1903. Evidence was adduced to show that she married in 1898 when she was 11 or 12 years old. The appellant made no attempt to produce the certified copy of the register of births which would have shown her exact age. The adoption was made in May 1904. It was challenged in 1953 after a lapse of about 50 years. The long delay in filing the suit is not satis-

factorily explained. A declaratory suit challenging the adoption could have been filed soon after the adoption. Rajeswararao died in 1950, Seshamma died on October 2, 1952. During his lifetime Rajeswararao was recognised by every member of the family as the adopted son of Bhaskara Rao. He was registered as karnam and acted as such till his death. Under Ex. B-12 dated November 19, 1937 the plaintiff's mother Kamappa purchased a property from Rajeswararao wherein he was described as the adopted son of Bhaskara Rao. Having regard to the long lapse of time and the recognition of Rajeswararao as the adopted son of Bhaskara Rao, the strongest presumption arises in favour of the validity of the adoption. The law on this point is correctly stated in Mulla's Hindu Law, 13th Ed., art. 512 page 519 —

"But when there is a lapse of 55 years between the adoption and its being questioned, every allowance for the absence of evidence to prove such fact must be favourably entertained. It stands to reason that after a very long term of years, and a variety of transactions of open life and conduct upon the footing that the adoption was a valid act the burden must rest heavily upon him who challenges its validity," see also Venkatasectarama Chandra Row v. Kanchu Marthi Raju, AIR 1925 PC 201, 202.

The presumption in this case is very heavy considering that all the parties to the adoption and all those who could have given evidence in favour of its validity have passed away. The appellant has not rebutted this presumption and has not shown that Seshamma did not attain the age of discretion in May 1904 and was not competent to make the adoption. The courts below rightly found in favour of the factum and validity of the adoption. There is no merit in this appeal.

5. The appeal is dismissed with costs
MKS/D.V.C. Appeal dismissed.

live in this relatively permissive, often disputatious society.

14. In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that the exercise of the forbidden right would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. (1966) 363 F 2d 744 at p. 749.

15. In the present case, the District Court made no such finding, and our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption.(3)

16. On the contrary, the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands, of opposition to this Nation's part in the conflagration in Vietnam.(4) It is revealing, in this respect, that the

3. The only suggestions of fear of disorder in the report are these:

"A former student of one of our high schools was killed in Viet Nam. Some of his friends are still in school and it was felt that if any kind of a demonstration existed, it might evolve into something which would be difficult to control.

"Students at one of the high schools were heard to say they would wear armbands of other colors if the black bands prevailed."

Moreover, the testimony of school authorities at trial indicates that it was not fear of disruption that motivated the regulation prohibiting the armbands; the regulation was directed against "the principle of the demonstration" itself. School authorities simply felt that "the schools are no place for demonstrations," and if the students "didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools."

4. The District Court found that the school authorities, in prohibiting black armbands, were influenced by the fact

meeting at which the school principals decided to issue the contested regulation was called in response to a student's statement to the journalism teacher in one of the schools that he wanted to write an article on Vietnam and have it published in the school paper. (The student was dissuaded.)(5)

17. It is also relevant that the school authorities did not purport to prohibit the wearing of all symbols of political or controversial significance. The record shows that students in some of the schools wore buttons relating to national political campaigns, and some even wore the Iron Cross, traditionally a symbol of Nazism. The order prohibiting the wearing of armbands did not extend to these. Instead, a particular symbol—black armbands worn to exhibit opposition to this Nation's involvement in Vietnam—was singled out for prohibition. Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with school work or discipline, is not constitutionally permissible.

18. In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may

that "[t]he Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the armband regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D. C. A wave of draft-card burning incidents protesting the war had swept the country. At that time two publicized draft burning were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views." 258 F Supp, at 972-973.

5. After the principals' meeting, the director of secondary education and the principal of the high school informed the student that the principals were opposed to publication of his article. They reported that "we felt that it was a very friendly conversation, although we did not feel that we had convinced the student that our decision was a just one."

be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. As Judge Gewin, speaking for the Fifth Circuit said, school officials cannot suppress "expressions of feelings with which they do not wish to contend" (1966) 363 F 2d 744 at p 749 (supra)

19. In (1923) 262 US 390 at 402, 67 L Ed 1042 at 1046 (supra), Justice McReynolds expressed the Nation's repudiation of the principle that a State might so conduct its schools as to "foster a homogeneous people." He said

"In order to submerge the individual and develop ideal citizens, Sparta assembled the males at seven into barracks and intrusted their subsequent education and training to official guardians. Although such measures have been deliberately approved by men of great genius, their ideas touching the relation between individual and State were wholly different from those upon which our institutions rest, and it hardly will be affirmed that any legislature could impose such restrictions upon the people of a State without doing violence to both letter and spirit of the Constitution."

20. This principle has been repeated by this Court on numerous occasions during the intervening years. In (1967) 385 US 589, 603, 17 L Ed 2d 629, 640 Mr Justice Brennan, speaking for the Court, said.

"The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" (1960) 364 US 479, 487, [5 L Ed 2d 231, 236.] The classroom is peculiarly the 'market-place of ideas'. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection' . . . "

21. The principle of these cases is not confined to the supervised and ordained discussion which takes place in the classroom. The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students (6)

6. In *Hammond v South Carolina State College* 272 F Supp 947 (DC SC 1967), District Judge Hemphill had before him a case involving a meeting on campus of 300 students to express their views on school practices. He pointed out that a school is not like a hospital or a jail enclosure. Cf. *Cox v Louisiana*, 379 US

This is not only an inevitable part of the process of attending school. It is also an important part of the educational process. A student's rights therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so "without materially and substantially interfering with appropriate discipline in the operation of the school" and without colliding with the rights of others. (1966) 363 F 2d 744 at p 749 (supra). But conduct by the student, in class or out of it, which for any reason — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guaranty of freedom of speech. Cf. *Blackwell v Issaquena City Bd of Educ.* (1966) 363 F 2d 749 (CA 5th Cir, 1966)

22. Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. Freedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots. The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom.

23. If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substan-

536, 13 L Ed 2d 471, 85 S Ct 453 (1965). *Adler v Florida* 385 US 39, 17 L Ed 2d 149, 87 S Ct 242 (1966). It is a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property. Cf. *Edwards v South Carolina*, 372 US 229, 9 L Ed 697, 83 S Ct 680 (1963), *Brown v Louisiana*, 383 US 131, 15 L Ed 2d 637, 87 S Ct 719 (1966).

tially disrupt the work and discipline of the school. Cf. *Hammond v. South Carolina State College*, (1967) 272 F Supp 947 (DCD SC 1967) (orderly protest meeting on state college campus); *Dickey v. Alabama State Board*, (1967) 273 F Supp 613 (DCMD Ala 1967) (expulsion of student editor of college newspaper). In the circumstances of the present case, the prohibition of the silent, passive "witness of the armbands", as one of the children called it, is no less offensive to the Constitution's guaranties.

24. As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the class rooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form of expression.

25. We express no opinion as to the form of relief which should be granted, this being a matter for the lower courts to determine. We reverse and remand for further proceedings consistent with this opinion.

26. Reversed and remanded.

SEPARATE OPINIONS

MR. JUSTICE STEWART, concurring.

27. Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last Term in *Ginsberg v. New York*, (1968) 390 US 629, 20 L Ed 2d 195. I continue to hold the view I expressed in that case: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child-like someone in a captive audience — is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees". *Id.*, (1968) 390 US 629 at 649-650, 20 L Ed 2d 195 at 209, 210 (concurring opinion). Cf.

Prince v. Massachusetts, (1943) 321 US 158, 88 L Ed 645.

MR. JUSTICE WHITE, concurring.

28. While I join the Court's opinion, I deem it appropriate to note, first, that the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct which sufficiently impinge on some valid state interest; and, second, that I do not subscribe to everything the Court of Appeals said about free speech in its opinion in (1966) 363 F 2d 744, 748 (C A 5th Cir 1966), a case relied upon by the Court in the matter now before us.

MR. JUSTICE BLACK, dissenting.

29. The Court's holding in this case ushers in what I deem to be an entirely new era in which the power to control pupils by the elected "officials of state supported public schools. . . ." in the United States is in ultimate effect transferred to the Supreme Court. (1) The Court brought this particular case here on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way "from kindergarten through high school." Here the constitutional right to "political expression" asserted was a right to wear black armbands during school hours and at classes in order to demonstrate to the other students that the petitioners were mourning because of the death of United States' soldiers in Vietnam and to protest that war which they were against. Ordered to refrain from wearing the armbands in school by the elected school officials and the teachers vested with state authority to do so, apparently only seven out of the school system's 18,000 pupils deliberately refused to obey the order. One defying pupil was Paul Tinker, 8 years old, who was in the second grade; another, Hope Tinker was 11 years old in the fifth grade; a third member of the Tinker family was 13, in the eighth grade; and a fourth member of the same family was John Tinker, 15 years old, an 11th grade high school pupil. Their father, a Methodist minister without a church, is paid a salary by the American Friends Service Committee. Another student who defied the school order and insisted on wearing an armband in school was Chris Eckhardt, an 11th grade pupil

1. The petition for certiorari here presented this single question:

"Whether the First and Fourteenth Amendments permit officials of state-supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum."

and a petitioner in this case. His mother is an official in the Women's International League for Peace and Freedom.

30. As I read the Court's opinion it relies upon the following grounds for holding unconstitutional the judgment of the Des Moines school officials and the two Courts below. First the Court concludes that the wearing of armbands is "symbolic speech" which is "akin to pure speech" and therefore protected by the First and Fourteenth Amendments. Secondly, the Court decides that the public schools are an appropriate place to exercise "symbolic speech" as long as normal school functions are not "unreasonably" disrupted. Finally, the Court arrogates to itself, rather than to the State's elected officials charged with running the schools, the decisions as to which school disciplinary regulations are "reasonable."

31. Assuming that the Court is correct in holding that the conduct of wearing armbands for the purpose of conveying political ideas is protected by the First Amendment compare, e.g., *Giboney v. Empire Storage & Ice Co.* (1949) 336 US 490, 93 L Ed 834, the crucial remaining questions are whether students and teachers may use the schools at their whim as a platform for the exercise of free speech — "symbolic" or "pure" — and whether the Courts will allocate to themselves the function of deciding how the pupils' school day will be spent. While I have always believed that under the First and Fourteenth Amendments neither the State nor Federal Government has any authority to regulate or censor the content of speech, I have never believed that any person has a right to give speeches or engage in demonstrations where he pleases and when he pleases. This Court has already rejected such a notion. In (1965) 379 US 536, 13 L Ed 2d 471, for example, the Court clearly stated that the rights of free speech and assembly "do not mean that anyone with opinions or beliefs to express may address a group at any public place and at any time" (1965) 379 US 536, 554, 13 L Ed 2d 471, 483.

32. While the record does not show that any of these armband students shouted, used profane language or were violent in any manner, a detailed report by some of them shows their armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, non-protesting students had better let them alone. There is also evidence that the professor of mathematics had his lesson period practically "wrecked" chiefly by disputes with Beth Tinker,

who wore her armband for her "demonstration." Even a casual reading of the record shows that this armband did divert students' minds from their regular lessons, and that talk, comments, etc., made John Tinker "self-conscious" in attending school with his armband. While the absence of obscene or boisterous and loud disorder perhaps justifies the Court's statement that the few armband students did not actually "disrupt" the classwork, I think the record overwhelmingly shows that the armbands did exactly what the elected school officials and principals foresaw it would, that is, took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war. And I repeat that if the time has come when pupils of state-supported schools, kindergarten, grammar school or high school, can defy and flaunt orders of school officials to keep their minds on their own school work, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step it appears to me, would be to hold unconstitutional laws that bar pupils under 21 or 18 from voting, or from being elected members of the Boards of Education. (2)

33. The United States District Court refused to hold that the State school orders violated the First and Fourteenth Amendments 258 F Supp 971. Holding that the protest was akin to speech, which is protected by the First and Fourteenth Amendments, that court held that the school orders were "reasonable" and hence constitutional. There was at one time a line of cases holding "reasonableness" as the court saw it to be the test of a "due process" violation. Two cases upon which the Court today heavily relies for striking down these school orders used this test of reasonableness, (1923) 262 US 390, 67 L Ed 1042 and (1923) 262 US 404=67 L Ed 1047. The opinions in both cases were written by Mr. Justice McReynolds; Mr. Justice

2 The following Associated Press article appeared in the Washington Evening Star, January 11, 1969, p A-2, col 1

"Bellingham, Mass (AP) — Todd R. Hennessy, 16, has filed nominating papers to run for town park commissioner in the March election.

"I can see nothing illegal in the youth's seeking the elective office," said Lee Ambler, the town counsel. "But I can't overlook the possibility that if he is elected any legal contract entered into by the park commissioner would be void because he is a juvenile."

"Todd is a junior in Mount St. Charles Academy, where he has a top scholastic record."

Holmes, who opposed this reasonableness test, dissented from the holdings as did Mr. Justice Sutherland. This constitutional test of reasonableness prevailed in this Court for a season. It was this test that brought on President Franklin Roosevelt's well-known Court fight. His proposed legislation did not pass, but the fight left the "reasonable" constitutional test dead on the battlefield, so much so that this Court in *Ferguson v. Skrupa*, (1963) 372 US 726, 729, 730, 10 L Ed 2d 93, 96, 97, 83 S Ct 1028, 95 ALR 2d 1347 after a thorough review of the old cases, was able to conclude in 1962:

"There was a time when the Due Process Clause was used by this Court to strike down laws which were thought unreasonable, that is, unwise or incompatible with some economic or social philosophy The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, *Burns*, and like cases — that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely — has long since been discarded."

The *Ferguson* case totally repudiated the old reasonableness due process test, the doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they are "unreasonable," "arbitrary," "shock the conscience," "irrational," "contrary to fundamental 'decency,'" or some other such flexible term without precise boundaries. I have many times expressed my opposition to that concept on the ground that it gives judges power to strike down any law they do not like. If the majority of the Court today, by agreeing to the opinion of my Brother Fortas, is resurrecting that old reasonableness due process test, I think the constitutional change should be plainly, unequivocally, and forthrightly stated for the benefit of the bench and bar. It will be a sad day for the country, I believe, when the present day Court returns to the *McReynolds*' due process concept. Other cases cited by the Court do not, as implied, follow the *McReynolds*' reasonableness doctrine. (1943) 319 US 624 = 87 L Ed 1628 clearly rejecting the "reasonableness" test, held that the Fourteenth Amendment made the First applicable to the States, and held that the two forbade a State to compel little school children to salute the United States flag when they had religious scruples against it. (3) Neither (1940) 310 US

88, 84 L Ed 1093, (1931) 283 US 359, 75 L Ed 1117, (1963) 372 US 229, 9 L Ed 2d 697, nor (1966) 383 US 131, 15 L Ed 2d 637, related to school children at all, and none of these cases embraced Mr. Justice *McReynolds*' reasonableness test; and *Thornhill*, (1940) 310 US 88 *Edwards*, & *Brown*, (1966) 383 US 131 relied on the vagueness of state statutes under scrutiny to hold it unconstitutional, (1965) 379 US 536, 555, 13 L Ed 2d 471, 484, (1966) 385 US 39, 17 L Ed 2d 149, cited by the Court as a "compare," indicating, I suppose, that these two cases are no longer the law, were not rested to the slightest extent on the *Meyers* and *Bartel* "reasonableness-due process-*McReynolds*" constitutional test.

34. I deny, therefore, that it has been the "unmistakable holding of this Court for almost 50 years" that "students" and "teachers" take with them into the "schoolhouse gate" constitutional rights to "freedom of speech or expression." Even *Meyer* did not hold that. It makes no reference to "symbolic speech" at all; what it did was to strike down as "unreasonable" and therefore unconstitutional a Nebraska law barring the teaching of the German language before the children reached their eighth grade. One can well agree with Justice Holmes and Mr. Justice Sutherland, as I do, that such a law was no more unreasonable than it would be to bar the teaching of Latin and Greek to pupils who have not reached the eighth grade. In fact, I think the majority's reason for invalidating the Nebraska law was that they did not like or in legal jargon that it "shocked the Court's conscience," "offended its sense of justice" was "contrary to fundamental concepts of the English-speaking world," as the Court has sometimes said. See, e. g., *Rochin v. California*, (1950) 342 US 165, 96 L Ed 183, and *Irvine v. California*,

teenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts — freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society."

3. In *Cantwell v. Connecticut*, 310 US 296, 303-304, 84 L Ed 1213, 1218, 60 S Ct 900, 128 ALR 1352 (1939), this Court said:

"The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Four-

(1953) 347 US 128, 98 L Ed 561. The truth is that a teacher of kindergarten, grammar school, or high school pupils no more carries into a school with him a complete right to freedom of speech and expression than an anti-Catholic or anti-Semitic carries with him a complete freedom of speech and religion into a Catholic church or Jewish synagogue. Nor does a person carry with him into the United States Senate or House, or to the Supreme Court, or any other court, a complete constitutional right to go into those places contrary to their rules and speak his mind on any subject he pleases. It is a myth to say that any person has a constitutional right to say what he pleases, where he pleases, and when he pleases. Our Court has decided precisely the opposite. See, e.g., (1965) 379 US 536, 555, 13 L Ed 2d 471, 484, (1966) 385 US 39, 17 L Ed 2d 149.

35 In my view, teachers, in state-controlled public schools are hired to teach there. Although Mr Justice McReynolds may have intimated to the contrary in *Meyers v Nebraska*, supra, certainly a teacher is not paid to go into school and teach subjects the State does not hire him to teach as a part of its selected curriculum. Nor are public school students sent to the schools at public expense to broadcast political or any other views to educate and inform the public. The original idea of schools, which I do not believe is yet abandoned as worthless or out of date, was that children had not yet reached the point of experience and wisdom which enabled them to teach all of their elders. It may be that the Nation has outgrown the old-fashioned slogan that "children are to be seen not heard," but one may, I hope, be permitted to harbor the thought that taxpayers send children to school on the premise that at their age they need to learn, not teach.

36 The true principles on this whole subject were in my judgment spoken by Mr Justice McKenna for the Court in *Waugh v Mississippi University* in (1914) 237 US 589, 596-597, 59 L Ed 1131, 1137. The State had there passed a law barring students from peaceably assembling in Greek letter fraternities and providing that students who joined them could be expelled from school. This law would appear on the surface to run afoul of the First Amendment's freedom of assembly clause. The law was attacked as violative of due process and as a deprivation of property, of liberty, and of the privileges and immunities clause of the Fourteenth Amendment. It was argued that the fraternity made its members more moral, taught discipline, and inspired its members to study harder and to obey better the rules of discipline and

order. This Court rejected all the "fervid" pleas of the fraternities' advocates decided unanimously against these Fourteenth Amendment arguments. The Court in its closing paragraph made this statement which has complete relevance for us today:

"It is said that the fraternity to which complainant belongs is a moral and of itself a disciplinary force. This need not be denied. But whether such membership makes against discipline was for the State of Mississippi to determine. It is to be remembered that the University was established by the State and is under the control of the State, and the enactment of the statute may have been induced by the opinion that 'membership in the prohibited societies divided the attention of the students and distracted from that singleness of purpose which the State desired to exist in its public educational institutions.' It is not for us to entertain conjectures in opposition to the views of the State and annul its regulations upon disputable considerations of their wisdom or necessity." (Emphasis (here in ' ') supplied)

37. It was on the foregoing argument that this Court sustained the power of Mississippi to curtail the First Amendment's right of peaceable assembly. And the same reasons are equally applicable to curtailing in the States' public schools the right to complete freedom of expression. Iowa's public schools, like Mississippi's University, are operated to give students an opportunity to learn, not to talk politics by actual speech, or by "symbolic" speech. And as I have pointed out before the record amply shows that public protest in the school classes against the Vietnam war "distracted from that singleness of purpose which the State (here Iowa) desired to exist in its public educational institutions." Here the Court should accord Iowa educational institutions the same right to determine for itself what free expression and no more should be allowed in its schools that it accorded Mississippi with reference to freedom of assembly. But even if the record were silent as to protest against the Vietnam war distracting students from their assigned class work, members of this Court, like all other citizens, know, without being told, that the disputes over the wisdom of the Vietnam war have disrupted and divided this country as few other issues ever have. Of course students, like other people, cannot concentrate on lesser issues when black arm-bands are being ostentatiously displayed in their presence to call attention to the wounded and dead of the war, some of the wounded and the dead being their friends and neighbours. It was, of course, to distract the attention of other students

that some students insisted up to the very point of their own suspension from school that they were determined to sit in school with their symbolic armbands.

38. Change has been said to be truly the law of life but sometimes the old and the tried and true are worth holding. The schools of this Nation have undoubtedly contributed to giving us tranquillity and to making us a more law-abiding people. Uncontrolled and uncontrollable liberty is an enemy to domestic peace. We cannot close our eyes to the fact that some of the country's greatest problems are crimes committed by the youth, too many of school age. School discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens. Here a very small number of students have crisply and summarily refused to obey a school order designed to give pupils who want to learn the opportunity to do so. One does not need to be a prophet or the son of a prophet to know that after the Court's holding today that some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders. This is the more unfortunate for the schools since groups of students all over the land are already running loose, conducting break-ins, sit-ins, lie-ins, and smash-ins. Many of these student groups, as is all too familiar to all who read the newspapers and watch the television news programs, have already engaged in rioting, property seizures and destruction. They have picketed schools to force students not to cross their picket lines and have too often violently attacked earnest but frightened students who wanted an education that the picketers did not want them to get. Students engaged in such activities are apparently confident that they know far more about how to operate public school systems than do their parents, teachers, and elected school officials. It is no answer to say that the particular students here have not yet reached such high points in their demands to attend classes in order to exercise their political pressures. Turned loose with lawsuits for damages and injunctions against their teachers like they are here, it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools rather than the right of the States that collect the taxes to hire the teachers for the benefit of the pupils. This case, therefore, wholly without constitutional reasons in my judgment, subjects all the public schools in the country to the whims and caprices of their loudest-mouthed, but may be not their brightest, students. I, for one, am not fully persuaded that school pupils are wise eno-

ugh, even with this Court's expert help from Washington, to run the 23,390 public school systems (4) in our 50 States. I wish, therefore, wholly to disclaim any purpose on my part, to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students. I dissent.

MR. JUSTICE HARLAN, dissenting.

39. I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. At the same time I am reluctant to believe that there is any disagreement between the majority and myself on the proposition that school officials should be accorded the widest authority in maintaining discipline and good order in their institutions. To translate that proposition into a workable constitutional rule, I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns — for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

40. Finding nothing in this record which impugns the good faith of respondents in promulgating the armband regulation, I would affirm the judgment below.

RGD

4. Statistical Abstract of the United States (1968), Table No. 578, p. 406.

AIR 1969 U.S.S.C. 87 (V 56 C 16)

(1969-22 L Ed 2d 344)*

**HARLAN, DOUGLAS, BLACK,
STEWART, FORTAS AND MAR-
SHALL JJ.**

Brotherhood of Railroad Trainmen et al., Petitioners v. Jacksonville Terminal Co., Respondents.

(No. 69) Decided on 25-3-1969.

†Industrial Disputes Act (1947), Ss. 23, 24 and 25—U. S. Case—Railway Labor Act — Peaceful picketing by rail employees — State Court have no jurisdiction to interfere.

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†Reference is given to a parallel Indian Provision for the convenience of Indian Lawyers.

HM/HM/D552/69/B

A railroad company after exhausting all remedies under Railway Labor Act for resolution of disputes, unilaterally changed the working conditions the rate of pay etc of its working employees. The employees struck work and picketed at various centres where the railroad carried on its operations. In an action for injunctive relief against the picketing unions, the trial court granted an injunction on the ground that picketing was a secondary boycott illegal under state law and would cause serious economic damage to entire state. The Florida court of appeal affirmed. On certiorari the U S Supreme Court reversed.

Held per Harlan (on behalf of himself and three others) that though the State Courts were not pre-empted of the jurisdiction over the cause the issues were governed by the Federal laws and the question of peaceful non-violent picketing in support of peaceful primary strikes were federally protected under Railway Labor Act and were therefore immune from State interference. Case law discussed.

(Paras 37 and 41)

Cases Referred: Chronological Paras

- (1968) 392 US 904 = 20 L Ed 2d 1362 = 88 S Ct 2060, Brotherhood of Railroad Trainmen v Jacksonville Terminal Co 4
(1967) 386 US 612 = 18 L Ed 2d 357 = 87 S Ct 1250, Woodwork Manufacturers v N. L. R. B. 32, 35, 40
(1966) 385 US 20 = 17 L Ed 2d 20 = 87 S Ct 226, Atlantic Coast Lane Railroad Co v Brotherhood of Railway Trainmen 3
(1966) 384 US 238 = 16 L Ed 2d 501 = 86 S Ct 1420, Railway Clerks v Florida ECR Co 16, 26
(1966) 362 F 2d 649, Railroad Trainmen v Atlantic CLR Co. 3, 6, 40
(1965) 381 US 676 = 14 L Ed 2d 640 = 85 S Ct 1596, Meat Cutters v Jewel Tea Co. 22
(1965) 350 F 2d 791, Electrical Workers v N L R B 43
(1965) 122 US App DC 8 = 350 F 2d 791, Electrical Workers v. N L R B 13
(1964) 377 US 53 = 12 L Ed 2d 129 = 84 S Ct 1063, N L R B v. Fruit & Vegetable Packers 35
(1964) 376 US 492 = 11 L Ed 2d 863 = 84 S Ct 899, Steelworkers v. N L R B 13, 27, 32
(1964) 336 F 2d 172, Florida ECR Co v Railroad Trainmen 16
(1963) 372 US 284 = 9 L Ed 2d 759 = 83 S Ct 691, Locomotive Engineers v Baltimore and O R Co 16, 52
(1963) 372 US 682 = 10 L Ed 2d 67 = 83 S Ct 959, Machinists v. Central Air Lines Inc. 20

- (1963) 372 US 726 = 10 L Ed 2d 93 = 83 S Ct 1028, W. M. Ferguson v. F. C. Skrupa 22
(1962) 370 US 173 = 8 Law Ed 2d 418 = 82 S Ct 1237, Cf. Marine Engineers v. Interlake Steamship Co 11, 12
(1961) 368 US 297 = 7 L Ed 2d 299 = 82 S Ct 327, Campbell v. Hussey 58
(1961) 366 US 667 = 6 L Ed 2d 592 = 81 S Ct 1285, Electrical Workers v N L R B 31, 33, 34
(1960) 362 US 330 = 4 L Ed 2d 774 = 80 S Ct 761, Railroad Telegraphers v. Chicago & N W. R. Co 16
(1960) 361 US 477 = 4 L Ed 2d 454 = 80 S Ct 419, Cf. N. L. R. B. v. Insurance Agents 39
(1959) 359 US 236 = 3 L Ed 2d 775 = 79 S Ct 773, Cf. Building Trades Council v Garmon 10, 20, 28
(1958) 357 US 93 = 2 L Ed 2d 1186 = 78 S Ct 1011, Carpenters v N L R B 31, 40
(1958) 356 US 634 = 2 L Ed 2d 1030 = 78 S Ct 932, Cf. Automobile Workers v Russell 28
(1957) 355 US 131 = 2 L Ed 2d 151 = 78 S Ct 206, Youngdahl v Rainfair 28
(1957) 353 US 30 = 1 L Ed 2d 622 = 77 S Ct 635, Cf. Railroad Trainmen v Chicago River & I R Co 24
(1957) 353 US 448 = 1 L Ed 2d 972 = 77 S Ct 912, Textile Workers v Lincoln Mills 23
(1956) 351 US 266 = 100 L Ed 1162 = 76 S Ct 794, Automobile Workers v. Wisconsin Employment Relations Board 28
(1956) 350 US 155 = 100 L Ed 166 = 76 S Ct 227, Teamsters Union v New York, N. H & H. R. Co. 13
(1955) 348 US 483 = 99 L Ed 563 = 75 S Ct 461, Williamson v Lee Optical Co. 22
(1954) 347 US 656 = 98 L Ed 1025 = 74 S Ct 833, Construction Workers v Laburnum Construction Co 28
(1953) 346 US 485 = 98 L Ed 228 = 74 S Ct 161, Garner v Teamsters 27
(1951) 340 US 383 = 95 L Ed 364 = 71 S Ct 359, Cf. Street Employees v Wisconsin Employment Relations Board 26, 36
(1950) 339 US 454 = 94 L Ed 978 = 70 S Ct 781, Automobile Workers v. O' Brien 26
(1950) 181 F 2d 34, Electrical Workers v N L R B. 32
(1949) 336 US 490 = 93 L Ed 834 = 69 S Ct 684, Joseph Giboney v Empire Storage and Ice Co 50, 51
(1948) 333 US 437 = 92 L Ed 792 = 68 S Ct 630, Bakery Drivers v. Wagshal 31

(1946) 331 US 218=91 L Ed 1447 =67 S Ct 1146, Rice v. Sante Fe Elevator Corpn.	58
(1945) 325 US 711=89 L Ed 1886 =65 S Ct 1282, Elgin J. & E. R. Co. v. Burley	16, 17, 40, 55
(1944) 323 US 192=89 L Ed 173= 65 S Ct 226, Steele v. Louisville & N. R. Co.	23
(1944) 321 US 50=88 L Ed 534=64 S Ct 413, Brotherhood of Railroad Trainmen v. Toledo Peoria & Western Railroad Co.	23
(1943) 318 US 363=87 L Ed 838= 63 S Ct 573, Cf. Clearfield Trust Co. v. United States	20
(1942) 318 US 261=87 L Ed 748 =63 S Ct 617, Penn Davies v. Milk Control Commission	59
(1942) 315 US 740=86 L Ed 1154 =62 S Ct 820, Electrical Workers v. Wisconsin Employment Relations Board	28
(1942) 130 F 2d 503, N. L. R. B. v. Peter Cailler Kohler Swiss Chocolates Co.	31, 43
(1941) 315 US 740=86 L Ed 1154 =62 S Ct 820, Allen Bradley Local v. Board	55
(1941) 312 US 219=85 L Ed 788 =61 S Ct 463, United States v. Hutcheson	22
(1936) 301 US 441=81 L Ed 1210, 57 S Ct 842, Townsend v. Yeo- mans	59
(1933) 291 US 17=78 L Ed 622= 54 S Ct 267, Federal Compress v. McLean	59
(1926) 272 US 605=71 L Ed 432= 47 S Ct 207, Napier v. Atlantic Coastline	59

Neal P. Rutledge, for Petitioners;
Dennis G. Lyons, for Respondent.

SUMMARY

After exhausting all procedures required by the Railway Labor Act for the resolution of a major dispute, a railroad company unilaterally changed its operating employees' rates of pay, rules, and working conditions, and the unions representing such employees called a strike and thereafter picketed at various locations where the railroad conducted operations. A railroad terminal company, which was jointly owned and controlled by the struck railroad and three other railroads, instituted an action in the Florida Circuit Court for injunctive relief against the unions and their officers to prevent picketing at the terminal, which picketing had secondary effects with regard to the other users of the terminal. The trial court held that the picketing constituted a secondary boycott illegal under state law and would cause serious economic damage to the entire state, and granted an injunction

restraining the unions from picketing the terminal except at a gate purportedly reserved for employees of the struck railroad. On appeal the Florida District Court of Appeals affirmed (201 So 2d 253).

On certiorari, the Supreme Court of the United States reversed. In an opinion by Harlan, J., expressing the view of four members of the Court, it was held that (1) although the Florida Courts were not pre-empted of jurisdiction over the cause, the issues were governed by federal rather than state law, (2) the Railway Labor Act permitted railway employees to engage in some forms of self-help, free from state interference, (3) drawing upon labor policies evinced by the Labor Management Relations Act, such protected self-help included peaceful primary strikes and nonviolent picketing in support thereof, (4) the question of which picketing activities were federally protected under the Railway Labor Act and therefore immune from state interference, and which activities were subject to prohibition by the state, was for consideration by Congress rather than the Supreme Court, and (5) until Congress acted, picketing—whether characterized as primary or secondary—was to be deemed conduct protected against state proscription.

DOUGLAS, J., joined by BLACK and STEWART, JJ., dissented, expressing the view that (1) since Congress had not pre-empted the field of picketing a rail carrier for purposes of a secondary boycott, a state's power over secondary boycotts should be held to be paramount to a labor union's, (2) the right to self-help under the Railway Labor Act should not override state law when secondary boycotts threatened to penalize a whole community, and (3) the states should be allowed a free hand in labor controversies unless Congress has adopted a contrary policy.

Fortas and Marshall, JJ. did not participate.

OPINION OF THE COURT

MR. JUSTICE HARLAN delivered the opinion of the Court.

2. This case arises out of the Nation's longest railroad labor dispute, much of the history of which is recorded in the pages of the United States and federal reports.(1) The events most pertinent to

1. See *Railway Clerks v. Florida E. C. R. Co.* (1966) 384 US 238=16 L Ed 2d 501=86 S Ct 1420; *Railroad Trainmen v. Atlantic C. L. R. Co.* (1962) 362 F 2d 649, aff'd. (1966) 385 US 20=17 L Ed 2d 20=87 S Ct 226, *Florida E. C. R. Co. v. Railroad Trainmen*, (1964) 336 F 2d 172. Cf. *Locomotive Engineers v. Baltimore &*

the present litigation began on April 24, 1966, when the Florida East Coast Railway Company (FEC), having exhausted all procedures required by the Railway Labor Act (2) for the resolution of a "major dispute" (3) unilaterally changed its operating employees' rates of pay, rules, and working conditions. Petitioners, who represent FEC's operating employees, responded by calling a strike and thereafter by picketing the various locations at which FEC carried on its operations, including the premises of the respondent, Jacksonville Railroad Terminal Company (4).

3 On the complaint of respondent and two railroads other than FEC, a United States District Court issued a temporary restraining order several hours after the picketing began, and later enjoined petitioners from picketing respondent's premises except at a "reserved gate" set aside for FEC employees. The Court of Appeals for the Fifth Circuit reversed, holding that the Norris-La-Guardia Act, 47 Stat 70, 29 USC S 101 et seq., prevented issuance of a federal injunction. *Railroad Trainmen v Atlantic C L R. Co.*, (1966) 362 F 2d 649. We affirmed by an equally divided Court (1966) 385 US 20-17 L Ed 2d 20-87 S Ct 226.

4 While that litigation was pending in the federal courts, respondent instituted the present action for injunctive relief in the Florida Circuit Court. Petitioners removed the action to the United States District Court, which promptly remanded to the state court. The Florida court issued a temporary injunction, substantially identical to the earlier federal order, which it made final after a full hearing. On appeal the Florida District Court of Appeals affirmed per curiam. The Supreme Court of Florida denied certiorari and dismissed an appeal. We

O R Co (1963) 372 US 284-9 L Ed 2d 759-83 S Ct 691.

2 44 Stat 577, as amended, 45 USC 151 et seq.

3 See *Elgin J. & E. R Co v Burley* (1945) 325 US 711, 722-725-89 L Ed 1886, 1894, 1895 = 65 S Ct 1282 (1964) 326 F 2d 172 supra, at 178-179, Part III, infra.

4 Petitioners are the Brotherhood of Railroad Trainmen, the Order of Railway Conductors and Brakemen, the Brotherhood of Locomotive Firemen and Engineers and several union officers. Petitioners contend that only the BRT and its officers were responsible for the picketing, and that the injunction was improper as to the others. Because of our disposition of the case we do not reach this question, and we treat petitioners jointly, as did the state courts.

granted certiorari, (1968) 392 US 904, 20 L Ed 2d 1362, 88 S Ct 2060 to determine the extent of state power to regulate the economic combat of parties subject to the Railway Labor Act.

I

5 Respondent, a Florida corporation, operates a passenger and freight rail terminal facility in Jacksonville, Florida, through which rail traffic passes to and from the Florida peninsula. The corporation is jointly owned and controlled by four railroad carriers, including FEC, which enjoy the common use of the terminal's facilities and services, and share equally in its operation (5).

6 FEC carries on substantial daily operations at the terminal, interchanging freight cars with the other railroads; it accounts for approximately 30% of all interchanges on the premises. Respondent provides various services necessary to FEC's operations, including switching, signalling, track maintenance, and repairs on FEC cars and engines. Without the work and co-operation of employees of respondent (and the other railroads) FEC could not carry on its normal activities at the terminal. In short, "despite the legal separateness of the Terminal Company's entity and operation, it cannot be disputed that the facilities and services provided by the Terminal Company in fact constitute an integral part of the day-to-day operations of the FEC..." (1966) 362 F 2d 649, 651.

7. Respondent maintains a "reserved gate" for the exclusive use of all FEC employees entering the terminal premises on foot to begin their work day. Notices to this effect are posted but compliance is not policed. FEC employees use other entrances as well, and other employees use the FEC reserved entrance. The terminal has a number of other foot, road, and rail entrances, through which pass employees of respondent and the railroads using the premises. No entrances are set aside to separate those employees of respondent and the other railroads who provide services for FEC from those who do not; nor, with one or two possible exceptions,

5 The three other roads are the Atlantic Coast Line Railroad Co., the Seaboard Air Line Railroad Co., and the Southern Railway System. Effective July 1, 1967, Coast Line and Seaboard merged. See *Florida E. C R Co v United States*, (1966) 259 F Supp 993, affirmed, (1967) 386 US 544-18 L Ed 2d 285 = 87 S Ct 1299.

For a discussion of one aspect of this unusual joint venture agreement see *Jacksonville Terminal Co v Florida E. C R Co* (1966) 363 F 2d 216.

do trains making interchanges with FEC pass through different gates from those which do not. The joint and common use of the premises and facilities would, presumably, render such separations impracticable.

8. On May 4, 1966, petitioners began to picket almost every entrance to the terminal. The signs stated clearly that the dispute was with FEC alone, and urged "fellow railroad men" not to "cross" and not to "assist FEC." (6) The picketing was entirely peaceful. It lasted only a few hours, until it was curtailed by a federal temporary restraining order, and thereafter by a series of federal and state injunctions.

9. The Florida Circuit Court found that resumption of general picketing "would result in a virtual cessation of activities. . . of the Terminal Company," and would cause serious economic damage to the entire State. Joint App., at 183. The court held that the picketing constituted a secondary boycott illegal under state law, that it unjustifiably interfered with respondent's business relations; that it violated the State's restraint of trade laws, (1967) 16 Fla Stat Ann S. 542.01 et seq. and that it sought to force respondent to violate its duties as a carrier under the Florida Transportation Act. (7) On this basis, the court enjoined petitioners from picketing the terminal except at the FEC reserved gate, and from causing or inducing respondent's employees to cease performing their duties of employment in connection with the FEC dispute.

II.

10. We consider initially petitioners' argument that the jurisdiction of the Florida court was ousted by the primary and exclusive jurisdiction of the National Labor Relations Board. Cf. *Building Trades Council v. Garmon*, (1959) 359 US 236, 3 L Ed 2d 775, 79 S Ct 773.

6. The signs read:

"Fellow Railroad Men
Do Not Cross or Assist F. E. C.
B. of R. T.
On Legal
Strike
Against F. E. C.

Please Make Common Cause With Us In
Major Dispute Against F. E. C."

A union official directing the picketing testified at the state hearing that picket lines at the rail entrances would have been taken down to allow movements unconnected with F. E. C. to pass.

7. (1967) 13A Fla Stat Ann Ss. 351.12, 351.14, 351.15, 351.16, 351.17, 351.19. These are duties, in essence, to transport and transfer freight and freight cars.

11. It is not disputed that petitioners, the respondent and its employees, and the railroads (including FEC) that use the terminal as well as their employees, are subject to the Railway Labor Act. See Ss. 1 First, Fourth, 45 USC Ss. 151 First, Fourth; Interstate Commerce Act, S. 1 (3), 24 Stat 379, 49 USC S. 1 (3). The petitioner organizations "are composed predominantly and overwhelmingly of employees. . . subject to the Railway Labor Act," Joint App., at 93; all pickets were members of local lodges composed solely of such employees, and were employees of the FEC. Id., at 94. However, the organizations' national membership includes a small percentage of employees who are not subject to the Railway Labor Act, (8) and who may be subject to the Labor Management Relations Act, 61 Stat 136, as amended, 29 USC S. 141 et seq. Petitioners contend that this is sufficient to bring the present dispute arguably within the LMRA, and they assert that until the National Labor Relations Board decides otherwise, no court may assume jurisdiction over the controversy. Cf. *Marine Engineers v. Interlake Steamship Co.* (1962) 370 US 173, 8 L Ed 2d 418, 82 S Ct 1237. (9)

This argument proves too much. For on petitioners' theory, it is hard to conceive of any railway labor dispute that is not "arguably" subject to the NLRB's primary jurisdiction. A serious question would be presented whether the parties to such a dispute were ever obligated to pursue the Railway Labor Act's procedures, and whether the Mediation and Adjustment Boards could ever concern themselves with a dispute — until the matter had first been submitted to the NLRB for a determination that it lacked jurisdiction.

12. This was not meant to be. The LMRA came into being against the back-

8. Seven percent of the BRT, 7% of the BLF & E, and 2% of the ORC & B are "employees of employers who are not subject to the Railroad Labor Act." Joint App 93-94.

9. In *Marine Engineers*, a state court enjoined picketing by the Marine Engineers Beneficial Association, having found that the union represented only "supervisors," who are not "employees" subject to the LMRA. LMRA S. 2 (3). We noted that decisions of the NLRB and lower courts had held the MEBA subject to the Act under some circumstances, and we reversed, holding that in any "doubtful case," (1962) 370 US, 173 at 182 = 8 L Ed 2d 418 at 425, where there existed an "arguable possibility of Labor Board jurisdiction," id., at 184, 8 L Ed 2d at 426, the matter must first be submitted to the NLRB.

ground of pre-existing comprehensive federal legislation regulating railway labor disputes. Sections 2 (2) and (3) of the LMRA, 29 USC Ss 152 (2), (3), expressly exempt from the Act's coverage employees and employers subject to the Railway Labor Act (10). And when the traditional railway labor organizations act on behalf of employees subject to the Railway Labor Act in a dispute with carriers subject to the Railway Labor Act, the organizations must be deemed, pro tanto, exempt from the Labor Management Relations Act. See LMRA S 2 (5), 29 USC S 152 (5). Marine Engineers, supra, is inapposite. For assuming, arguendo, that this is a "doubtful case," (1962) 370 US 173 at 182=8 L Ed 2d 418 at 425, we were not there concerned with a conflict between two independent and mutually exclusive federal labor schemes.

13. Whatever might be said where railway organizations act as agents for, or as joint venturers with, unions subject to the LMRA, see *Electrical Workers v. NLRB*, (1965) 122 US App DC 8, 350 F.2d 791, or where railway unions are engaged in a dispute on behalf of their nonrail employees, or where a rail carrier seeks a remedy against the conduct of nonrailway employees see *Steelworkers v. NLRB*, (1964) 376 US 492, 501 = 11 L Ed 2d 863 869=84 S Ct 899, *Teamsters Union v. New York, N H & H R Co* (1956) 350 US 155, 100 L Ed 166=76 S Ct 227, none of these is this case. This is a railway labor dispute, pure and simple. And although we shall make use of analogies drawn from the LMRA to determine the rights of employees subject to

[3] 10 In the debates preceding enactment of the Taft-Hartley amendments, 61 Stat 140, 29 USC S 158 (b), Senator Taft responded as follows to the criticism that it was inequitable to allow railroad employees to engage in conduct forbidden others by S 8 (b) (4) of the LMRA:

"I want to point out that railway labor has never been covered by the Wagner Act, it has always been covered by the Railway Labor Act, which provides a somewhat different procedure. We saw no reason to change that situation, because there were no abuses which had arisen in connection with the operation of the Railway Labor Act." 93 Cong Rec 6657, II Legislative History of the Labor Management Relations Act, 1947, at 1571. In 1959, S 8 (b) (4), was amended to expand the class of persons protected against secondary pressures. 73 Stat 542; see *Steelworkers v. NLRB*, 376 US 492, 500-501, 11 L Ed 2d 863, 869, 84 S Ct 899 (1964). However, the amendment did not expand the scope of "employees" or "labor organizations" whom the Act forbade to engage in such conduct.

the Railway Labor Act, see *infra*, Parts V-VII, the LMRA has no direct application to the present case.

III

14. The heart of the Railway Labor Act is the duty, imposed by S 2 First upon management and labor, "to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules and working conditions, and to settle all disputes . . . in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof."

15. The Act provides a detailed framework to facilitate the voluntary settlement of major disputes. A party desiring to effect a change of rates of pay, rules, or working conditions must give advance written notice S 6. The parties must confer, S 2 Second, and if conference fails to resolve the dispute, either or both may invoke the services of the National Mediation Board, which may also proffer its services sua sponte if it finds a labor emergency to exist. S 5 First. If mediation fails, the Board must endeavor to induce the parties to submit the controversy to binding arbitration, which can take place, however, only if both consent Ss 5 First, 7. If arbitration is rejected and the dispute threatens "substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President," who may create an emergency board to investigate and report on the dispute. S 10. While the dispute is working its way through these stages, neither party may unilaterally alter the status quo. Ss 2 Seventh, 5 First, 6, 10.

16. Nowhere does the text of the Railway Labor Act specify what is to take place once these procedures have been exhausted without yielding resolution of the dispute. Implicit in the statutory scheme, however, is the ultimate right of the disputants to resort to self-help—"the inevitable alternative in a scheme which deliberately denies the final power to compel arbitration." *Florida E C R Co v. Railroad Trainmen*, (1964) 336 F.2d 172, 181. We have consistently so held in a long line of decisions. *Railway Clerks v. Florida E C R Co*, (1966) 384 US 238, 244-16 L Ed 2d 501 506=86 S Ct 1420, *Locomotive Engineers v. Baltimore & O R Co* (1963) 372 US 284 = 9 L Ed 2d 759=83 S Ct 691, *Railroad Telegraphers v. Chicago & N. W R Co* (1960) 362 US 330=4 L Ed 2d 774=80 S Ct 761, *Elgin, J. & E R Co v. Burley*, (1945) 325 US 711, 725=89 L Ed 1886, 1895=65 S Ct 1282.

17. Both before and after enactment of the Railway Labor Act, (11) as well as during congressional debates on the Act itself, (12) proposals were advanced for replacing this final resort to economic warfare with compulsory arbitration and antistrike laws. But although Congress and the Executive have taken emergency ad hoc measures to compel the resolution of particular controversies, (13) no such general provisions have ever been enacted. And for the settlement of major disputes, "the statutory scheme relies throughout on the traditional voluntary processes of negotiation, mediation, voluntary arbitration, and conciliation. Every facility for bringing about agreement is provided and pressures for mobilizing public opinion are applied. The parties are required to submit to the successive procedures designed to induce agreement. S. 5 First (b). But the compulsions go only to insure that those procedures are exhausted before resort can be had to self-help. No authority is empowered to decide the dispute and no such power is intended, unless the parties themselves agree to arbitration." (1945) 325 US 711 at 725=89 L Ed 1886 at 1895 supra.

IV.

18. We have not previously had occasion to consider whether the Railway Labor Act circumscribes state power to regulate economic warfare between disputants subject to the Act. Read narrowly, the decisions cited above at p. 9, do no more than negate the "implication" of an independent federal remedy against self-help, (14) but do not foreclose a State

11. See generally, L. Lecht, *Experience Under Railway Labor Legislation* (1955) 38, 46-47, 197-198, 221-222, 230-237; *Use of Federal Power in Settlement of Railway Labor Disputes*, House Doc. No. 285, 67th Cong, 2d Sess (1922), at 76-85.

12. See 67 Cong Rec 4508, 4512-4513, 4517-4518, 4569, 4582, 4648, 4702, 8814, 9205-9206, 69th Cong, 1st Sess (1926).

13. E. g., Joint Resolution, PL No. 88-108, 77 Stat 129 (August 28, 1963). The Senate Report stated: "This proposal is not and cannot conceivably be considered as a precedent for the railroad industry. . . . It is what is purports to be — a one-shot solution through legislative means to a situation which imperiled beyond question the economy and security of the entire Nation." S. Rep No. 459, 88th Cong, 1st Sess (1963), at 7. See Generally, 1 *Federal Legislation to End Strikes: A Documentary History*, c VI, 3 Print, 90th Cong, 1st Sess (1962); 2 id., cc. X, XI; L. Lecht, *Experience Under Railway Labor Legislation* 176-177, 184-185, 195-196, 200-201, 206-207 (1955).

14. Compare, e. g., *Steele v. Louisville & N.R. Co.* (1944) 323 US 192, 89 L Ed

from bringing its own sanctions to bear on such conduct. On this theory, once the Act's required processes have been exhausted, a State would be free to impose whatever restrictions it wished on the parties' use of self-help.

19. The Act is silent on this question, as is its legislative history. (15) We think it clear, however, that the exercise of plenary state authority to curtail or entirely prohibit self-help would frustrate effective implementation of the Act's processes. The disputants' positions in the course of negotiation and mediation, and their willingness to submit to binding arbitration or abide by the recommendations of a presidential commission, would be seriously affected by the knowledge that after these procedures were exhausted a State would, say, prohibit the employees from striking or prevent the railroad from taking measures necessary to continue operating in the face of a strike. Such interference would be compounded if the disputants were — as they frequently would be — subjected to various and divergent state laws, Railway (and airline) (16) labor disputes typically present problems of national magnitude. A strike in one State often paralyzes transportation in an entire section of the United States, and transportation labor disputes frequently result in simultaneous work stoppages in many States.

20. The Railway Labor Act's entire scheme for the resolution of major disputes would become meaningless if the States could prohibit the parties from engaging in any self-help. And the potentials for conflict, see (1959) 359 US 236, 249, 250 = 3 L Ed 2d 775, 785, 786 = 79 S Ct 773 (concurring opinion), and for the imposition of inconsistent state obligations, cf. *Clearfield Trust Co. v. United States*, (1943) 318 US 363=87 L Ed 838 =63 S Ct 573, are simply too great to allow each State which happens to gain personal jurisdiction over a party to a railroad labor dispute to decide for itself what economic self-help he may or may not pursue. The determination of the permissible range of self-help "cannot be left to the laws of the many States, for

173, 65 S Ct 226. See Note, *Implying Civil Remedies from Federal Regulatory Statutes*, (1963) 77 Harv L Rev 285.

15. What little relevant legislative history we have found, however, indicates that in opting for the voluntary settlement of railway labor disputes, Congress intended to limit state authority to impose the rejected compulsions. See 67 Cong Rec 4706-4707, 69th Cong, 1st Sess (1926).

16. Air carriers and their employees were made subject to the Railway Labor Act in 1936, 49 Stat 1189, 45 USC Ss. 181, 182.

it would be fatal to the goals of the Act" If conduct were prohibited by state laws "even though in furtherance of the federal scheme. The needs of the subject matter manifestly call for uniformity" *Machinists v. Central Airlines, Inc* (1963) 372 US 682, 691-692, 10 L Ed 2d 67, 74, 83 S Ct 956.

21 It follows that even though the Florida courts may have jurisdiction over this litigation, the application of state law is limited by paramount federal policies of nationwide import.

V.

22. We are presented, then, with the problem of delineating the area of labor combat protected (17) against infringement by the States. The text and legislative history of the Railway Labor Act, and the decisional law thereunder, provide little guidance. To refer to the "general" labor law, as it existed around the time the Act came into being, would be a historical Lake forays into economic due process, see *Ferguson v Skrupa*, (1963) 372 US 726-10 L Ed 2d 93 = 83 S Ct 1028, *Williamson v Lee Optical Co* (1955) 348 US 483, 488=99 L Ed 563 572 = 75 S Ct 461 this judge-made law of the late 19th and early 20th centuries was based on self-mesmerized views of economic and social theory, see *F. Frankfurter* and *N. Green*, the *Labor Injunction* 1-46, 199-205 (1930), *A. Cox & D. Bok*, *Cases on Labor Law* 101-105 (5th ed 1962), and on statutory misconstruction. See *United States v. Hutcheson*, (1941) 312 US 219=85 L Ed 783=61 S Ct 463 We need not hold that the *Norris-LaGuardia Act* applies directly to this case (18) to find in its enactment a clear disapproval of these free-wheeling judicial exercises. See *Meat Cutters v Jewel Tea Co* (1965) 381 US 676, 697, 700-709,

17 In the context of labor relations law, this word is fraught with ambiguity "Protected conduct" may, for example, refer to employee conduct which the States may not prohibit, see, e. g., *Weber v. Anheuser-Busch, Inc* (1955) 348 US 468, 474=99 L Ed 546, 574=75 S Ct 480 or to conduct against which the employer may not retaliate. Cf., e.g., *NLRB v. Truck Drivers*, (1957) 353 US 87, 96=1 L Ed 2d 676, 681=77 S Ct 643 Throughout this opinion we use the word in the former sense only.

18 The question whether the *Norris-LaGuardia Act* bars state Courts from issuing labor injunctions was argued in a somewhat different context, but not decided, in *Avco Corp v Machinists*, (1968) 390 US 557=20 L Ed 2d 126=88 S Ct 1235. It is argued here, but again we find no need to reach it,

718, 14 L Ed 2d 640, 653, 655, 661, 666, 85 S Ct 1596 (separate opinion of Mr. Justice Goldberg)

23. To the extent that there exists today any relevant corpus of "national labor policy," it is in the law developed during the more than 30 years of administering our most comprehensive national labor scheme, the *Labor Management Relations Act*. This Act represents the only existing congressional expression as to the permissible bounds of economic combat. It has, moreover, presented problems of federal-state relations analogous to those at bar. The Court has in the past referred to the *LMRA* for assistance in construing the *Railway Labor Act*, see, e.g., *Steele v Louisville & N R Co* (1944) 323 US 192, 200-201 =89 L Ed 173, 181, 182=65 S Ct 226, *Railroad Trainmen v. Toledo, P. & W R Co* (1944) 321 US 50, 61, n=18, 83 L Ed 534 541=64 S Ct 413, and we do so again here. Indeed, even if we were to revive the "common law" of labor relations, the common law has always been dynamic and adaptable to changing times, and we would today look to these legislatively based principles for guidance. Cf. *Textile Workers v Lincoln Mills*, (1957) 353 US 448, 456, 457=1 L Ed 2d 972, 980=77 S Ct 912.

24. It should be emphasized from the outset however, that the *Labor Management Relations Act* cannot be imported wholesale into the railway labor arena. Even rough analogies must be drawn circumspectly, with due regard for the many differences between the statutory schemes (19) Cf. *Railroad Trainmen v. Chicago River & I. R Co* (1957) 353 US 30, 31, n2=1 L Ed 2d 662, 624=77 S Ct 635 We refer to the *LMRA's* policies not in order to "apply" them to peti-

19 For example, in referring to decisions holding state laws pre-empted by the *LMRA*, care must be taken to distinguish pre-emption based on federal protection of the conduct in question e.g., *Teamsters v Oliver*, (1959) 358 US 283=3 L Ed 2d 312=79 S Ct 297, *Street Employees v Wisconsin Employment Relations Board*, (1951) 340 US 383 = 95 L Ed 364 = 71 S Ct 359, 22 ALR 2d 874 from that based predominantly on the primary jurisdiction of the *National Labor Relations Board*, e.g., *Building Trades Council v Garmon*, (1959) 359 US 236=3 L Ed 2d 775=79 S Ct 773 al though the two are often not easily separable. See *NLRB v Insurance Agents*, (1960) 361 US 477, 493-494, n 23=4 L Ed 2d 454, 466, 467=80 S Ct 419 There is, of course, no administrative agency equivalent to the *NLRB* with jurisdiction over railway labor disputes.

tioner's conduct—for we conclude that this would be neither justified nor practicable—but only to determine whether it is within the general penumbra of conduct held protected under the Act or whether it is beyond the pale of any activity thought permissible.

25. In order to gain better perspective for viewing the central issue in this case — petitioners' alleged "secondary" activities—we examine first what we find to be polar examples of protected and unprotected conduct—primary strikes and picketing on the one hand, violence and intimidation on the other.

VI.

26. The Court has indicated, without reference to the Labor Management Relations Act, that employees subject to the Railway Labor Act enjoy the right to engage in primary strikes over major disputes. In (1966) 384 US 238, 244=16 L Ed 2d 501, 506=86 S Ct 1420, we held that:

"The unions, having made their demands and having exhausted all the procedures provided by Congress, were therefore warranted in striking. For the strike has been the ultimate sanction of the union, compulsory arbitration not being provided."

Similarly, in (1964) 336 F 2d 172, 181, the Fifth Circuit Court of Appeals concluded that "when the machinery of industrial peace fails, the policy in all national labor legislation is to let loose the full economic power of each (party). On the side of labor, it is the cherished right to strike." Whether the source of this right be found in a particular provision of the Railway Labor Act(20) or in the scheme

(15, 16) 20 Cf. S. 2 Fourth, 48 Stat 1186: "Employees shall have the right to organize and bargain collectively through representatives of their own choosing." It has been suggested that this provision is "comparable" to S. 7 of the LMRA, which grants employees the right to "self organization" and the right to engage in "concerted activities. . . ." and which, even apart from S. 13, protects the right to strike, see, e.g., Street Employees v. Wisconsin Employment Relations Board, (1951) 340 US 383, 389, 95 L Ed 364, 372=71 S Ct 359, 22 ALR 2d 874. S. Comm. Print, 73d Cong, 1st Sess (1935), 1 Legislative History of the National Labor Relations Act, 1935, at 1350-1351. However, S. 2 Fourth of the RLA, added in 1934, was designed primarily, if not exclusively, to prohibit coercive employer practices. See HR Rep No. 1944, 73d Cong, 2d Sess (1934), at 2; L. Lecht, Railway Labor Legislation, c. V (1955). The explicit language of S. 7 of the LMRA was probably res-

as a whole, it is integral to the Act. State courts may not enjoin a peaceful strike by covered railway employees, no matter how economically harmful the consequences may be. Cf. Street Employees v. Wisconsin Employment Relations Board, (1951) 340 US 383=95 L Ed 364=71 S Ct 359, Automobile Workers v. O'Brien, (1950) 339 US 454=94 L Ed 978=70 S Ct 781.

27. The Court has consistently held peaceful primary picketing incident to a lawful strike to be protected conduct under the Labor Management Relations Act. "Picketing has traditionally been a major weapon to implement the goals of a strike," (1964) 376 US 492, 499=11 L Ed 2d 863, 868=84 S Ct 899 and "it is implicit in the Act that the public interest is served by freedom of labor to use the weapon of picketing." Garner v. Teamsters, (1953) 346 US 485, 500=98 L Ed 228, 244=74 S Ct 161. We see no possible grounds for distinguishing picketing under the Railway Labor Act. Peaceful primary strikes and picketing incident thereto lie within the core of protected self-help under the Railway Labor Act.

28. On the other hand, the Labor Management Relations Act gives no colorable protection to violent and coercive conduct incident to a labor dispute. Electrical Workers v. Wisconsin Employment Relations Board, (1942) 315 US 740, 750=86 L Ed 1154, 1165=62 S Ct 820. The state interest in preventing "conduct marked by violence and imminent threats to public order" is compelling, (1959) 359 US 236, 247, 3 L Ed 2d 775, 784, 79 S Ct 773, and such conduct may be enjoined by state courts. Youngdahl v. Rainfair, (1957) 355 US 131=2 L Ed 2d 151, 78 S Ct 206; Automobile Workers v. Wisconsin Employment Relations Board, (1956) 351 US 266, 100 L Ed 1162, 76 S Ct 794. Cf. Automobile Workers v. Russell, (1958) 356 US 634=2 L Ed 2d 1030=78 S Ct 932, Construction Workers v. Laburnum Construction Co. (1954) 347 US 656=98 L Ed 1025=74 S Ct 833. The federal concern for protecting such conduct when engaged in by railway employees is no less tenuous. The States' interest in preventing it is no less compelling.

ponsive to the difference between the "embryo organizations in the industries covered by" the LMRA, and the already "strongly organized" railway unions. S. Comm. Print., supra, 1 Legislative History, supra, at 1329. For an indication of the economic power of railway labor organizations prior to enactment of the Railway Labor Act, see G. Eggert, Railway Labor Disputes (1967).

VII.

29. Petitioners committed no acts of violence. But their picketing, albeit peaceful, could not be characterized as purely "primary." Respondent asserts, in essence, that, because the picketing had secondary aspects, it was necessarily unprotected and therefore subject to proscription by the state court. The matter, however, is not so simply resolved.

30. No cosmic principles announce the existence of secondary conduct, condemn it as an evil, or delimit its boundaries. These tasks were first undertaken by judges, intermingling metaphysics with their notions of social and economic policy. And the common law of labor relations has created no concept more elusive than that of "secondary" conduct, it has drawn no lines more arbitrary, tenuous, and shifting than those separating "primary" from "secondary" activities. See *F. Frankfurter & N. Green* (1930) *The Labor Injunction* 43-46, 170 *1 L. Teller* (1940) *Labor Disputes and Collective Bargaining*, S 145, E Oakes (1927) *Organized Labor and Industrial Conflicts*, S 407 et seq. *Barnard & Graham, Labor and the Secondary Boycott*, (1940) 15 *Wash L. Rev* 137, *Hellerstein, Secondary Boycotts in Labor Disputes* (1938) 47 *Yale L.J* 341. Cf. *Aaron, Labor Injunctions in the State Courts* (1964) Part I, 50 *Va L. Rev* 950, 971-977. For these reasons, as well as those stated above, supra, at—22 L Ed 2d 356 (Para 22) this body of common law offers no guidance for the problem at hand.

31. It was widely assumed that, prior to 1947, the Norris-LaGuardia Act prevented federal courts from enjoining any "secondary boycotts." See (1947) 93 *Cong Rec* 4198 (remarks of Senator Taft), *Bakery Drivers v. Wagschal* (1948) 333 *US* 437, 442=92 *L. Ed* 792, 796 = 68 *S. Ct* 630. Indeed, in an opinion written by Judge Learned Hand, the Court of Appeals for the Second Circuit held that secondary conduct was fully protected by the Wagner Act. *NLRB v. Peter Cailier Kohler Swiss Chocolates Co* (1942) 130 *F.2d* 503. The 1947 Taft-Hartley amendments 61 Stat 140, and the 1959 Landrum Griffin amendments, 73 Stat 545, explicitly narrowed the scope of protected employee conduct under the Labor Management Relations Act; Ss 8 (b) (4) and 8 (e) of the Act proscribed a variety of secondary activities. (21) But Congress

enacted "no...sweeping prohibition" of secondary conduct. *Carpenters v. NLRB* (1958) 357 *US* 93, 98=2 *L. Ed* 2d 1185, 1193=78 *S. Ct* 1011. And despite their relative precision of language (22) the experience under these amendments amply demonstrates that—as at common law—bright lines cannot be drawn between "legitimate 'primary activity'" and banned "secondary activity". . . . *Electrical Workers v. NLRB*, (1961) 366 *US* 667, 673=6 *L. Ed* 2d 592, 597=81 *S. Ct* 1285.

32. The fuzziness of this distinction stems from the overlapping characteristics of the two opposing concepts, and from the vagueness of the concepts themselves. The protected primary strike "is aimed at applying economic pressure by halting the day-to-day operations of the struck employer." (1964) 376 *US* 492, 499, 11 *L. Ed* 2d 863, 868, 84 *S. Ct* 899 and protected primary picketing "has characteristically been aimed at all those approaching the situs whose mission is selling, delivering, or otherwise contributing to the operations which the strike is endeavoring to halt," *ibid.*, including other employers and their employees. "The gravamen of a secondary boycott," on the other hand, "is that its sanctions bear, not upon the employer who alone is a party to the dispute, but upon some third party who has no concern in it. Its aim is to compel him to stop business with the employer in the hope that this will induce the employer to give in to his employees' demands." *Electrical Workers v. NLRB*, (1950) 181 *F.2d* 34, 37, see also *Woodwork Manufacturers v. NLRB*, (1967) 386 *US* 612, 623 = 18 *L. Ed* 2d 357, 366=87 *S. Ct* 1250. These principles often come into conflict, and attempts to harmonize them in the context of S 8 (b) (4) of the Labor Management Relations Act have created ramified sets of rules.

33. The problem of delineating the scope of permissible picketing at a "common situs"—a place, such as respondent's terminal, where both the struck employer and "secondary" or "neutral" employers are carrying on business activities—has been among the most mooted and complex under the Act. See generally, (1961)

under unusual circumstances, the LMRA in its entirety is inapplicable to such persons. Part II, supra. It would be inappropriate to give any weight to these isolated passing remarks about one statutory scheme made in the context of amending an entirely different one.

22 Section 8 (b) (4) "does not speak generally of secondary boycotts. . . [but] describes and condemns specific union conduct directed to specific objectives." *Carpenters v. NLRB*, supra, (1958) 357 *US* 93 at 98=2 *L. Ed* 2d 1185 at 1193.

[23] 21 Petitioners contend that Senator Taft's statement, during the congressional debates, that S 8 (b) (4) did not apply to persons subject to the Railway Labor Act, supra, n. 10, necessarily entails that the Railway Labor Act protects secondary conduct. But, except

366 US 667, 674-679 = 6 L Ed 2d 592, 598, 601=81 S Ct 1285, Moore v. Dry Dock Co. (1950) 92 NLRB 547; Lesnick, The Gravamen of the Secondary Boycott, (1962) 62 Col L Rev 1363; Koretz, Federal Regulation of Secondary Strikes and Boycotts—Another Chapter, (1959) 59 Col L Rev 125. It is difficult to formulate many generalizations governing common situs picketing, but it is clear that secondary employers are not necessarily protected against picketing aimed directly at their employees.

34. In (1961) 366 US 667 = 6 L Ed 2d 592 supra, for example, we noted that striking employees could picket at a gate on the struck employer's premises which was reserved exclusively for employees of the secondary employer, to induce those employees to refuse to perform work for their employer which was connected with the struck employer's normal business operations. The Court affirmed this principle in (1961) 366 US 667 = 6 L Ed 2d 592, supra, where it held that striking employees could picket to induce a neutral railroad's employees to refuse to pick up and deliver cars for the struck employer — even though the picketed gate was owned by the railroad, and the railroad's employees would have to pass by the place of picketing to pick up and deliver cars for other plants that were not struck.

35. If the common situs rules were applied to the facts of this case — considering, for example, FEC's substantial regular business activities on the terminal premises, FEC's relationships with respondent and the other railroads using the premises, (23) the mixed use in fact of the purportedly separate entrances, and the terminal's characteristics which made it impossible for the pickets to single out and address only those secondary employees engaged in work connected with FEC's ordinary operations on the premises—the state injunction might well be found to forbid petitioners from engaging in conduct protected by the Labor Management Relations Act. The fact that respondent, the other roads, or other industries in the State suffered serious economic injury as a consequence of petitioners' activities would not, of course, in itself render the picketing unlawful. (1967) 386 US 612, 627=18 L Ed 2d 357, 368=87 S Ct 1250 see NLRB v. Fruit & Vegetable Packers, (1964) 377 US 58 = 12 L Ed 2d 129=84 S Ct 1063; (1951) 340 US 383=95 L Ed 364=71 S Ct 359.

36. In short, to condemn all of the petitioners' picketing which carries any

23. Cf. also Railroad Trainmen v. Florida E. C. R. Co., (1966) 362 F 2d 649, 654-655; NLRB v. Electrical Workers, (1955) 228 F 2d 553; Douds v. Architects, (1948) 75 F Supp 672.

"secondary" implications would be to paint with much too broad a brush.

VIII.

37. We have thus far concluded that although the Florida courts are not preempted of jurisdiction over this cause, Part II, supra, the issues therein are governed by federal law, Parts III, IV supra, that the Railway Labor Act permits railway employees to engage in some forms of self-help, free from state interference, *ibid.*; and, drawing upon labor policies evinced by the Labor Management Relations Act, Part V, supra, that such protected self-help includes peaceful "primary" strikes (24) and non-violent picketing in support thereof, Part VI, supra, and that it cannot categorically be said that all picketing carrying "secondary" implications is prohibited, Part VII, supra. Given these conclusions, it remains to be considered whether, under the present framework of congressional legislation, this Court should undertake precisely to mark out which of the petitioners' picketing activities at respondent's premises are federally protected, and therefore immune from state interference, and which of them are subject to prohibition by the State. We believe that such a course would be a wholly inappropriate one for us to take in the absence of a much clearer manifestation of congressional policy than is to be found in existing laws.

37.A Certainly we could not proceed to such a task under the common law of labor relations. For even on the unjustified hypothesis that all secondary conduct is necessarily wrongful, we would lack meaningful standards for separating primary from secondary activities. Nor do the terms of the Railway Labor Act offer assistance. As we have indicated, the Act is wholly inexplicit as to the scope of allowable self-help.

38. Nor can we properly dispose of this case simply by undertaking to determine to what precise extent petitioners' picketing activities would be protected or proscribed under the terms of the Labor Management Relations Act. For although, in the absence of any other viable guidelines, we have resorted to the LMRA for assistance in mapping out very general boundaries of self-help under the Railway Labor Act, there is absolutely no warrant for incorporating into that Act the panoply of detailed law developed by the National Labor Rela-

24. The right to strike finds support not only in analogy to the LMRA, but in the history of, and decisions under, the Railway Labor Act itself. Supra at (Paras 14 to 23) 22 L Ed 2d 354, 355, 357, 358.

tions Board and courts under Section 8 (b) (4) The LMRA, as we have noted exempts employees who are subject to the Railway Labor Act, supra, at —, 22 L Ed 2d 353 (Para 12) and the inapplicability of S 8 (b) to railroad employees was specifically pointed out during the congressional debates on the LMRA Supra, at n 10

39 Even if the task of adapting the LMRA's principles to railway disputes could be managed and implemented by an agency with administrative expertise, but cf NLRB v Insurance Agents, (1960) 361 US 477 497 498=4 L Ed 2d 454, 469=80 S Ct 419, Congress has invested no agency with even colorable authority to perform this function. The very complexity of the distinctions examined in Part VII, supra, if nothing else, plainly demonstrates that we lack the expertise and competence to undertake this task ourselves

40 Moreover, "from the point of view of industrial relations, our railroads are largely a thing apart. 'The railroad world is like a state within a state'" (1945) 325 US 711, 749, 751=89 L Ed 1886, 1908, 1909, = 65 S Ct 1282 (Mr Justice Frankfurter, dissenting). Thus, if Congress should now find that abuses in the nature of secondary activities have arisen in the railroad industry, see n 10 supra it might well decide—as it did when it considered the garment and construction industries, see LMRA S 8 (e) — that this field requires extraordinary treatment of some sort. Cf, e.g., Railroad Trainmen v Florida E C R Co (1966) 362 F 2d 649, 654—655. Certainly, it is for the Congress, and not the courts, to strike "the balance between the uncontrolled power of management and labor to further their respective interests" (1958) 357 US 93 100=2 L Ed 2d 1186, 1194 = 78 S Ct 1011, see (1967) 386 US 612=18 L Ed 2d 357=87 S Ct 1250, id., at 648 650, 18 L Ed 2d at 330 381 (separate memorandum). The Congress has not yet done so

41 In short, we have been furnished by Congress neither usable standards nor access to administrative expertise in a situation where both are required. In these circumstances there is no really satisfactory judicial solution to the problem at hand. However we conclude that the least unsatisfactory one is to allow parties who have unsuccessfully exhausted the Railway Labor Act's procedures for resolution of a major dispute to employ the full range of whatever peaceful economic power they can muster, so long as its use conflicts with no other obligation imposed by federal law. Hence until Congress acts, picketing —

whether characterized as primary or secondary — must be deemed conduct protected against state proscription (25) Cf Electrical Workers v NLRB (1965) 350 F 2d 791, 792-793 (dissenting opinion) (1942) 130 F 2d 503. Any other solution — apart from the rejected one of holding that no conduct is protected — would involve the courts once again in a venture for which they are institutionally unsuited

42 The judgment of the Florida District Court of Appeal is accordingly Reversed

43 MR JUSTICE FORTAS and MR JUSTICE MARSHALL took no part in the consideration or decision of this case

SEPARATE OPINION

44 MR JUSTICE DOUGLAS, with whom MR JUSTICE BLACK and MR JUSTICE STEWART concur, dissenting

45 Respondent provides terminal facilities for four railroads at Jacksonville, Florida. Petitioners have a longstanding labor dispute with one of those carriers, Florida East Coast. They have established a picket line, manned by employees of FEC but established at all entrances and exits to the Terminal and not restricted to the single entrance designated (1) for use by FEC employees. The conceded purpose of the picketing was to cause respondent and the other three carriers not to interchange traffic with FEC

46 Petitioner Brotherhood however, has no labor dispute with any carriers using the Terminal except FEC. The Florida court found that the pattern of picketing being used "would result in a virtual cessation of activities not only of the Terminal Company but also of numerous industries in Duval County and Florida"

25 Our holding is, of course, limited to disputes subject to the Railway Labor Act and in no way detracts from the power of the States to regulate labor conduct not otherwise governed by paramount federal scheme. Compare *Giboney v Empire Storage & Ice Co* (1949) 336 US 490=93 L Ed 834=69 S Ct 624

1 When the strike started on January 23, 1963, respondent designated a special gate for the exclusive use of FEC employees who report to work at the Terminal

The strike originally involved only non-operating employees of FEC. But in 1966 the operating unions also went on strike against FEC

47. The order entered (2) barred all picketing by FEC employees except at the designated single entrance. The trial court relied, *inter alia*, on the ground that "[t]he past and threatened picketing seeks to coerce plaintiff [respondent] into embargoing the FEC in violation of the Restraint of Trade Laws of this State." The laws referred to are 16 Fla Stat Ann S. 542.01 et seq. which set up a broad regulatory scheme banning "a combination of capital, skill or acts by two or more persons" to "create or carry out restrictions in trade or commerce." The District Court of Appeal, in affirming the trial court in the present case, said that it "exercised a proper authority in enjoining a violation of a valid state statute". 201 So 2d 253.

48. The question therefore is whether Florida may ban picketing(3) in support of a secondary boycott.

49. Congress could pre-empt this field of picketing any rail carrier for purposes of a secondary boycott as our rail-carriers and their labor problems are conspicuously within reach of the Commerce Clause. Congress in the Labor Management Relations Act of 1947, 29 USC S. 141, et seq. did legislate on secondary boycotts.(4) *Id.*, S. 158 (b) (4) (i) (B). But it expressly excluded from that regulatory scheme.(5) "any person subject to the Railway Labor Act," *id.*,

2. We were asked to review a temporary injunction issued by the trial court. See 385 US 935=17 L Ed 2d 215=87 S Ct 284. The permanent injunction, now here, was affirmed per curiam by the District Court of Appeal, 201 So 2d 253, and the Florida Supreme Court dismissed an appeal and denied certiorari.

3. The picketing was first enjoined by the Federal District Court in a proceeding brought by two carriers (other than FEC) and the Terminal Company. That judgment was reversed by the Court of Appeals which held that the requirements of the Norris-La Guardia Act, 29 USC S. 101 et seq. had not been met. (1966) 362 F 2d 649.

We affirmed the Court of Appeals by an equally divided Court. (1966) 385 US 20=17 L Ed 2d 20=87 S Ct 226.

4. See, e. g., *Labor Board v. Rice Milling Co.*, 341 US 665=95 L Ed 1277=71 S Ct 961; *Electrical Workers v. Labor Board* (1961) 366 US 667=6 L Ed 2d 592=81 S Ct 1285; *Steel Workers v. Labor Board* (1964) 376 US 492=11 L Ed 2d 863=84 S Ct 899.

5. See S. Rep. No. 105, 80th Cong. 1st Sess. p 19; *Local No. 25 v. New York, N. H. & H. R. Co.*, 350 US 155, 159-160, 100 L Ed 166, 171-172, 76 S Ct 227.

S. 152 (2) and any individual employed by such person. *Id.*, S. 152 (3).

50. We are therefore in an area where Congress has not legislated and, as I see it, the case is controlled by *Giboney v. Empire Storage & Ice Co.*, 336 US 490 =93 L Ed 834=69 S Ct 684.

51. In *Giboney*, Missouri applied its anti-trade-restraint law to enjoin a union from picketing employers to enforce a secondary boycott. We stated that the basic issue was "whether Missouri or a labor union has paramount constitutional power to regulate and govern the manner in which certain trade practices shall be carried on" in Missouri. 336 US, 490 at 504=93 L Ed 834 at 844. A State's power over secondary boycotts was held to be paramount; and that is what we should hold today, since Congress has not pre-empted the subject.

52. It is suggested that there is an hiatus which this Court should fill. To do so, we would have to fill out large gaps between the Railway Labor Act, 45 USC S. 151 and many other specialized Acts of Congress that touch on pieces of the problems of labor in the railroad field. Once the remedies provided in the Railway Labor Act, 45 USC S. 149 et seq., are exhausted, federal administrative remedies are at an end. No authority is empowered to settle the dispute; no compulsory arbitration is provided. The conditions of work may be as bad as the employees suffer them to be and made as good as they can agree upon through bargaining. "When the various procedures established by the Act are exhausted, both parties. . . are relegated to self-help in adjusting" the dispute. (1963) 372 US 284, 291=9 L Ed 2d 759, 764=83 S Ct 691.

53. Legislating interstitially is one thing; judicial insertion into our federal railway labor law of rules governing secondary boycotts is formulation of national policy in the raw. Whether it should be done and if so, how, are matters for the Senate and the House.

54. The effort of the Court to find support for this secondary boycott in federal law is a masterful endeavor. The opinion is indeed a brilliant brief for a federal law to support the struggle of the Trainmen to end the ugly struggle. The difficulty is that no matter how carefully federal law is examined no express sanction for what the Trainmen can do can be found. Federal authority for what they do rests on the thinnest of inferences and yet that inference is brought under the Supremacy Clause.

55. Article VI of the Constitution states that "This Constitution, and the laws of the United States which shall be

made in pursuance thereof shall be the Supreme Law of the land, and the judges in every State shall be bound thereby "But one looks in vain for any federal "law" that collides with state law or that can be said to preempt state law Federal law says that when the parties exhaust their remedies under the Railway Labor Act they may resort to "self-help" — not a congressional phrase but a judicial gloss put on the Act, (1945) 325 US 711, 725=89 L Ed 1886 1895=65 S Ct 1282 But it is strong medicine to say that their right to "self-help" overrides state law Certainly it does not when violence is used to injure people and destroy property *Allen Bradley Local v Board*, 315 US 740, 86 L Ed 1154, 62 S Ct 820 For then the States have an arsenal of authority to deal with the situation Why is that power greater than the power to protect the economy of the area? We have a finding that if the conduct which the Court authorizes continues there will be serious injury to "numerous industries in Duval County" — industries that have no responsibility for the labor dispute

56 The question, says the Court, is whether "the States could prohibit the parties from engaging in any self-help" If that is true then the Act's scheme would be impaired But that is not the issue It is whether the State can prevent a secondary boycott which threatens to paralyze a whole community If a State cannot fill that hiatus in a federal scheme then much law will have to be unlearned

57 States' rights are often used as a cloak to cover unconstitutional encroachments such as the maintenance of second class citizenship for Negroes or Americans of Mexican ancestry But a state policy to confine an industrial dispute to the parties and, if possible, not to let it paralyze the entire community cannot be put in that category

58 Congress in adopting a federal regulation can make it exclusive of all state regulation in which event one may not be required "by a State to do more or additional things or conform to added regulations even though they in no way conflicted with what was demanded of him under the Federal Act" *Rice v Sante Fe Elevator Corp* 331 US 218 236=91 L Ed 1447, 1462=67 S Ct 1146 And see *Campbell v Hussey*, 368 US 297, 300-301=7 L Ed 2d 299 301-302=82 S Ct 327 But that principle although uniformly recognized has provoked much dissent in its application as the dissents in the *Rice* and *Campbell* cases illustrate

59 As Mr Justice Brandeis said in *Napier v Atlantic Coast Line* 272 US

605, 611=71 L Ed 432, 438=47 S Ct 207, "The intention of Congress to exclude States from exerting their police power must be clearly manifested" And the Court mindful of the force of the Tenth Amendment and the place of the States in our constitutional system, has resolved close cases in favour of a continuing power on the part of the States to legislate in their customary fields and thus has permitted state regulations to mesh with federal controls See *Federal Compress v McLean*, 291 US 17, 78 L Ed 622 54 S Ct 267 *Townsend v Yeoman*, 301 US 441 454 81 L Ed 1210, 1220 57 S Ct 842 *Penn Davies v Milk Control Commission* 318 US 261=87 L Ed 748=63 S Ct 617

60 Even here there have been dissents when it came to particular applications of the principle to the facts of a case But I venture that in no case prior to today's decision has a State been barred from legislating in a field which is not specifically touched by the federal regulation and which remains after the federal remedies have spent themselves and proved to be of no avail

61 The States should be allowed a free hand in labor controversies except and unless Congress has adopted a contrary policy We search in vain for any such federal law in this context

62 I would affirm the judgment

GGM/D V C

Order accordingly

AIR 1969 U S S C. 100 (V 56 C 17)
(1969-22 L Ed 2d 542)*

MARSHALL BLACK STEWART,
BRENNAN AND WHITE, JJ

Robert Eli Stanley Appellant v State of Georgia, Respondent

(No 293) Decided on 7-4-1969

†Constitution of India, Arts. 19 (1) (a) and (f) and 13 — Case from America — Constitution of United States of America, First and Fourteenth Amendments ** — State statute prohibiting private possession of obscene matter, is unconstitutional under the 1st Amendment read with the 14th Amendment — Governmental in-

*Reproduced from 1962 22 L Ed 2d 542 with kind permission of the publishers

†Reference is given to a parallel Indian Provision for the convenience of Indian Lawyers

**Amendment 1 "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise

HM/HM/D650/69/D

terest in dealing with such matter, extent of—Right to receive information and ideas is fundamental to free society — (Constitution of United States of America, First Amendment and Fourteenth Amendment.)

The First and the Fourteenth Amendments prohibit making mere private possession of obscene material a crime.

(Para 2)

Where a state obscenity statute, imposes criminal sanctions upon the mere private possession of obscene matter, the statute is to that extent unconstitutional as violating the First Amendment as made applicable to the States, by the Fourteenth Amendment.

(Para 2)

But these Amendments recognise a valid governmental interest in dealing with the problem of obscenity. But assertion of such an interest cannot in every context be insulated from all constitutional protection. This cannot foreclose an examination of the constitutional implication of a statute forbidding mere private possession of such material.

(Para 5)

Ceaseless vigilance is the watchword to prevent erosion of the First Amendment rights by Congress or by the States. The door barring Federal and State intrusion into this area cannot be left ajar. It must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests. (1957) 354 US 476=1 L Ed 2d 1498 = 77 S Ct 1304 Ref.

(Para 5)

The United States Constitution protects the right to receive information and ideas. The freedom (of speech and press) necessarily protects this right, regardless of their social worth. This right is fundamental to American free society.

(Para 6)

Moreover, in the context of a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home, that right takes on an

thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment 14.—Section 1.—"All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the States wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy. Mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read or what films he may watch. The whole constitutional heritage of Americans rebels at the thought of giving government the power to control men's minds.

(Paras 6, 7)

It is irrelevant that obscenity in general, or the particular films before the Court, are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for the Court to draw, if indeed such a line can be drawn at all.

(Para 8)

Under the First Amendment, the State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

(Para 9)

The difficulties of proving an intent to distribute obscene matter or in producing evidence of actual distribution under statutory schemes prohibiting the distribution of obscene matter, which difficulties might exist if a statutory prohibition of mere possession of obscene matter is not upheld, do not justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to the American scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws.

(Para 11)

The States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home.

(Para 12)

Cases Referred: Chronological Paras

(1963) 393 US 819=21 L Ed 2d 90	
=89. S Ct 124	1
(1968) 390 US 629=20 L Ed 2d 195	
=88 S Ct 1274, Ginsberg v. New York	3, 4
(1967) 386 US 767=18 L Ed 2d 515	
=87 S Ct 1414, Redrup v. New York	10
(1966) 383 US 463=16 L Ed 2d 31	
=86 S Ct 942, Ginzburg v. New York	14
(1965) 381 US 479=14 L Ed 2d 510	
=85 S Ct 1678, Griswold v. Connecticut	6

- (1965) 379 US 476=13 L Ed 2d 431
=85 S Ct 506 Slan Ford v Texax 17
- (1965) 381 US 301=14 L Ed 2d 398
85 S Ct 1493 Lamount v Post-
master General 6
- (1964) 378 US 184=12 L Ed 2d 793
=84 S Ct 1676, Jacobellis v
Ohio 4
- (1961) 367 US 643=6 L Ed 2d 1081
81 S Ct 1684, Mapp v Ohio 22
- (1959) 361 US 147=4 L Ed 2d 203
= 80 S Ct 215, Smith v Cali-
fornia 4, 14
- (1959) 360 US 684=3 L Ed 2d 1512=
=79 S Ct 1362, Kingsley Inter-
national Pictures Corp v
Regents 8
- (1958) 357 US 449=2 L Ed 2d 1488
=78 S Ct 1163, Cf Naacp v
Alabama 6
- (1957) 354 US 476=1 L Ed 2d
1498=77 S Ct 1304, Roth v United
States 3, 4, 5, 10
- (1952) 343 US 495=96 L Ed 1098
=72 S Ct 777, Cf Joseph Bur-
styn Inc v Wilson 8
- (1950) 339 US 56=94 L Ed 653=
70 S Ct 430, United States v
Rabinowitz 21
- (1948) 333 US 507=92 L Ed 840
=68 S Ct 665, Winters v New
York 6, 8
- (1943) 319 US 141=87 L Ed 1313=
63 S Ct 862, Martin v City of
Struthers 6
- (1928) 277 US 438=72 L Ed 944=
48 S Ct 564, Olmstead v United
States 6
- (1927) 275 US 192=72 L Ed 231=
48 S Ct 74, Marron v United
States 20
- (1927) 274 US 357=71 L Ed 1095
=47 S Ct 641, Whitney v California 9
- (1925) 268 US 510=69 L Ed 1070
=45 S Ct 571, Cf Pierce v Soci-
ety of Sisters 6
- Wesley R Asinof for Appellant, J
- Robert Sparks, for Respondent

SUMMARY

The defendant was tried and convicted in the Superior Court of Fulton County, Georgia, of knowingly having possession of obscene matter in violation of a Georgia statute. The obscene matter in question consisted of films which a state officer seized after federal and state agents had found them in a desk drawer in a bedroom of the defendant's home as they searched it pursuant to a search warrant issued following an investigation of the defendant's alleged book making activities. The Supreme Court of Georgia affirmed the conviction (224 Ga 259, 161 SE 2d 309)

On appeal the United States Supreme Court reversed and remanded. In an opinion by Marshall, J., expressing the view of six members of the court, it was held that the Georgia statute, inso-

far as it made mere private possession of obscene matter a crime, was unconstitutional under the First and Fourteenth Amendments

BLACK, J., concurred, saying that he agreed with the court that the mere possession of reading matter or movie films, whether labeled obscene or not, cannot be made a crime by a state without violating the First Amendment, made applicable to the states by the Fourteenth Amendment

STEWART, J., joined by Brennan and White, JJ, concurred in the result, but would reverse the conviction on the ground, disregarded by the court, that the films were seized in violation of the Fourth and Fourteenth Amendments, and hence were inadmissible in evidence at the defendant's trial

OPINION OF THE COURT

Mr Justice MARSHALL delivered the opinion of the Court

An investigation of appellant's alleged bookmaking activities led to the issuance of a search warrant for appellant's home. Under authority of this warrant, federal and state agents secured entrance. They found very little evidence of bookmaking activity, but while looking through a desk drawer in an upstairs bedroom one of the federal agents accompanied by a state officer, found three reels of eight-millimeter film. Using a projector and screen found in an upstairs living room, they viewed the films. The state officer concluded that they were obscene and seized them. Since a further examination of the bedroom indicated that appellant occupied it, he was charged with possession of obscene matter and placed under arrest. He was later indicted for "knowingly hav[ing] possession of obscene matter" in violation of Georgia law (1) Appellant was tried before a jury and convicted. The Supreme Court of Georgia affirmed. *Stanley v. State*, (1968) 224 Ga 259, 161 SE 2d 309. We noted probable jurisdiction of an appeal brought under 28 USC S 1257 (2). (1968) 393 US 819=21 L Ed 2d 90=89 S Ct 124

1 "Any person who shall knowingly bring or cause to be brought into this State for sale or exhibition, or who shall knowingly sell or offer to sell, or who shall knowingly lend or give away or offer to lend or give away, or who shall knowingly have possession of or who shall knowingly exhibit or transmit to another, any obscene matter, or who shall knowingly advertise for sale by any form of notice printed, written, or verbal, any obscene matter, or who shall knowingly manufacture, draw, duplicate or print any obscene matter with intent to sell

2. Appellant raises several challenges to the validity of his conviction. (2) We find it necessary to consider only one. Appellant argues here, and argued below, that the Georgia obscenity statute, insofar as it punishes mere private possession of obscene matter, violates the First Amendment, as made applicable to the States by the Fourteenth Amendment. For reasons set forth below, we agree that the mere private possession of obscene matter cannot constitutionally be made a crime.

3. The court below saw no valid constitutional objection to the Georgia statute, even though it extends further than the typical statute forbidding commercial sales of obscene material. It held that "[i]t is not essential to an indictment charging one with possession of obscene matter that it be alleged that such possession was 'with intent to sell, expose or circulate the same.'" (1968) 224 Ga. 259 at 261=161 SE 2d, 309 at 311 supra. The State and appellant both agree that the question here before us is whether "a statute imposing criminal sanctions upon the mere [knowing] possession of obscene matter" is constitutional. In this context, Georgia concedes that the present case appears to be one of "first impression. . . on this exact point." (3) but contends that since "obscenity is not

expose or circulate the same, shall, if such person has knowledge or reasonably should know of the obscene nature of such matter, be guilty of a felony, and, upon conviction thereof, shall be punished by confinement in the penitentiary for not less than one year nor more than five years; Provided, however, in the event the jury so recommends, such person may be punished as for a misdemeanor. As used herein, a matter is obscene if, considered as a whole, applying contemporary community standards, its predominant appeal is to prurient interest, i. e., a shameful or morbid interest in nudity, sex or excretion." Ga Code Ann S. 26-6301. (Supp 1968).

2. Appellant does not argue that the films are not obscene. For the purpose of this opinion, we assume that they are obscene under any of the tests advanced by members of this Court. See *Redrup v. New York*, (1967) 386 US 767=18 L Ed 2d 515=87 S Ct 1414.

3. The issue was before the Court in *Mapp v. Ohio*, (1961) 367 US 643=6 L Ed 2d 1081=81 S Ct 1684=84 ALR 2d 933, but that case was decided on other grounds. Mr. Justice Stewart, although disagreeing with the majority opinion in *Mapp*, would have reversed the judgment in that case on the ground that the Ohio statute proscribing mere possession of

within the area of constitutionally protected speech or press," *Roth v. United States*, (1957) 354 US 476, 485=1 L Ed 2d 1498, 1507=77 S Ct 1304 the States are free, subject to the limits of other provisions of the Constitution, see, e.g., *Ginsberg v. New York*, (1968) 390 US 629, 637-645=20 L Ed 2d 195, 202-207=88 S Ct 1274 to deal with it any way deemed necessary, just as they may deal with possession of other things thought to be detrimental to the welfare of their citizens. If the State can protect the body of a citizen, may it not, argues Georgia, protect his mind?

4. It is true that Roth does declare, seemingly without qualification, that obscenity is not protected by the First Amendment. That statement has been repeated in various forms in subsequent cases. See, e.g., *Smith v. California*, (1959) 361 US 147, 152=4 L Ed 2d 205, 210=80 S Ct 215; *Jacobellis v. Ohio*, (1964) 378 US 184, 186-187=12 L Ed 2d 793, 796, 797=84 S Ct 1676 (opinion of Brennan, J.); supra, (1968) 390 US 629 at 635=20 L Ed 2d 195 at 201. However, neither Roth nor any subsequent decision of this Court dealt with the precise problem involved in the present case. Roth was convicted of mailing obscene circulars and advertising, and an obscene book, in violation of a federal obscenity statute. (4) The defendant in a companion case, (1957) 354 US 476=1 L Ed 2d 1498=77 S Ct 1304, was convicted of "lewdly keeping for sale obscene and indecent books, and [of] writing, composing and publishing an obscene advertisement of them. . . ." (1968) 354 US 476 at 481=1 L Ed 2d 1498 at 1505. None of the statements cited by the Court in Roth for the proposition that "this Court has always assumed that obscenity is not protected by the freedoms of speech and press" were made in the context of a statute punishing mere private possession of obscene material; the cases cited deal for the most part with use of the mails to distribute objectionable material or with some form of public distribution or dissemination. (5) Moreover, none of this

obscene material was "not 'consistent with the rights of free thought and expression assured against state action by the Fourteenth Amendment'" (1961) 367 US, 643 at 672=6 L Ed 2d 1081 at 1108=84 ALR 2d 933.

4. 18 USC S. 1461.

5. Ex parte Jackson, (1878) 96 US 727, 736-737=24 L Ed 877. 880 (use of the mails); *United States v. Chase*, (1890) 135 US 255, 261=34 L Ed 117, 119=10 S Ct 756 (use of the mails); *Robertson v. Baldwin*, (1897) 165 US 275, 281=41 L Ed 715, 717=17 S Ct 326 (publication); *Public Clearing House v. Coyne*, (1904) 194 US

Court's decisions subsequent to Roth involved prosecution for private possession of obscene materials. Those cases dealt with the power of the State and Federal Governments to prohibit or regulate certain public actions taken or intended to be taken with respect to obscene matter (6). Indeed with one exception we have been unable to discover any case in

497, 508=48 L Ed 1092, 1098=24 S Ct 789 (use of the mails), *Hoke v United States*, (1913) 227 US 308, 322=57 L Ed 523, 527=33 S Ct 281=43 LRA NS 906 (use of interstate facilities), *Near v Minnesota*, (1931) 283 US 697, 716=75 L Ed 1357, 1367=51 S Ct 625, (publication), *Chaplinsky v New Hampshire*, (1942) 315 US 568, 571-572=86 L Ed 1031, 1034, 1035=62 S Ct 766 (utterances), *Hannegan v Esquire, Inc* (1946) 327 US 1, 158=90 L Ed 586, 593=66 S Ct 456 (use of the mails), *Winters v New York* (1948) 333 US 507, 510=92 L Ed 840, 847=68 S Ct 665 (possession with intent to sell), *Beauharnais v Illinois*, (1952) 343 US 250, 266=96 L Ed 919 932=72 S Ct 725 (libel)

6 Many of the cases involved prosecutions for sale or distribution of obscene materials or possession with intent to sell or distribute. See *Redrup v New York*, (1967) 386 US 767=18 L Ed 2d 515=87 S Ct 1414, *Mushkin v New York* (1966), 383 US 502=16 L Ed 2d 56=86 S Ct 958, *Ginzburg v United States* (1966) 383 US 463=16 L Ed 2d 31=86 S Ct 942, *Jacobellis v Ohio* (1964) 378 US 184=12 L Ed 2d 793=84 S Ct 1676, *Smith v California*, (1959) 361 US 147=4 L Ed 2d 205, 80 S Ct 215. Our most recent decision involved a prosecution for sale of obscene material to children, *Ginsberg v New York*, (1968) 390 US 629=20 L Ed 2d 195=88 S Ct 1274; cf *Interstate Circuit, Inc v City of Dallas*, (1966) 390 US 676=20 L Ed 2d 225=83 S Ct 1298. Other cases involved federal or state statutory procedures for preventing the distribution or mailing of obscene material, or procedures for predistribution approval. See *Freedman v Maryland*, (1965) 380 US 51=13 L Ed 2d 649=85 S Ct 734, *Bantam Books, Inc v Sullivan*, (1963) 372 US 58=9 L Ed 2d 584=83 S Ct 631, *Manual Enterprises, Inc v Day*, (1962) 370 US 478=8 L Ed 2d 639=82 S Ct 1432, *Kingsley Books Inc v Brown*, (1957) 354 US 436=1 L Ed 2d 1469=77 S Ct 1325. Still another case dealt with an attempt to seize obscene material "kept for the purpose of being sold published, exhibited or otherwise distributed or circulated." *Marcus v Search Warrant*, (1961) 367 US 717, 719=6 L Ed 2d 1127, 1129=81 S Ct 1706. See also *A Quantity of Books v Kansas* (1964) 378 US 205=12 L Ed 2d 809=84 S Ct 1723, *Memoirs v Massachusetts* (1966) 383 US 413=16

which the issue in the present case has been fully considered (7)

5 In this context, we do not believe that this case can be decided simply by citing *Roth*. *Roth* and its progeny certainly do mean that the First and Fourteenth Amendments recognize a valid governmental interest in dealing with the problem of obscenity. But the assertion of that interest cannot, in every context, be insulated from all constitutional protections. Neither *Roth* nor any other decision of this Court reaches that far. As the Court said in *Roth* itself, "[c]easeless vigilance is the watchword to

L Ed 2d 1=86 S Ct 975 was a proceeding in equity against a book. However, possession of a book determined to be obscene in such a proceeding was made criminal only when "for the purpose of sale, loan or distribution." (1966) 383 US, 413 at 422=16 L Ed 2d 1 at 7

7 The Supreme Court of Ohio considered the issue in *State v Mapp*, (1960) 170 Ohio St 427=166 NE 2d 387. Four of the seven judges of that court felt that criminal prosecution for mere private possession of obscene materials was prohibited by the constitution. However, Ohio law required the concurrence of "all but one of the judges" to declare a state law unconstitutional. The view of the "dissenting" judges was expressed by Judge Herbert

"I cannot agree that mere private possession of [obscene] literature by an adult should constitute a crime. The right of the individual to read, to believe or disbelieve, and to think without governmental supervision is one of our basic liberties, but to dictate to the mature adult what books he may have in his own private library seems to the writer to be a clear infringement of his rights as an individual." (1960) 170 Ohio St 427 at 437=166 NE 2d, 387 at 393

Shortly thereafter, the Supreme Court of Ohio interpreted the Ohio statute to require proof of "possession and control for the purpose of circulation or exhibition." *State v Jacobellis*, (1962) 173 Ohio St 22, 27-28=179 NE 2d 777, 781, rev'd on other grounds, (1964) 378 US 184=12 L Ed 2d 793=84 S Ct 1676. The interpretation was designed to avoid the constitutional problem posed by the "dissenters" in *Mapp*. See *State v Ross*, (1967) 12 Ohio St 2d 37=231 NE 2d 299

Other cases dealing with non public distribution of obscenity or with legitimate uses of obscenity have expressed similar reluctance to make such activity criminal, albeit largely on statutory grounds. In *United States v Chase*, (1890) 135 US 255=34 L Ed 117=10 S Ct 756, the Court

Amendment rights] by Congress or by the States. The door barring federal and state intrusion into this area cannot be left ajar; it must be kept tightly closed and opened only the slightest crack necessary to prevent encroachment upon more important interests." (1957) 354 US, 476 at 488. = 1 L Ed 2d 1498 at 1509. Roth and the cases following it discerned such an "important interest" in the regulation of commercial distribution of obscene material. That holding cannot foreclose an examination of the constitutional implications of a statute forbidding mere private possession of such material.

6. It is now well established that the Constitution protects the right to receive information and ideas. "This freedom [of speech and press] . . . necessarily protects the right to receive. . . ." *Martin v. City of Struthers*, (1943) 319 US 141, 143=87 L Ed 1313, 1316=63 S Ct

held that federal law did not make criminal the mailing of a private sealed obscene letter on the ground that the law's purpose was to purge the mails of obscene matter "as far as was consistent with the rights reserved to the people, and with a due regard to the security of private correspondence. . . ." (1890) 135 US, 255 at 261=34 L Ed 117 at 120. The law was later amended to include letters and was sustained in that form. *Andrews v. United States*, (1896) 162 US 420 = 40 L Ed 1023=16 S Ct 798. In *United States v. 31 Photographs*, 156 F Supp 350 (DC SD NY 1957), the court denied an attempt by the Government to confiscate certain materials sought to be imported into the United States by the Institute for Sex Research, Inc., at Indiana University. The court found, applying the Roth formulation, that the materials would not appeal to the "prurient interest" of those seeking to import and utilize the materials. Thus, the statute permitting seizure of "obscene" materials was not applicable. The court found it unnecessary to reach the constitutional questions presented by the claimant, but did note its belief that "the statement. . . [in Roth] concerning the rejection of obscenity must be interpreted in the light of the widespread distribution of the material in Roth." 156 F Supp, 350 at 360, n40. See also *Redmond v. United States*, (1966) 384 US 264, 16 L Ed 2d 521, 86 S Ct 1415 where this Court granted the Solicitor-General's motion to vacate and remand with instructions to dismiss an information charging a violation of a federal obscenity statute in a case where a husband and wife mailed undeveloped films of each other posing in the nude to an out-of-state firm for developing. But see *Ackerman v. United States*, 293 F 2d 449 (CA 9th Cir 1961).

862; see *Griswold v. Connecticut*, (1965) 381 US 479, 482=14 L Ed 2d 510, 513=85 S Ct 1678, *Lamont v. Postmaster General*, (1965) 381 US 301, 307-308=14 L Ed 2d 398, 402, 403=85 S Ct 1493 (Brennan, J., concurring); cf. *Pierce v. Society of Sisters*, (1925) 268 US 510=69 L Ed 1070 =45 S Ct 571. This right to receive information and ideas, regardless of their social worth, see *Winters v. New York*, (1948) 333 US 507, 510=92 L Ed 840, 847=68 S Ct 665, is fundamental to our free society. Moreover, in the context of this case—a prosecution for mere possession of printed or filmed matter in the privacy of a person's own home—that right takes on an added dimension. For also fundamental is the right to be free, except in very limited circumstances, from unwanted governmental intrusions into one's privacy.

"The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man." *Olmstead v. United States*, (1928) 277 US 438, 478=72 L Ed 944, 956=48 S Ct 564, (Brandeis, J., dissenting). See (1965) 381 US 479=14 L Ed 2d 510 supra; cf. *NAACP v. Alabama*, (1958) 357 US 449, 462=2 L Ed 2d 1488, 1499=78 S Ct 1163.

7. These are the rights that appellant is asserting in the case before us. He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library. Georgia contends that appellant does not have these rights, that there are certain types of materials that the individual may not read or even possess. Georgia justifies this assertion by arguing that the films in the present case are obscene. But we think that mere categorization of these films as "obscene" is insufficient justification for such a drastic invasion of personal liberties guaranteed by the First and Fourteenth Amendments. Whatever may be the justifications for other statutes regulating obscenity, we do not think they reach into the privacy of one's own home. If the First Amendment means anything, it means that a State has no business telling a man, sitting alone in his own house, what books he may read

or what films he may watch. Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds.

8 And yet, in the face of these traditional notions of individual liberty, Georgia asserts the right to protect the individual's mind from the effects of obscenity. We are not certain that this argument amounts to anything more than the assertion that the State has the right to control the moral content of a person's thoughts (8). To some, this may be a noble purpose, but it is wholly inconsistent with the philosophy of the First Amendment. As the Court said in *Kingsey International Pictures Corp. v. Regents*, (1959) 360 US 684, 688-689: "3 L Ed 2d 1512, 1516=79 S Ct 1362 "[t]his argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. And in the realm of ideas it protects expression which is eloquent no less than that which is unconvincing." Cf. *Joseph Burstyn, Inc. v. Wilson* (1952) 343 US 495=96 L Ed 1098=72 S Ct 777. Nor is it relevant that obscenity in general, or the particular films before the Court are arguably devoid of any ideological content. The line between the transmission of ideas and mere entertainment is much too elusive for this Court to draw, if indeed such a line can be drawn at all. See (1948) 333 US 507 at 510=92 L Ed 849 at 847, supra. What ever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.

9 Perhaps recognizing this, Georgia asserts that exposure to obscenity may lead to deviant sexual behavior or crimes of sexual violence. There appears to be little empirical basis for that assertion (9). But more importantly, if the

8 Communities believe and act on the belief, that obscenity is immoral, is wrong for the individual and has no place in a decent society. They believe, too, that adults as well as children are corruptible in morals and character, and that obscenity is a source of corruption that should be eliminated. Obscenity is not suppressed primarily for the protection of others. Much of it is suppressed for the purity of the community and for the salvation and welfare of the 'consumer'. Obscenity at bottom is not crime. Obscenity is sin." *Henkin, Morals and the Constitution: The Sin of Obscenity*, (1963) 63 Col L Rev 391, 395.

9 See, e.g., Cairns, Paul & Wishner, *Sex Censorship: The Assumptions of Anti Obscenity Laws and the Empirical Evi-*

State is only concerned about literature inducing anti-social conduct, we believe that in the context of private consumption of ideas and information we should adhere to the view that "[a]mong free men, the deterrents ordinarily to be applied to prevent crime are education and punishment for violations of the law."

" *Whitney v. California* (1927) 274 US 357, 378 71 L Ed 1095, 1107, 47 S Ct 641 (Brandeis, J., concurring). See Emerson, *Toward a General Theory of the First Amendment*, (1963) 72 Yale LJ 877-938. Given the present state of knowledge the State may no more prohibit mere possession of obscenity on the ground that it may lead to anti-social conduct than it may prohibit possession of chemistry books on the ground that they may lead to the manufacture of homemade spirits.

10 It is true that in *Roth* this Court rejected the necessity of proving that exposure to obscene material would create a clear and present danger of anti-social conduct or would probably induce its recipients to such conduct (1957) 354 US, 176 at 486-487=1 L Ed 2d 1498 at 1507, 1508. But that case dealt with public distribution of obscene materials and such distribution is subject to different objections. For example, there is always the danger that obscene material might fall into the hands of children: see *Ginsberg v. New York*, supra, or that it might intrude upon the sensibilities or privacy of the general public (10). See *Redrup v. New York* (1967) 386 US 767, 769, 18 L Ed 2d 515, 517, 87 S Ct 1414. No such dangers are present in this case.

11 Finally, we are faced with the argument that prohibition of possession of obscenity is a necessary incident to statutory schemes prohibiting distribution. That argument is based on alleged difficulties of proving an intent to distribute or in producing evidence of actual distribution. We are not convinced that

ence (1962) 46 Minn L Rev 1009 see also Jahoda, *The Impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate* (1954), summarized in the concurring opinion of Judge Frank in *United States v. Roth*, 237 F 2d 796, 814-816 (CA 2d Cir. 1956).

10 The Model Penal Code provisions dealing with obscenity are limited to cases of commercial dissemination. Model Penal Code S 251.4 (Prop Official Draft 1962) see also Model Penal Code S 207.10 and comment 4 (Tent Draft No 6, 1957). H. Packer, *The Limits of the Criminal Sanction* 316-328 (1968). Schwartz, *Morals of Fences and the Model Penal Code*, 63 Col L Rev 669 (1963).

such difficulties exist, but even if they did we do not think that they would justify infringement of the individual's right to read or observe what he pleases. Because that right is so fundamental to our scheme of individual liberty, its restriction may not be justified by the need to ease the administration of otherwise valid criminal laws. See *Smith v. California*, supra.

12. We hold that the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime. (11) Roth and the cases following that decision are not impaired by today's holding. As we have said, the States retain broad power to regulate obscenity; that power simply does not extend to mere possession by the individual in the privacy of his own home. Accordingly, the judgment of the court below is reversed and the case is remanded for proceedings not inconsistent with this opinion.

13. It is so ordered.

SEPARATE OPINIONS

MR. JUSTICE BLACK, concurring.

14. I agree with the Court that the mere possession of reading matter or movie films, whether labeled obscene or not, cannot be made a crime by a State without violating the First Amendment, made applicable to the States by the Fourteenth. My reasons for this belief have been set out in many of my prior opinions, as for example, (1959) 361 US 147, 155=4 L Ed 2d 205, 212=80 S Ct 215 (concurring opinion), and *Ginzburg v. New York*, (1966) 383 US 463, 476=16 L Ed 2d 31, 41=86 S Ct 932 (dissenting opinion).

11. What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are involved in most statutes making mere possession criminal.

Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials. See, e.g., 18 USC S. 793 (d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation. . . ." In such cases, compelling reasons may exist for overriding the right of the individual to possess those materials.

15. Mr. Justice STEWART, with whom Mr. Justice BRENNAN and Mr. Justice WHITE join, concurring in the result.

16. Before the commencement of the trial in this case, the appellant filed a motion to suppress the films as evidence upon the ground that they had been seized in violation of the Fourth and Fourteenth Amendments. The motion was denied, and the films were admitted in evidence at the trial. In affirming the appellant's conviction, the Georgia Supreme Court specifically determined that the films had been lawfully seized. The appellant correctly contends that this determination was clearly wrong under established principles of constitutional law. But the Court today disregards this preliminary issue in its hurry to move on to newer constitutional frontiers. I cannot so readily overlook the serious inroads upon Fourth Amendment guarantees countenanced in this case by the Georgia courts.

17. The Fourth Amendment provides that "no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The purpose of these clear and precise words was to guarantee to the people of this Nation that they should forever be secure from the general searches and unrestrained seizures that had been a hated hallmark of colonial rule under the notorious writs of assistance of the British Crown. See *Stanford v. Texas*, (1965) 379 US 476, 481=13 L Ed 2d 431, 434=85 S Ct 506. This most basic of Fourth Amendment guarantees was frustrated in the present case, I think, in a manner made the more pernicious by its very subtlety. For what happened here was that a search that began as perfectly lawful became the occasion for an unwarranted and unconstitutional seizure of the films.

18. The state and federal officers gained admission to the appellant's house under the authority of a search warrant issued by a United States Commissioner. The warrant described "the place to be searched" with particularity. (1) With like particularity, it described "the things to be seized" — equipment, records, and other material used in or derived from an illegal wagering business. (2) And

1. "[T]he premises known as 280 Spring-side Drive, S. E., two-story residence with an annex on the main floor constructed of brick and frame, in Atlanta, Fulton County, Georgia, in the Northern District of Georgia. . . ."

2. [B]ookmaking records, wagering paraphernalia consisting of bet slips, account sheets, recap sheets, collection sheets,

the warrant was issued only after the Commissioner had been apprised of more than adequate probable cause to issue it (3)

19 There can be no doubt, therefore, that the agents were lawfully present in the appellant's house lawfully authorized to search for any and all of the items specified in the warrant and lawfully empowered to seize any such items they might find (4) It follows therefore, that the agents were acting within the authority of the warrant when they proceeded to the appellant's upstairs bedroom and pulled open the drawers of his desk But when they found in one of those drawers not gambling material but moving picture films, the warrant gave them no authority to seize the films

20 The controlling constitutional principle was stated in two sentences by this Court more than 40 years ago

"The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another As to what is to be taken nothing is left to the discretion of the officer executing the warrant" *Marron v United States*, (1927) 275 US 192, 196 = 72 L Ed 231, 237=48 S Ct 74

This is not a case where agents in the course of a lawful search came upon contraband, criminal activity, or criminal evidence (5) in plain view For the record makes clear that the contents of the films

adding machines money used in or derived from the wagering business, records of purchases, records of real estate and bank transactions, the money for which was derived from the wagering business, and any other property used in the wagering business, which are being used and/or have been used in the operation of a bookmaking business or represent the fruits of a bookmaking business being operated in violation of Sections 4411, 4412 and 7203 IRC of 1954"

3 Before the Commissioner were no less than four lengthy and detailed affidavits, setting out the grounds for the affiants' reasonable belief that the appellant was engaged in an illegal gambling enterprise, and that the paraphernalia of his trade were concealed in his house

4 The fact that almost no gambling material was actually found has no bearing, of course, upon the validity of the search The constitutionality of a search depends in no measure upon what it brings to light *Byars v United States*, 273 US 28, 29=71 L Ed 520, 522=47 S Ct 248

could not be determined by mere inspection And this is not a case that presents any questions as to the permissible scope of a search made incident to a lawful arrest For the appellant had not been arrested when the agents found the films After finding them, the agents spent some 50 minutes exhibiting them by means of the appellant's projector in another upstairs room Only then did the agents return downstairs and arrest the appellant

21 Even in the much criticized case of *United States v Rabinowitz* (1950) 339 US 56=94 L Ed 653=70 S Ct 430, the Court emphasized that "exploratory searches cannot be undertaken by officers, with or without a warrant" *Id.*, at 62, 94 L Ed at 658 This record presents a bald violation of that basic constitutional rule To condone what happened here is to invite a government official to use a seemingly precise and legal warrant only as a ticket to get into a man's home, and once inside, to launch forth upon unconfined searches and indiscriminate seizures as if armed with all the unbridled and illegal power of a general warrant

22 Because the films were seized in violation of the Fourth and Fourteenth Amendments, they were inadmissible in evidence at the appellant's trial *Mapp v Ohio*, (1961) 367 US 643=6 L Ed 2d 1081=81 S Ct 1684 Accordingly the judgment of conviction must be reversed

5 See *Warden v Hayden*, 387 US 294, 18 L Ed 2d 782=87 S Ct 1642
RGD

AIR 1969 U S S C. 108 (V 56 C 18)
(1969-21 L Ed 2d 759)*

WHITE AND FORTAS, JJ

Dunbar Stanley Studios, Inc., Appellants v State of Alabama
(No 376) decided on 25-2-1969

*Constitution of India, Arts 304, 14 - Case under U. S. A. Constitution - Interstate trade - Tax on non-resident travelling photographers - Pictures taken in State but developed and printed outside and sent back to State - Travelling photographers paid commission on

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†Reference is given to a parallel Indian Provision for the convenience of Indian Lawyers

GM/GM/C998/69/D

collection — Commerce clause held not violated — Tax also imposed on photography business conducted in fixed location within State — Held no discrimination — Constitution of America, Art. I, S. 8, Cl. 3 and 14th Amendment, S. 1.)*

Under a State statute which levied a license tax on transient or travelling photographer of \$ 5 for each week of operation in a locality within the State, the State assessed its licence tax against a non-resident photography firm, which had no office, place of business or inventory in the State, but which pursuant to a contract with a department store chain had sent non-resident photographers to stores within the State, to take photographs of children. The exposed films were developed, printed and finished outside the State. Then they were mailed to the store which took orders, collected for the pictures and paid a percentage of the receipts to the photography firm. By the same State statute, a tax from \$ 5 to \$ 25 a year was imposed, on a photography business conducted in a fixed location within the State, depending on the size of the city or town. The non-resident firm sought a declaration that the assessment of the transient photographer's tax against it was improper. It claimed that the tax was upon inter-State commerce in violation of the commerce clause of the American Federal Constitution. On appeal from the Supreme Court of the State, the Supreme Court of America, affirming the decision:

Held that in taking the pictures within the State, the photographers were engaged in an essentially local activity or business of providing photographers' services which could constitutionally be made subject to local taxation. It was immaterial that the firm's photographers were non-residents or that the intermediate processing stage took place outside the State before the pictures were returned for delivery. The Commerce clause thus was not violated by the assessment of the transient photographer's tax

* Article 1, Section 8, Clause 3 — "The Congress shall have power...To regulate commerce with foreign nations, and among the several states, and with the Indian Tribes."

Amendment 14, Section 1. "All persons born or naturalised in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

against the non-resident firm.

(Paras 2, 7, 8)

That the tax is laid upon the distinctive business of the photographer, not upon the soliciting of orders or the processing of film. The Commerce Clause precludes a state-imposed flat sum privilege tax on an inter-State enterprise whose only contact with the taxing State is the solicitation of orders and the subsequent delivery of merchandise within the taxing State. Such taxes have a substantial inhibitory effect on commerce which is essentially inter-State.

(Para 6)

In determining whether a state tax imposes an impermissible burden on inter-State commerce, the issue is whether the local activity which is made the nominal subject of the tax is such an integral part of the inter-State process, the flow of commerce, that it cannot realistically be separated from it. The essentially local character of the activity is emphasized by the intimate connection between photographers and the local stores in which they set up their temporary studios. Engaging in such local business may constitutionally be made subject to local taxation.

(Para 7)

The extraction of a natural resource within a State is not immunized from state taxation merely because, once extracted, the product will immediately be shipped out of the State for processing and sale to consumers.

(Para 8)

Held further that the tax was not invalid as a discrimination against inter-State commerce, the tax being levied equally upon all transient or travelling photographers whether their travel was inter-State or entirely within the State and there being no showing that the tax on transient out-of-state photographers was so disproportionate to the tax imposed on photographers with a fixed location within the State as to bear unfairly on the former.

(Para 9)

Cases Referred: Chronological Paras

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|--|-------|
| (1961) 273 Ala 129 = 135 So 2d 388, Haden v. Olan Mills Inc | 6, 11 |
| (1961) 366 US 199 = 6 L Ed 2d 227 = 81 S Ct 929, State of Alaska v. Arctic Maid | 7, 8 |
| (1957) 354 US 390 = 1 L Ed 2d 1420 = 77 S Ct 1096, West Point Wholesale Grocery Co. v. City of Opelike | 6, 9 |
| (1954) 347 US 157 = 98 L Ed 583 = 74 S Ct 396, Michigan Wisconsin Pipe Line Co. v. Calvert | 7 |
| (1953) 258 Ala 359 = 62 So 2d 446, Graves v. State | 6, 7 |
| (1952) 342 US 389 = 96 L Ed 436 = 72 S Ct 424, Memphis Steam Laundry Cleaner Inc v. Stone | 6 |

(1948) 334 US 385 = 92 L Ed 1460
= 68 S Ct 1156, Toomer v Wit-
sell

(1946) 327 US 416 = 90 L Ed 760
= 66 S Ct 526 = 162 ALR 844,
Nippert v City of Richmond

(1941) 313 US 117 = 85 L Ed 1223
= 61 S Ct 881 Caskey Baking
Co v Virginia

(1940) 311 US 454 = 85 L Ed 275
= 61 S Ct 334, Best & Co v
Max Well

(1923) 262 US 172 = 67 L Ed 929
= 43 S Ct 526, Oliver Iron Mining
Co v Lord

(1919) 251 US 95 = 64 L Ed 157=
40 S Ct 93, Wagner v City of
Covington

J Edward Thornton, for Appellant
William H Burton, for Appellee

SUMMARY

Under an Alabama statute levying a license tax on a transient or traveling photographer of \$ 5 for each week of operation in a locality within the state, the state assessed its license tax against a non resident photography firm which had no office place of business, or inventory in the state but which, pursuant to a contract with a department store chain, had sent non resident photographers to stores within the state on various occasions to take pictures of children, the exposed film being developed, printed, and finished outside the state and then mailed to the store which took the orders, collected for the pictures, and paid a percentage of the receipts to the photography firm. The state statute also imposed a tax of from \$5 to 25 a year on a photography business conducted in a fixed location within the state depending on the size of the city or town. The non resident firm sought a declaration from the state courts that the assessment of the transient photographer's tax against it was improper, claiming that the tax was levied upon interstate commerce in violation of the Commerce clause of the Federal Constitution. The Circuit Court Montgomery County, sustained the tax, and the Supreme Court of Alabama affirmed (210 So 2d 696).

On appeal, the Supreme Court of the United States affirmed. In an opinion by Fortas J, expressing the view of eight members of the court it was held that (1) the Commerce clause was not violated by the assessment of the transient photographer's tax against the non resident firm since in taking the pictures within the state the photographers were engaged in an essentially local activity or business of providing photographers' services which could constitutionally be made subject to local taxation, it being immaterial that the firm's photographers

were non-residents, or that the intermediate processing stage took place outside the state before the pictures were returned for delivery, and (2) the tax was not invalid as a discrimination against interstate commerce, the tax being levied equally upon all transient or traveling photographers whether their travel was interstate or entirely within the state and there being no showing that the tax on transient out-of-state photographers was so disproportionate to the tax imposed on photographers with a fixed location within the state as to bear unfairly on the former.

WHITE, J, concurred, expressing the view that there would have been unconstitutional discrimination against interstate commerce if, as asserted by the nonresident firm, the transient tax had been applied to it solely because of its interstate shipment of films, but that the record failed to show that Alabama had so applied its tax.

OPINION OF THE COURT

MR JUSTICE FORTAS delivered the opinion of the Court.

1 Alabama levies a tax upon photograph galleries and persons engaged in photography. If the business is conducted "at a fixed location," the tax in the large cities (1) is \$ 25 a year for each county, town, or city. For each "transient or traveling photographer," the tax is \$ 5 per week for each county, town, or city in which he plies his trade. (2)

2 This case involves state assessments of the transient photographers tax against

1 For smaller towns, the rate is stepped down. The lowest rate is \$ 3 a year for localities with fewer than 1,000 inhabitants.

2 Title 51, Code of Alabama S 569, reads as follows:

"Photographers and photograph galleries. Every photograph gallery, or person engaged in photography when the business is conducted at a fixed location. In cities and towns of seventy five thousand inhabitants and over, twenty-five dollars, in cities and towns of less than seventy-five thousand and not less than forty thousand inhabitants fifteen dollars, in cities and towns of less than forty thousand and not less than seven thousand inhabitants ten dollars, in cities and towns of less than seven thousand and over one thousand inhabitants five dollars, in all other places whether incorporated or not three dollars. The payment of the license required in this section shall authorize the doing of business only in the town, city or county where paid. For each transient or traveling photographer, five dollars per week."

appellant and its predecessor partnership. (3) Appellant sought a declaration from the state courts that the assessment was improper, claiming that the tax was levied upon interstate commerce, in conflict with the Commerce Clause of the Constitution. The Supreme Court of Alabama sustained the tax. — Ala —, 210 So 2d 696 (1968). We affirm.

3. Appellant is a photography firm specializing in selling photographs of children. It is organized as a North Carolina corporation and its principal office and processing plant are in Charlotte, North Carolina. It has no office or place of business in Alabama, nor does it maintain an inventory there. Its activities in that State stem from a contract between appellant and J. C. Penney Company. Penney operates department stores in eight cities in Alabama, as well as elsewhere in the Nation. By the terms of the contract, as summarized in the complaint appellant's photographers, nonresidents of Alabama, "were at the disposal of the local Penney stores. The local store manager requested appellant to send representatives for picture taking on specified dates." During the period for which the tax has been assessed, appellant's photographers were sent to J. C. Penney stores in eight Alabama cities. According to the complaint, each visit lasted two to five days, and each city was visited from one to five times a year.

4. The Penney stores advertised the photographic service, inviting parents to bring their children to be photographed during the visit by appellant's photographer. Each store took orders for the photographs, arranged the time for the sitting, provided a place in the store for the temporary studio, collected the money, and delivered the pictures to the customer when completed. Appellant was paid a percentage of the receipts from the Penney stores.

5. Appellant's activities were limited to taking the pictures, transmitting the exposed film to its office in North Carolina where it was developed, printed, and finished, and mailing the finished prints to the Penney store in Alabama.

6. It is clear from the taxing statute itself and from the decisions of the Supreme Court of Alabama that the tax is laid upon the distinctive business of the photographer, not upon the soliciting of orders or the processing of film.

3. No point has been made as to the identity of the taxpayer or its liability for the tax if it may be constitutionally levied.

Graves v. State, (1953) 258 Ala 359, 62 So 2d 446; Haden v. Olan Mills, Inc (1961) 273 Ala 129, 135 So 2d 388. Appellant argues that since each of its photographers came into Alabama from North Carolina to ply his trade, bringing his equipment with him, and since he merely exposed his film in Alabama, the developing, printing and finishing operation being conducted in North Carolina, his activities in Alabama are an inseparable part of interstate commerce and cannot constitutionally be subject to the Alabama license tax. Appellant relies upon familiar cases decided by this Court holding that the Commerce Clause precludes a state-imposed flat sum privilege tax on an interstate enterprise whose only contact with the taxing State is the solicitation of orders and the subsequent delivery of merchandise within the taxing State. West Point Wholesale Grocery Co. v. State of Opelika, (1957) 354 US 390, 1 L Ed 2d 1420, Memphis Steam Laundry Cleaner, Inc. v. Stone, (1952) 342 US 389, 96 L Ed 436, Nippert v. City of Richmond, (1946) 327 US 416, 90 L Ed 760. Such taxes have a substantial inhibitory effect on commerce which is essentially interstate.

7. But these cases are not applicable to the present facts. In determining whether a state tax imposes an impermissible burden on interstate commerce, the issue is whether the local activity which is made the nominal subject of the tax is "such an integral part of the interstate process, the flow of commerce, that it cannot realistically be separated from it." Michigan-Wisconsin Pipe Line Co. v. Calvert, (1954) 347 US 157, 166, 98 L Ed 583, 591. If, for example, a license tax were imposed on the acts of engaging in soliciting orders or making deliveries, conflict with the Commerce Clause would be evident because these are minimal activities within a State without which there can be no interstate commerce. But in the present case, the "taxable event," as defined by the State's courts, is "pursu[ing] the art of photography in Alabama (1953) 258 Ala 359, 362, 62 So 2d 446, 448. When appellant's photographers set up their equipment in the local stores, posed the children brought to them to be photographed, and operated their cameras, they were engaged in an essentially local activity: the business of providing photographers' services. The essentially local character of the activity is emphasized by the intimate connection between appellant's photographers and the local stores in which they set up their temporary studios. Engaging in such local business may constitutionally be made subject to local taxation. E. g., State of Alaska v. Arctic Maid (1961) 366 US 199, 6 L Ed 2d 227.

8 It could hardly be suggested that if J C Penney had set up its own resident or transient photography studios using its own employees, such a photography business would have been exempt from state licensing merely, because it chose to send the exposed film out of the State for processing. The extraction of a natural resource within a State is not immunized from state taxation merely because once extracted the product will immediately be shipped out of the State for processing and sale to consumers (1961) 366 US 199 at p 203—204 6 L Ed 2d 227 at 230, 231 (supra) *Oliver Iron Mining Co. v Lord* (1923) 262 US 172, 177 179 67 L Ed 929 935 936 Cf *Toomer v Witsell* (1948) 334 US 385, 394 395, 92 L Ed 1460, 1470. A fortiori the fact that an intermediate processing stage takes place outside the State before the pictures are returned to the State for final delivery does not make the taking of the pictures—the activity on which the tax was imposed — so inseparable a part of the flow of interstate commerce as to be immune from state license taxation. The mere substitution for J C Penney's own employees of a transient photographer who comes into Alabama from North Carolina does not convert the essentially local activity of photographing the subjects into an interstate activity immune from the state privilege tax. Cf *Caskey Baking Co. v Virginia*, (1941) 313 US 117=85 L Ed 1223 *Wagner v City of Covington* (1919) 251 US 95, 34 L Ed 157.

9 Nor is the tax invalid as a discrimination against interstate commerce. Alabama's tax is levied equally upon all transient or traveling photographers whether their travel is interstate or entirely within the State. On the record before us, there is no basis for concluding that the \$ 5 per week tax on transient out of state photographers is so disproportionate to the tax imposed on photographers with a fixed location (4) as to bear unfairly on the former. Cf (1957) 345 US 390 1 L Ed 2d 1420, *Best & Co. v Maxwell* (1940) 311 US 454 85 L Ed 275. In none of the cities for which appellant's complaint gives the details of its activities would the transient tax imposed on it have exceeded that which a fixed location photographer would have had to pay

4 See n 1, supra

to operate in the city (5). For example, in 1965, five visits are listed to Mobile, resulting in an assessed tax of \$ 25. This is equal to the flat rate tax which a photographer permanently located in the city would have had to pay. Since, according to the complaint, the maximum tax on appellant in any year for any city would be \$ 25 (6) the burden could hardly be prohibitive.

10 Affirmed

SEPARATE OPINION

MR JUSTICE WHITE, concurring

11 Alabama taxes its transient photographers on a different, and often more burdensome basis than those not in that category. If firms operating precisely as appellant does, and mailing their film to a central point within the State for development are taxed as transient photographers then there is no unconstitutional discrimination against interstate commerce. But if appellant is taxed as a transient photographer because its films are sent for development across a state line, then there is discrimination against interstate commerce. Although appellant contends that it is because of the interstate shipment of films that the transient tax was applied, and although the decision in (1961) 273 Ala 129=137 So 2d 388 arguably supports that view I do not think that a sufficient showing has been made in this record that Alabama has so applied its tax. Since the burden of proof is on the appellant here I join the Court despite the uncertainty of the record on this score.

RGD

5 Appellant asserts in his brief—but not in the complaint—that the taxes assessed for its operations in Birmingham were almost twice what a fixed location photographer would have had to pay for the same period. Even assuming that to be true we are not prepared to say that this relative burden is improper given the differences between the two ways of carrying on the business.

6 Allegedly, there were up to five visits per year to each city, each visit extending from two to five days. The tax rate for transient photographer was \$ 5 for each week of operation in a locality.

from the petitioner's firm and put in the custody of the Supurdgar, and

(e) To issue such other appropriate writ, direction or order against such of the respondents as may be deemed expedient by this Hon'ble Court.

2. The petitioner is a partner in the firm known as Messrs. Ghanshyam Das Lachmi Narain which carries on wholesale business in grain at Katarniyaghat, district Bahraich. Said firm holds a licence in form 'B' under the U. P. Foodgrains Dealers Licensing Order, 1964. Under the U. P. Foodgrains (Restrictions on Hoarding) Order, 1966 the petitioner could hold in stock up to one thousand quintals of one type of grain and further he could hold a total quantity of 2500 quintals of all types of grains. Said Order was modified by the U. P. Foodgrains (Restrictions on Hoarding) (Amendment) Order, 1967 which was published in the U. P. Gazette dated February 1-1967. According to the amended Order, the petitioner could hold a total quantity of 1000 quintals of foodgrains of all kinds and only 250 quintals of grain of any one particular type.

3. The allegation in the petition is that the petitioner got knowledge of this amended Order only on 13th March, 1967 when the Senior Marketing Inspector, Nanpara circulated a notice of even date to that effect. A copy of that notice is filed as annexure 2 to the petition. Then it is alleged that the very next day, i. e. on 14th March, 1967 the petitioner addressed an application to the Regional Food Controller, Gorakhpur through the Marketing Inspector, Bichia, district Bahraich asking for permission to hold a stock of 1000 quintals of paddy and 500 quintals of maize till April 30, 1967 and that the said application was forwarded by the Marketing Inspector with a recommendation in favour of the request made therein. Another allegation made in the petition is that the Regional Food Controller Gorakhpur had granted a permit to the petitioner on 4th February, 1967 for exporting 3000 quintals of paddy from Katarniya Ghat to Khalilabad. A copy of that permit is filed as annexure 4 to the petition. It is said that the petitioner could despatch only 1116 quintals of paddy up to 27th February, 1967 in pursuance of that permit and failed to despatch the rest because of the non-availability of railway wagons for which he had already applied. Then a reference is made to Government letter no. 7210/XXIX d-466/64 dated December 11, 1964 which inter alia stated:

"If there is any grain with any dealer beyond 250 quintals for which Railway wagon has been indented, it should not be taken into account while taking action under the Anti-Hoarding Order. This

should be treated as grain under despatch."

The petitioner then alleged that in so far as on February 26, 1967 he applied for one wagon for the despatch of paddy and another for despatch of maize and on March, 6, 1967 for two wagons for despatch of maize for which he had obtained receipts nos. 073265, 073266 and 073283 but the aforesaid wagons could not arrive till March 15, 1967 on which date respondent no. 3 made a raid and finding grain in stock with the petitioner more than permissible under the amended Order seized the same, he can by no means be taken to have contravened the amended Order in view of the instructions contained in the aforesaid Government letter a true copy of which is filed as annexure 5 to the petition.

4. As a result of the report lodged by respondent no. 3 at police station Sujauli on March 15, 1967, the petitioner is being prosecuted before respondent no. 2 under Section 3/7, Essential Commodities Act, 1955. The petitioner challenges the validity of this prosecution firstly on the ground that in view of the facts stated above, the petitioner cannot be taken to have contravened the amended Order and secondly on the ground that the amended order being in excess of the power conferred by Sections 3 and 5 of the Essential Commodities Act, 1955 read with the notification issued under Section 5 of the Act by the Central Government and also being in contravention of Article 301 of the Constitution is void, inoperative and ultra vires.

5. The petition has been contested by the respondents namely, the State of Uttar Pradesh, the Sub-Divisional Magistrate, Nanpara, district Bahraich and the officer who made a raid on 15th March, 1967 and lodged a report at the aforesaid police station. A counter affidavit sworn by Ram Sunder Tewari of police station Sujauli has been filed on behalf of all the three respondents. The material allegations made in paragraphs 5 to 11 of the petition are not controverted in the counter-affidavit in a specific manner as they should have been if the respondents really intended to controvert those allegations. In regard to most of these allegations what is said in the counter-affidavit is either that they are not known to the deponent and, as such, denied or that the same are not admitted because there is nothing on the record of the criminal case pending against the petitioner to support those allegations. Even the allegation in paragraph 10 wherein reference is made to a Government letter copy of which is annexure 5 to the petition is not admitted in the counter-affidavit for the reason that the deponent of the affidavit does not know the same.

6. I have heard learned counsel for the petitioner and learned Standing Counsel representing the respondents at some length. The main contention of the learned counsel for the petitioner is that the amended order for the contravention of which the petitioner is being prosecuted is void and inoperative. He puts forth that contention for various reasons I shall now proceed to deal with the grounds advanced by learned counsel for striking down the amended Order.

7. His first contention is that the provision in para 3 of the order in question providing for the limits of the stock to be held by a grain dealer is bad in so far as it goes beyond the provisions of the Act itself under which it purports to have been framed. As already indicated, para 3 of the Order in question says that no licensed dealer shall have in his possession at any time a quantity of any one of the foodgrains exceeding 250 quintals or of all kind of foodgrains exceeding 1000 quintals. The argument of the learned counsel is that it is only clause (d) of sub-section (2) of Section 3 of the Essential Commodities Act (hereinafter to be called "the Act") under which such an Order could be promulgated and that clause provides for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition use or consumption of, any essential commodity and in so far as the impugned provision is not regulatory but restrictive, it must be held to be in excess of the power or the authority under which it purports to have been issued. Sub-section (2) of Section 3 of the Act has various clauses (a) to (j). On a perusal of these various clauses I agree with the contention of the learned counsel that the impugned provision does not appear to be covered by any of these clauses except clause (d). Said clause (d) no doubt confers power only for "regulating". So the question arises if the impugned provision can be held to be regulatory or must necessarily be held to be restrictive. In support of his contention that the impugned provision must be held to be restrictive or prohibitory learned counsel places reliance on the case of State of Mysore v. H Sanjeeviah AIR 1967 SC 1189. That was a case under the Mysore Forest Act (XI of 1900). Rule-making power was conferred thereunder by Section 37. Sub-section (1) of Section 37 conferred rule-making power in general terms. Its sub-section (2) provides—

"Such rules may, among other matters,

(a)

(b) prohibit the import, export, collection, or moving of forest produce without a pass from an officer authorised to issue the same or otherwise than in accordance with the conditions of such pass."

By rule 2 framed on October 13, 1952 it was provided that no person shall import forest produce into, export forest produce from, or move forest produce within, any of the areas specified in Schedule 'A' unless such forest produce is accompanied by a permit prescribed in Rule 3. On April 15, 1959 the State of Mysore issued a notification adding a proviso to Rule 2 which read as follows—

"Provided that no such permit shall authorise any person to transport forest produce between sun-set and sun-rise in any of the areas specified in Schedule 'A'."

It was the validity of this proviso which was the subject-matter of the decision before the Supreme Court in the case cited above. The party challenging the validity of the said proviso maintained that it was not regulatory but prohibitory and, as such, went beyond the rule-making power conferred by the Act. This contention was upheld by the Supreme Court as shall appear from the following observations made in paragraphs 5 and 6 of the report.—

"Power to impose restrictions of the nature contemplated by the two provisos to Rule 2 is not to be found in any of the clauses of sub-section (2) of Section 37. By sub-section (1) the State Government is invested with the power to regulate transport of forest produce "in transit by land or water". The power which the State Government may exercise is, however, power to regulate transport of forest produce, and not the power to prohibit or restrict transport. Prima facie, a rule which totally prohibits the movement of forest produce during the period of sun-set and sun-rise is prohibitory or restrictive of the right to transport forest produce. A rule regulating transport in its essence permits transport, subject to certain conditions devised to promote transport; Such a rule aims at making transport orderly so that it does not harm or endanger other persons following a similar vocation or the public, and enables transport to function for the public good. It was observed by one of us (Subba Rao, J.) in *Automobile Transport (Rajasthan) Ltd v. State of Rajasthan*, 1963-1 SCR 491 at p 549—(AIR 1962 SC, 1406 at p 1430)."

'Restrictions obstruct the freedom, whereas regulations promote it. Police regulations, though they may superficially appear to restrict the freedom of movement, in fact provide the necessary conditions for the free movement. Regulations such as provision for lighting, speed, good conditions of vehicles, turnings, rule of the road and similar others, really facilitate the freedom of movement rather than retard it. So too, licensing system with compensatory fees would

not be restrictions but regulatory provisions; for without it, the necessary lines of communications, such as roads, waterways and air-ways cannot effectively be maintained and the freedom declared may in practice turn out to be an empty one. So too, regulations providing for necessary services to enable the free movement of traffic, whether charged or not, cannot also be described as restrictions impeding the freedom.'

It was asserted in the affidavit filed on behalf of the State in reply to the petition that the restriction imposed by the rules on the freedom of citizens to transport timber, fire-wood, charcoal and bamboos is a reasonable restriction and in the public interest, i.e. to prevent unauthorised felling of trees and bamboos and smuggling them from the State forests. It was said that checking transport of the forest produce during nights would require enormous increase in the number of checking staff of the Forest Department, that such staff will have to work in two or three shifts every day if they have to check transport of forest produce during nights also, further that such staff will have to be equipped with lanterns and warm clothing if they have to work during nights that persons who indulge in smuggling of timber find nights more convenient to avoid detection, and that smuggling of forest produce is a serious menace to preservation of forests in the State and safeguarding of the property of the State. Whether or not these are good grounds for imposing restrictions on transport of forest produce is not a matter with which we are concerned in dealing with the power of the State by rules to restrict the right to transport forest produce. The power conferred upon the State Government is merely "to regulate the transit" of forest produce and not to restrict it. If the provisos are in truth restrictive of the right to transport the forest produce, however, good the grounds apparently may be for restricting the transport of forest produce, they cannot on that account transform the power conferred by the provisos into a power merely regulatory. The High Court was, therefore, in our view, right in holding that the two provisos to R. 2 are not regulatory in character, but are restrictive."

I have thus no hesitation in concluding that the impugned provision is not regulatory but is in effect prohibitory and, as such, it goes beyond the power conferred by clause (d) of sub-section (2) of Section 3 of the Act. As already stated, no other clause of sub-section (2) of section 3 of the Act appears to cover it. So the inescapable conclusion is that sub-section (2) of Section 3 of the Act does not cover the impugned provision.

8. Learned Standing Counsel has, however, maintained that it is immaterial whether or not any clause of sub-section (2) of Section 3 covers the impugned provision so long as it can be found to be covered by sub-section (1) of Section 3 of the Act. Section 3(1) provides:

"If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices, it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein."

The argument of the learned Standing Counsel is that the above-quoted provision is couched in very wide terms in so far as it clearly says that in the circumstances mentioned in it the Central Government may by order provide for regulating or prohibiting the production, supply and distribution thereof (i. e. any essential commodity) and trade and commerce therein. Thus he contends that the words "supply and distribution" are wide enough to cover "storage". He maintains that unless "storage" is regulated or prohibited, if necessary, it is not possible to maintain supply or secure equitable distribution which is the basic object of section 3. The learned counsel for the petitioner on the other hand, contends that the language of Section 3(1) howsoever wide it may be cannot be taken to include "storage". I am unable to agree with the learned counsel for the petitioner. In my view power to regulate or prohibit "storage" is clearly implied in the wide language of sub-section (1) of Section 3.

9. Learned counsel for the petitioner then argues that advantage cannot be taken of the general provision of sub-section (1) to save the impugned order when it is found in excess of the provision contained in clause (d) of sub-sec. (2) of Section 3 which specifically deals with the subject-matter of the impugned order and the same does not appear to be covered by any of the clauses of sub-section (2). He also argues in this connection that in so far as clause (d) of sub-section (2) which deals with "storage" specifically provides only for its regulation, it must be held if it is found that the general provision of sub-section (1) covers "storage", that to that extent the general provision is in conflict with the special provision in clause (d) of sub-section (2) and, as such, the specific provision in clause (d) of sub-section (2) must prevail as against the general provision in sub-section (1). In my view neither of the arguments is tenable. It is now well settled that the specific provi-

sions such as are contained in sub-section (2) are merely illustrative and they cannot be read as restrictive of the generality of powers conferred by sub-section (1). In this connection reference may be made to the case of Afzal Ullah v State of Uttar Pradesh, AIR 1964 SC 264. The material observations occur in paragraph 13 of the report. Reference may also be made to the case of Emperor v. Sibnath Banerji, AIR 1945 PC 156 which is referred to with approval in the aforesaid Supreme Court case. In that case the Privy Council refers to the decision of the Federal Court which stated—

"The Legislature having set out in plain unambiguous language in para (x) the scope of the rules which may be made providing for apprehension and detention in custody it is not permissible to press in aid the more general words in Section 2 (1) in order to justify a rule which so plainly goes beyond the limits of para (x) though if para (x) were not in the Act at all, perhaps different considerations might apply."

Their Lordships of the Privy Council with reference to the aforesaid observations of the Federal Court observed on page 160—

"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of Sub-sections (1) and (2) of Section 2, Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that Rule 26 was invalid. In the opinion of their Lordships, the function of Sub-section (2) is merely an illustrative one, the rule-making power is conferred by sub-section (1), and 'the Rules' 2 which are referred to in the opening sentence of Sub-section (2) are the rules which are authorised by, and made under sub-section (1), the provisions of Sub-section (2) are not restrictive of Sub-section (1), as indeed is expressly stated by the words 'without prejudice to the generality of the powers conferred by Sub-section (1)'. There can be no doubt—as the learned Judge himself appears to have thought—that the general language of Sub-section (1) amply justifies the terms of Rule 26, and avoids any of the criticisms which the learned Judge expressed in relation to Sub-section (2)."

Learned counsel for the petitioner cited a number of cases in support of the contention that in case of a conflict between a general provision and a special provision whether the two are in the same Act or are in two different Acts the special provision must prevail as against the general provision. It is unnecessary to refer to those authorities because the proposition so far as it goes cannot possibly be assailed. The question is if it has

any application to the case in hand. Evidently there arises no occasion to invoke that proposition unless it be found that there is really a conflict between a general provision and a special provision. The argument of the learned counsel is that if Sub-section (1) of Section 3 be taken to provide for the restriction of "storage" then in so far as the specific provision in clause (d) of sub-section (2) of S 3 provides only for regulation by licence of "storage", it must be held that there is a conflict between the general provision contained in Sub-section (1) of S 3 and the special provision contained in Clause (d) of Sub-section (2) of Section 3 and in that view of the matter it must be held that the special provision in Clause (d) of Sub-section (2) must prevail as against the general provision contained in Sub-section (1) of Section 3. In my view the very basis for the argument is non-existent. Sub-section (2) opens with the words "without prejudice to the generality of the powers conferred by Sub-section (1)". These words are there in Sub-section (2) obviously with a view to avoid any conflict between what is provided in Sub-section (2) and what is provided in Sub-section (1). In his arguments learned counsel assumes that to prevent which the Legislature deliberately introduced in Sub-section (2) the words cited above. So, in fact there is no conflict and there can possibly be no conflict, having in view the opening words of Sub-section (2), between the two, namely Sub-section (1) and Clause (d) of Sub-section (2) of Section 3 of the Act and, as such, there arises no occasion to say that Section 3(2)(d) should prevail as against Section 3(1). I accordingly repeal the contention.

10. Another contention of the learned counsel is that the impugned Order being violative of Article 301 of the Constitution deserves to be struck down. He argues that Article 302 of the Constitution cannot be invoked to its aid for the simple reason that it is a subordinate legislation and not a law made by Parliament. In support of his contention he places reliance on the case of AIR 1967 SC 1189. In paragraph 8 of the report following observations on which strong reliance is placed are made—

"Article 304 which is an exception to Article 301 has no application to this case, because that Article saves certain laws from the operation of Article 301 if the law is passed by the Legislature of a State. The provisos to Rule 2 are not made by the executive Government in exercise of delegated authority. The rules have the force of law, but when made did not become part of the Act (see Section 77 of the Mysore Forest Act)."

11. On a close examination of the point urged by the learned counsel it ap-

pears that the Supreme Court case cited above is distinguishable in so far as their Lordships while saying "the rules have the force of law, but when made did not become part of the Act" rely on Section 77 of the Mysore Forest Act which provides "All rules made by the Government under this Act shall be published in the official Gazette, and shall thereupon have the force of law." Obviously there being an express provision in Section 77 of the Mysore Forest Act to the effect that rules shall have the force of law without adding that the same when made shall be deemed to be a part of the enactment itself, it could not possibly be said on the basis of principles of statutory interpretation that rules when made in accordance with the provisions of the enactment became part of the enactment itself. Had there been no such provision as is contained in Section 77 of the Mysore Forest Act, there would have been no occasion to say as is said in the observations reproduced above that the rules when made did not become part of the Act with the result that Article 304 (because the enactment concerned in that case was an enactment passed by a State Legislature and not by Parliament) could not be invoked to save the rules once the same appeared to be in contravention of Article 301. Here the position is different in so far as there is no provision in the Essential Commodities Act, 1955 to indicate as to what would be the effect of the rules or Orders made thereunder. In the absence of any such express provision, the principles of statutory interpretation must apply for determining the position of Orders framed in accordance with the provisions of the Essential Commodities Act vis-a-vis the Act itself. In the case of *Willingale v. Norris*, (1909) 1 KB 57 it is observed on page 64:—

"If it be said that a regulation is not a provision of an Act, I am of opinion that *Rex v. Walker*, (1875) LR 10 QB 355 is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done."

Again reference may be made to the case of *Wicks v. Director of Public Prosecutions*, 1947 AC 362. It is observed on page 365:—

"There is of course no doubt that when a statute like the Emergency Powers (Defence) Act, 1939, enables an authority to make regulations, a regulation which is validly made under the Act, i.e., which is

intra vires of the regulation-making authority, should be regarded as though it were itself an enactment."

This being the correct legal position, it is difficult to accept the contention of the learned counsel that the impugned Order even though it may have been framed within the four corners of the Essential Commodities Act cannot be deemed to be law passed by Parliament. The Act has been passed by Parliament. The Act authorises promulgation of Orders. So the Orders promulgated within the authority delegated by the Act would be deemed to be a part of the enactment. In that view of the matter Article 302 of the Constitution must apply to save the impugned Order. There is a decision of a Division Bench of this Court also on the same point. *Shobha v. State*, 1962 All LJ 831; (AIR 1963 All 29) may be referred to in this connection. The material observations which occur on page 833 (of ALJ): (at p. 31 of AIR) run as below:—

"Ours is not a case of an independent legislation. It is a case where an Order has been framed under an existing Act, i.e., the Essential Commodities Act. The Order merely carried out the purposes of that Act In other words, it is in the nature of delegated legislation. There was no argument before us and indeed none was possible that there has been a delegation of legislative functions in the instant case. The position of all the Orders framed under Section 3 of the Essential Commodities Act is to make those Orders a part of the Act itself. It would be a complete misconception to treat the impugned Order as independent of the Essential Commodities Act. Inasmuch as the Essential Commodities Act has been passed under Article 302 of the Constitution and fulfils all the requirements of that provision, it was not necessary that the Parliament should have passed another Act in order to give protection to the impugned Order. The position of the impugned Order and such other Orders is analogous to that of the rules or regulations framed under the statute which are treated to be a part of the statute itself. See *Khetsidas Girdhari Lal v. Pratapmull Rameshwar*, AIR 1946 Cal 197 and *Saligram Singh v. Emperor*, AIR 1945 Pat 69. It is trite that if and when the Essential Commodities Act is repealed, the impugned Order would also disappear and cannot be continued unless there is another Act passed making its continuance possible. Under these circumstances, we have no hesitation in rejecting the submission made by Mr. Saran that the Parliament has not passed any law under Article 302 of the Constitution which could give protection to Clause 3 of the Order."

Having regard to the correct legal position as discussed above I am of opinion

that the contention is without any substance and must be repelled.

12. The last contention of the learned counsel for the petitioner is that the impugned Order is to be struck down for the reason that it falls outside the delegation effected by the Central Government in exercise of powers conferred on it by Section 5 by notification dated 9th June, 1966. The material portion of the notification reads—

"In exercise of the powers conferred by Section 5 of the Essential Commodities Act, 1955 (10 of 1955), the Central Government hereby directs—

(a) that the powers conferred on it by Sub-section (1) of Section 3 of the said Act to make orders to provide for the matters specified in Clauses (a), (b), (c), (d), (e), (f), (h), (i), (ii) and (j) of Sub-section (2) thereof shall, in relation to foodstuffs, be exercisable also by a State Government subject to the conditions..."

The argument raised before me is that by this notification the delegation is effected in favour of the State Government of the power conferred on the Central Government by Sub-section (1) of Section 3 of the Act to make orders to provide for the matters specified in such clauses of Sub-section (2) of Section 3 as are enumerated in the extract cited above. The argument proceeds that in so far as the impugned Order is not covered by any of those clauses of Sub-section (2), it must be held that it had been promulgated outside the authority delegated in favour of the State Government. As against that, the contention of the learned Standing Counsel is twofold. His first contention is that by the notification referred to above, power to make orders not only in respect of matters specified in the various clauses enumerated in the notification has been conferred but also the general power conferred on the Central Government by Sub-section (1). The other contention is that, at any rate, the impugned Order is covered by Clause (d) of Sub-section (2). In my view neither of the contentions has any substance. The first contention, as is abundantly clear, from a perusal of Section 5 by which authority to delegate is conferred cannot be sustained. Section 5 itself says that the Central Government can delegate power to make orders only in respect of such matters as are specified by the authority effecting delegation. That being so, the Central Government never possessed authority to delegate the power enjoyed by it under Sub-section (1) to make Orders without specifying the matters. That is why, the notification dated 9th June, 1966 by which delegation is effected takes care to specify matters in respect of which power to make Orders is delegated. There is nothing wrong if in specifying matters the Central Govern-

ment chose to adopt the specifications contained in Sub-section (2). And it was also in the discretion of the Central Government not to effect delegation in respect of all the matters, specified in Sub-section (2). The Central Government actually omitted clause (g) of Sub-section (2) in the notification effecting delegation. So, neither the language of the notification nor that of Section 5 of the Act justifies the contention raised by the learned counsel. The language of the notification clearly says that power under Sub-section (1) of Section 3 to make Orders to provide for the matters specified in certain clauses of Sub-section (2) as enumerated in the notification is being delegated. In the face of that language and also that of Section 5, it is impossible to maintain that the Central Government has by this notification delegated the general power to make Orders under sub-section (1). In fact neither it could do so nor has it done so. I accordingly repel the contention.

13. As regards the other contention, I need only say, as I have indicated above, that the impugned Order is not covered by Clause (d) of Sub-section (2) of Section 3. It is unnecessary to repeat the reasons for that conclusion which are detailed above. I accordingly repel the contention.

14. In view of the foregoing discussion, it seems that the last contention raised by the learned counsel for the petitioner must be upheld. He has also drawn my attention to the case of *Sujan Singh Mafu Ram v. The State of Haryana*, AIR 1968 Punj 363 decided by a Division Bench of the Punjab High Court. The view expressed above finds full support from that decision of the Punjab High Court. I accordingly conclude that the impugned Order has got to be struck down for the reason that it is outside the authority delegated by the Central Government in favour of the State Government by notification dated June 9, 1966.

15. In that view of the matter, the petition must be allowed. The petition is accordingly allowed with costs. The petitioner's prosecution is quashed and the grain seized or its value if it has already been sold is directed to be restored to the petitioner.

RSK/D V C.

Petition allowed.

AIR 1969 ALLAHABAD 566 (V 56 C 108)
V G OAK C J. AND
T. P. MUKERJEE, J.

H. G. Misra & Co., Petitioner v. Appellate Assistant Commissioner of Income-tax and others, Opposite Parties

Civil Misc Writ No 1635 of 1967 D/- 31-10-1968

(A) Constitution of India, Art. 141 — Supreme Court holding S. 238 of Income-

BM/EM/A625/69/D

tax Act, 1961, as valid in AIR 1968 SC 162 — Question of excessive delegation of powers was not argued before Supreme Court — Courts are even then bound to proceed on basis that Section 298 is valid. AIR 1968 SC 162, Ref. (Para 6)

(B) Income-tax Act (1961), S. 298 — Income-tax (Removal of Difficulties) Order (No. 2 of 1963) — Order is not in excess of powers conferred by S. 298 or discriminatory in nature — (Constitution of India, Art. 14) — (General Clauses Act (1897), S. 6 (c) and (e)).

Levy of advance tax under Section 18A of the Old Act is not a matter relating to assessment of income-tax. Assessment proceedings commence after the previous year has closed and the assessment year has started. In the case of advance tax, however, the procedure for its levy commences during the previous year itself. It is not possible, therefore to hold that proceedings for levy of penalty for non-payment of advance tax are included in the proceedings for assessment of income-tax. Consequently, none of the Sub-clauses (a) to (m) in Section 297 (2) apply to save the liability to penalty for non-payment of advance tax already incurred under the old Act. It cannot also be assumed that the Legislature intended that the liability to pay penalty for failure to furnish returns or to pay advance tax incurred under the old Act should terminate with the repeal thereof. Such an assumption would be irrational. There is, therefore, no difficulty in holding that the power to levy penalty under Section 18A of the old Act is saved by Clauses (c) and (e) of Section 6 of the General Clauses Act, there being no intention to the contrary in the repealing Act. The position, therefore, is that though the liability survived, there is no specific provision in the new Act to give effect to such liability. (Paras 10 & 11)

The first condition precedent, namely, the existence of a difficulty in giving effect to the provisions of the new Act, is clearly satisfied. The second condition is that the Central Government may not do anything inconsistent with the provisions of the new Act. The provisions of the Order are not inconsistent with the provisions of the new Act which also impose penalty for failure to pay advance tax in the same way as the old Act did.

(Para 12)

There is also nothing in the content of the terms of the Order to suggest that it is discriminatory in nature. It applies equally to all assesseees who were liable to pay advance tax and furnish estimates under the old Act for the financial year 1961-62, but defaulted in doing so. The Income Tax Officer has no discretion in the matter. He has to impose penalty on

all such defaulters and the Order gives him no scope for meting out differential treatment to them. If some assesseees had escaped penal proceedings before the promulgation of the order on 11-6-1963, that does not mean that the Order itself makes a discrimination between assesseees in the same category. (Para 14)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 162 (V 45)=
1967-66 ITR 680, Kalawati Devi
Harlalka v. Commr. of Income
Tax, West Bengal 6, 9, 10

R. C. Sharma, for Petitioner; Standing
Counsel, for Opposite Parties.

MUKERJEE, J.:— This writ petition raises the question of vires of Section 298 of the Income Tax Act 1961 and the Removal of Difficulties Order No. 2 of 1963 issued by the Central Government thereunder by notification dated the 11th June, 1963. The material facts are as follows:

2. The applicant, who is the assessee in this case, is a firm constituted with effect from the first day of October, 1963, to carry on the business of manufacture of hosiery and sale of cotton yarn at Kanpur. Its first accounting period commenced on the 1st of October, 1961 and ended on the 31st March, 1962. For this period, the applicant returned an income of Rs. 74,129/- assessable for the assessment year 1962-63. The income was ultimately assessed at Rs. 86,302/-. The Indian Income Tax Act, 1922, hereafter referred to as the old Act, was in force throughout this account period. The applicant was a new assessee and, therefore, Section 18-A (3) of the Old Act was applicable to it. Section 18-A (3) ran as follows:—

"18A (3). Any person who has not hitherto been assessed shall, before the 15th day of March in each financial year, if his total income of the period which would be the previous year for an assessment for the financial year next following is likely to exceed the maximum amount not chargeable to tax in his case by two thousand five hundred rupees, send to the Income-tax Officer an estimate of the tax payable by him on that part of his income to which the provisions of Section 18 do not apply of the said previous year calculated in the manner laid down in Sub-section (1) and shall pay the amount, on such of the dates specified in that Sub-section as have not expired, by instalments which may be revised according to the proviso to Sub-section (2)."

Under this section, read with Section 18A (1), there was clearly an obligation on the part of the applicant to submit an estimate of the tax payable by him and pay the amount by equal instalments on the 15th of December, 1961 and on the 15th of March, 1962. The applicant, however, did not either file the estimate nor pay.

the amount of the advance tax as required by Section 18A (3).

3 On the 1st April, 1962 the Income Tax Act, 1961, hereafter referred to as the new Act, came into force and, by sub-section (1) of Section 297 thereof, the old Act stood repealed with effect from the said date. As the applicant had not complied with the provisions of Section 18A (3) of the old Act, the Income Tax Officer issued a notice to the applicant on the 18th September, 1964 requiring it to show cause why penalty should not be imposed under Section 273 of the new Act. In reply the applicant stated that the penal provisions of Section 273 of the new Act were not attracted in case of non-compliance with the provisions of Section 18A (3) of the old Act. The Income Tax Officer rejected the contention and imposed a penalty of Rs 500/- under Section 273 (b) of the new Act by his order dated 28th February, 1966.

4 The applicant appealed to the Appellate Assistant Commissioner and contended that Section 273 (b) of the new Act, under which penalty had been imposed would be applicable if the applicant had committed the default under Section 212 (3) of the new Act (corresponding to Section 18A (3) of the old Act). As, however, the new Act was not in force, on the 15th December, 1961 and the 15th March, 1962, when the defaults in question were committed, the provisions of Section 273 (b) could not be pressed into service for imposition of penalty for such defaults. The Appellate Assistant Commissioner overruled the objection. He found that by virtue of the powers conferred on the Central Government by Section 298 (1) of the new Act, the Removal of Difficulties Order No 2 of 1963 had been promulgated which provided that the reference to Sections 212, 215, 216 and 217 in Section 273 of the new Act should be treated as reference to the corresponding provisions of Section 18-A of the old Act in cases where there had been default under Section 18-A of the old Act for the financial year commencing on the 1st day of April, 1961. As, in the instant case, the relevant accounting period fell within the financial year commencing on the 1st day of April, 1961, the Appellate Assistant Commissioner held that the Removal of Difficulties Order was applicable and the default under Section 18-A (3) of the old Act should be regarded as a default under Section 212 (3) of the new Act. The Appellate Assistant Commissioner, therefore, sustained the penalty of Rs 500/- imposed by the Income Tax Officer.

5 At the hearing before us it was contended on behalf of the applicant that, in the first place, Section 298 of the new Act was ultra vires in so far as it

authorises the Central Government to "do anything" in the garb of removal of difficulties. Thus, it was contended, amounts to excessive delegation of powers, including legislative powers, and it should be struck down on that ground. Secondly, it was argued, assuming that Section 298 was validly enacted, the Central Government went beyond the powers conferred by Section 298 in promulgating the Removal of Difficulties Order No 2 of 1963 which authorised the I. T. O to levy penalty under Section 273 of the new Act in respect of default under Section 18-A (3) committed under the old Act. It was contended that the power conferred by the Legislature to the Central Government under Section 298 related only to details regarding the working of taxation laws, such powers were not intended to be exercised for imposition of penalty in respect of a default committed under an Act which had been repealed. It was also contended that the Central Government had no power to give a retrospective effect to the Removal of Difficulties Order from the 1st of April, 1962. Further, it was urged that the order was discriminatory and, therefore, unconstitutional.

6. The challenge to the vires of Section 298 of the new Act must fail in view of the decision of the Supreme Court in the case of *Kalawati Devi Harlalka v Commissioner of Income Tax, West Bengal* (1957) 66 ITR 680 (AIR 1968 SC 162), in which it was held that the section had been validly enacted. It is true that the point now raised by the applicant in the present case, namely, excessive delegation of powers, was not considered by the Supreme Court in that case, but it is not open to this Court to disregard the decision of the Supreme Court on that ground. Under Article 141 of the Constitution, the law declared by the Supreme Court is binding on all courts within the territory of India and we are bound to proceed on the basis that Section 298 of the new Act is valid.

7. The next point for consideration is whether, in promulgating the Removal of Difficulties Order, No 2 of 1963, the Central Government exceeded the powers conferred by Section 298. Sub-section (1) of Section 298 of the new Act which is material for our purpose, runs as follows—
"298 Power to remove difficulties—
(1) If any difficulty arises in giving effect to the provisions of this Act the Central Government may, by general or special order, do anything not inconsistent with such provisions which appears to it to be necessary or expedient for the purpose of removing the difficulty."

In pursuance of the powers conferred by the above Sub-section the Central Government issued the following Order by notification on the 11th June, 1963—

"In exercise of the powers conferred by Section 298 of the Income-tax Act, 1961 (XLIII of 1961), the Central Government hereby makes the following order, namely:—

1. Short title and commencement—(1) This Order may be called the Income-tax (Removal of Difficulties) Order No. 2 of 1963.

(2) It shall be deemed to have come into force on the 1st day of April, 1962.

2. Applicability of Section 273 of Act XLIII of 1961 in certain cases. Where in respect of the financial year commencing on the 1st day of April, 1961, an assessee has furnished an estimate of the tax payable by him under Sub-section (2) or Sub-section (3) of Section 18-A of the Indian Income-tax Act, 1922 (XI of 1922) (hereinafter referred to as the repealed Act), which he knew or had reason to believe to be untrue, or where he has without reasonable cause failed to furnish an estimate of the tax payable by him under Sub-section (3) of Section 18-A of the repealed Act in respect of the said financial year, the provisions of Section 273 of the Income-tax Act, 1961 (XLIII of 1961), shall apply as if the references in that Section to the provisions of Section 212, Chapter XVII-C, Section 215, Section 210 and Section 217 were, so far as may be, references to the corresponding provisions of Section 18-A of the repealed Act."

8. From the terms of Section 298 of the new Act quoted above, it would appear that the Central Government has been authorised by the Legislature to make a general or special order for the purpose stated therein provided the following two conditions are satisfied, namely:—

(i) that there is a difficulty in giving effect to the provisions of the new Act, and

(ii) that such order is not inconsistent with such provisions.

As regards the first pre-condition, there is no doubt that the Central Government was faced with obvious difficulty. As we have already noticed, the applicant was liable under the old Act to furnish an estimate of the advance tax payable by him and to pay the same in equal instalments on the 15th December, 1961 and on the 15th March, 1962, when the old Act was in force. There is no dispute that the applicant did not comply with these requirements. The applicant was, therefore, liable to penalty under Section 18-A (9) read with Section 28 (1) of the old Act. The old Act, however, was repealed on 1-4-1962 by virtue of the provisions of Section 297 (1) read with Section 1 (3) of the new Act. By reason of the repeal the applicant could not be proceeded against under the provisions of the old Act in respect of the default committed by it

and it is not possible to take penal action against the applicant under Section 18-A (9). The applicant's liability to penalty, however, was not extinguished. Section 6 of the General Clauses Act (Act No. X of 1897) provides as follows:—

"6. Where this Act, or any Central Act or Regulation made after the commencement of this Act repeals any enactment hitherto made or hereafter to be made, then, unless a different intention appears, the repeal shall not—

(a); or

(b); or

(c) affect any right, privilege, or obligation or liability acquired, accrued or incurred under any enactment so repealed; or

(d); or

(e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the repealing Act or Regulation had not been passed."

9. In the case of 1967-66 ITR 680= (AIR 1968 SC 162) (supra) the facts were that the Commissioner of Income-tax West Bengal issued a notice under Section 33-B of the old Act on the 24th January, 1963 after its repeal. The question to be decided was whether the Commissioner had jurisdiction to issue the notice under Section 23-B of the old Act in view of Section 297 (2) of the new Act read with paragraph 4 of the Income Tax (Removal of Difficulties) Order, 1962. The matter was heard by Banerji J., sitting singly, in writ jurisdiction. He held that a proceeding under Section 33-B of the old Act was, in reality a proceeding in assessment and, therefore, the notice was saved by reason of the provisions of Section 297 (2) (a) of the new Act. On behalf of the Revenue, Section 6 of the General Clauses Act 1897, appears to have been also pressed into service to validate the impugned notice. The learned Judge observed that as the Commissioner could take action under Section 33-B of the old Act, even after its repeal, in view of the saving provisions of Section 297 (2) (a) of the new Act, it was not necessary to determine whether Section 6 of the General Clauses Act also saved the power of the Commissioner under Section 33-B of the old Act, but he remarked as follows:—

"If it had been necessary to do so, I would have no hesitation in holding that such power would be saved under Section 6, Clauses (c) and (e) of the General Clauses Act, there being no intention to the contrary in the repealing Act of 1961."

10. When the case, eventually went up in appeal to the Supreme Court, and it has been reported in 1967-66 ITR 680- (AIR 1968 SC 162), Sikri J., quoted the above remarks of Banerji J., but he held that Section 6 of the General Clauses Act had no application to the case inasmuch as a contrary intention appeared from the language and content of Section 297(2) which provided for all matters relating to assessments including revisions under Section 33B. The case before us, however, stands on a different footing. Levy of advance tax under Section 18-A of the old Act is not a matter relating to assessment of income-tax. Assessment proceedings commence after the previous year has closed and the assessment year has started. In the case of advance tax, however, the procedure for its levy commences during the previous year itself. It is not possible, therefore to hold that proceedings for levy of penalty for non-payment of advance tax are included in the proceedings for assessment of income-tax. Consequently, none of the Sub-clauses (a) to (m) in Section 297 (2) apply to save the liability to penalty for non-payment of advance tax already incurred under the old Act. It cannot also be assumed that the Legislature intended that the liability to pay penalty for failure to furnish returns or to pay advance tax incurred under the old Act should terminate with the repeal thereof. Such an assumption would be irrational. There is, therefore, no difficulty in holding that the power to levy penalty under Section 18-A of the old Act is saved by S. 6, Clauses (c) and (e) of the General Clauses Act quoted above, there being no intention to the contrary in the repealing Act.

11. The position, therefore, is that though the liability survived, there was no specific provision in the new Act to give effect to such liability. In view of this patent difficulty the Central Government promulgated the Income-tax (Removal of Difficulties) Order No. 2, 1963, which provides inter alia that the default contemplated in Section 18-A (3) of the old Act shall be regarded as a default under Section 212 (3) for the purpose of imposition of penalty under Section 273 of the new Act.

12. The first condition precedent, namely, the existence of a difficulty in giving effect to the provisions of the new Act, is clearly satisfied. The second condition as noted above, is that the Central Government may not do anything inconsistent with the provisions of the new Act. Mr. Sharma, appearing for the assessee, submitted that this provision is not satisfied in the present case. His contention is that imposition of penalty in the present case by resort to the provisions of the Order would result in an infringement

of Section 273 of the new Act, which requires the satisfaction of the I. T. O. "In the course of any proceedings in connection with the regular assessment." He contended that as there has been no regular assessment under the new Act, Section 273 was not attracted. The contention is, however, misconceived inasmuch as the regular assessment for the relevant assessment year 1962-63 was clearly made under the new Act. We are not satisfied that the provisions of the Order are inconsistent with the provisions of the new Act which also impose penalty for failure to pay advance tax in the same way as the old Act did.

13. We are unable to hold, therefore, that the Central Government exceeded its powers in promulgating the Income-Tax (Removal of Difficulties) Order No. 2, 1963.

14. There is also nothing in the content of the terms of the Order to suggest that it is discriminatory in nature. It applies equally to all assesseees who were liable to pay advance tax and furnish estimates under the old Act for the financial year 1961-62, but defaulted in doing so. The Income Tax Officer has no discretion in the matter. He has to impose penalty on all such defaulters and the Order gives him no scope for meting out differential treatment to them. If some assesseees had escaped penal proceedings before the promulgation of the Order on 11-6-1963, that does not mean that the Order itself makes a discrimination between assesseees in the same category. This contention must also fail.

15. The last contention is that the Central Government was not competent to give retrospective effect to the Order in exercise of its delegated powers. It would be noticed that the Order was promulgated on 11-6-1963, but it was given effect from the 1st of April, 1962. In the case of this assessee notice under Section 274 was issued on 18-9-1964, after the promulgation of the Order and penalty was imposed even thereafter on 28-2-1966. Hence, the fact that the Order has been given retrospective effect, does not operate to the prejudice of the assessee and it would be merely academic to enter into a discussion of the applicant's contention in point.

16. The petition in writ must, therefore, be dismissed with costs without prejudice to the contentions of the applicant not bearing on the validity of Section 298 of the new Act and of the Order. The applicant would be at liberty to agitate such other contentions before the Income Tax Appellate Tribunal, if it is so advised.

RSK/D.V.C.

Petition dismissed.

AIR 1969 ALLAHABAD 571 (V 56 C 109)
RAJESHWARI PRASAD AND
A. K. KIRTY JJ.

Mahant Manadeo, Appellant v. Mahant Yaduvansh Deo Gopinath, Respondent.

First Appeal No. 374 of 1957 D/- 29-8-68, against judgment and decree of Civil J., Allahabad, D/- 28-9-1957.

(A) T. P. Act (1882), S. 8 — Deed, construction — Real intention of parties must be judged from contents of document as a whole and not from use of any specific word or phrase therein.

(B) Hindu Law — Religious Endowments — Relinquishment of office of Mahantship cannot be made in favour of person other than the person next entitled to succeed.

(C) Hindu Law — Religious Endowments — Head of religious or charitable institution has no power to bargain away his office or alter constitution of institution. AIR 1917 Pat 382, Foll.; AIR 1963 SC 309, Ref.

(D) Civil P. C. (1908), O. 8, R. 2 — Special defence — Suit on basis of contract — Defendant may admit contract and contractual liability and to avoid effect of admission raise plea of frustration or performance.

(E) Civil P. C. (1908), S. 92, O. 8, R. 2 — Principles of Clauses (1) and (2) of S. 92 apply to defence also — Suit not under S. 92 — Special defence — Plea requiring Court to enter into questions covered by provisions of S. 92 — Cannot be entertained.

It is undoubtedly open to a defendant to raise special defence by raising plea in confession and avoidance. The Court is bound to consider such a plea of avoidance provided, the Court is competent to go into the questions on which that plea is based in that particular proceeding. In case, a consideration of that plea necessitates going into question which the particular court is not competent to go into in that proceeding, the Court must refuse to entertain that plea or to enquire into those pleas. A special defence raised in a suit, which is not a suit under Section 92 Civil P. C. and which requires the Court to enter into an enquiry of questions which are covered by the provisions of S. 92 cannot be entertained and enquired into by the Court. The principle underlying S. 92 Clauses (1) and (2) is equally applicable to defence also. The first reason for arriving at that conclusion is that there does not appear to be any rational basis for holding the view that a defence by which a defendant seeks to obtain such relief as can be granted to a plaintiff only in a suit under S. 92 should not be equally barred in a suit which is

not a suit under S. 92. The other reason for arriving at the above conclusion is that when a plea in confession and avoidance is raised by the defendant, his position is analogous to the position of a plaintiff, particularly in relation to the plea of avoidance. It is for the defendant in such a case to establish the correctness of the plea, and it is only when that is done that he would be entitled to the relief which he seeks by raising that defence. AIR 1927 All 526, Rel. on.

(Paras 29 and 30)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 309 (V 50) =

1963-3 SCR 623, Abdul Kayum

v. Mulla Alibhai 24

(1927) AIR 1927 All 526 (V 14) =

ILR 49 All 191, Ram Dayal

v. Mt. Sarswati 30

(1917) AIR 1917 Pat 382 (V 4) =

40 Ind Cas 276, Krishna Dayal

Gir v. Laldhari Gir 22, 23

Shambhu Pd. and Lalji Sinha, for Appellant; S. B. L. Gour and K. B. L. Gour, for Respondent.

R. PRASAD, J.:—This is a defendant's first appeal. It is directed against the judgment and decree of the learned Civil Judge, Allahabad in original suit No. 6 of 1953 dated 28th September 1957.

2. The plaintiff-respondent Mahant Yaduvansh Deo alias Gopinath filed the suit on certain facts to be narrated hereafter and prayed for the following reliefs—

(a) That the deed dated 11th January, 1951 registered on the 18th January 1951, be suitably rectified or set aside in the light of the submissions made in this plaint which is valued at Rs. 31,320/- and the defendant be directed by an injunction to give up the management of the movable and immovable properties of the Sangat, mentioned in the First and the Second schedules of this plaint, and the administration of its other affairs to the plaintiff, and be restrained from interfering with the plaintiff's administration and management of the Sangat, its properties valued Rs. 3,792/- being one-tenth of the total valuation of Rs. 37,920/-.

(b) That the defendant may be ordered to render accounts of his agency period to the plaintiff from the date of his taking over as such till the date of handing over which is valued at Rs. 1,907/8/-, the profit from the properties for 15 months from the date the deed in question was registered i.e. 18th January, 1951 to the date of filing the suit.

(c) That a receiver may be appointed to take charge of the administration and management of the affairs and properties of the Sangat pending the present litigation. A separate application is also being made for the same. No valuation for this relief is necessary as in the Court-fees Act

only a fixed amount of Rs 18/12/- is provided for the appointment of receiver.

(d) That if the plaintiff be found to be out of possession of the Sangat properties, mentioned in the First and the Second Schedules of this plaint, then possession may also be given over the same which is valued at Rs 37,920, and

(e) That the costs of the suit may be granted to the plaintiff

3. The facts with which the plaintiff came to Court put briefly are as follows -

On the 25th December 1940, the plaintiff was installed as Mahant of Udasin Sangat, Daraganj, Allahabad city and from that time he administered the affairs of the Sangat till the 5th April 1950. On 5th April 1950, the plaintiff was arrested by the Daraganj Police, Allahabad city and was lodged in Naini Central Jail lock-up as an under-trial prisoner in connection with certain criminal cases but was finally released on the 6th March, 1952 after obtaining acquittals. The defendant is the Mahant of another Udasin Sangat at Amritsar. When he heard of the arrest of the plaintiff, he came down to Allahabad and with the intention of usurping the plaintiff's Mahantship, interviewed him in Jail and made such representations to him as were calculated to create fear in the mind of the plaintiff. He represented to the plaintiff that the criminal cases against him were very serious and unless properly defended, they might end in conviction. He also offered financial help for the parvi of the cases as well as to properly administer the affairs of the Sangat during the absence of the plaintiff in Jail. The plaintiff was extremely puzzled and on account of the distress in his mind, he could not exercise any foresight. The result was that he was readily led away by the representations of the defendant and reposed confidence in him. The defendant, however, played deception on the plaintiff. It was suggested by the defendant that with a view to raise money for the parvi in the criminal cases and with a view to properly administer and manage the affairs of the Sangat and its properties, the plaintiff should appoint the defendant by means of a registered deed as his managing agent during his absence, and that he would render accounts to him when the plaintiff returned from jail and would further hand over the management to the plaintiff. Placed under the circumstances as the plaintiff was he agreed to the proposal of the defendant and appointed him as his managing agent on the 11th January, 1951, by signing a deed of appointment which was got prepared by the defendant outside the jail on the 10th January 1951. The defendant never intended, in fact to help the plaintiff in the time of difficulty but his real intention was to usurp the gaddi.

The signature of the plaintiff was obtained on the document without allowing the plaintiff to have knowledge of its contents or without allowing the plaintiff to appreciate the implications thereof. The recitals made in that document are false and fraudulent. At any rate, the clause in the deed which was to the effect that Mahant Mandeoji Mahant Akhara Kashiwala had all the rights and that he could manage the affairs of this institution in any way he liked, and that after the acquittal of the plaintiff, it would be in the option of Mahant Mandeoji either to return the Mahantship to the plaintiff or to decide the matter in any way he liked, was fraudulently inserted in the deed and was never brought to the knowledge of the plaintiff. The plaintiff never intended to relinquish or release his rights, title and interest relating to the office of Mahantship, Daraganj Sangat in favour of the defendant. Seven days after the document was prepared, it was presented for registration in the office of the Sub-Registrar, Allahabad on the 18th January, 1951. The plaintiff was brought from jail to the office of the Sub-Registrar in police custody. The Sub-Registrar read over the deed to the plaintiff. When the plaintiff found its language ambiguous and confusing he immediately made a statement before the Sub-Registrar and got the same incorporated in the registration endorsement, to the effect, that on being released from jail, he would get back his right of ownership with power to keep the management in his own hands or to appoint any other person for the purpose. When the plaintiff was released from jail on the 6th March 1952, he attempted to get back possession from the defendant but the defendant refused to hand over possession to the plaintiff. The plaintiff, thereafter, served a registered notice dated 12th April 1952 on the defendant. In reply to that notice, the defendant stated that he became full fledged Mahant of the Daraganj Sangat under the deed mentioned above. The deed did not express the real intention of the plaintiff and most of its contents are against the intention of the plaintiff.

4. On such allegations, the plaintiff prayed for the reliefs which have been mentioned above and filed the suit in forma pauperis.

5. The suit was contested by the defendant. He filed a written statement traversing most of the allegations in the plaint. It was, however, admitted that the plaintiff was in management of the property till the 5th April 1950. According to the defendant, the Math called Chhota Udasin Sangat Gaddi Baba Mela Ram is a branch of Akhara Kashiwala of Amritsar which had similar branches at

Banaras, Bindraban, Rameshwaram and other places. The Mahant of Amritsar Math is the Shri Mahant of all its branches and exercised controlling influence over all the Maths and has power to appoint and remove Mahants. Mahant Charandeo was the last Mahant of Daraganj Sangat, who was appointed by Shri Mahanth Hargyandeo, the then Mahant of Amritsar Math. Mahant Charandeo died on 5th December 1940 and at that time, the defendant was the Mahant of Amritsar Math.

6. On learning of the death of Mahant Charandeo, the defendant came to Daraganj Sangat with a view to appoint a successor to the deceased Mahant. According to the custom prevailing in all the Udasin Sangats, it was not necessary that the Gaddi should go from Guru to the eldest chela or to any chela of the previous Mahant. It was open to the Shri Mahant to appoint any Sadhu of the Guru Sampradaya to which the parties belonged. The plaintiff did not and could not succeed to the Gaddi of the Sangat on the death of Mahant Charandeo as of right. The defendant, however, appointed the plaintiff the Mahant of the Daraganj Sangat on 14th April 1942 when the plaintiff executed a deed of agreement. The fact that the Daraganj Sangat was a branch of the Amritsar Math and that the Mahantship was to be given by Shri Mahant was admitted in the said agreement. The agreement showed that such a Mahant was to be of good conduct and was not to marry nor was he entitled to transfer the Math property in any manner. It was also conceded in the agreement that the Mahant would be liable to be removed from the Gaddi in case he went against practices prevailing in the Sangat or against the terms of his appointment given in the agreement. On being thus appointed the Mahant of Daraganj Sangat, the plaintiff obtained possession of the Sangat property. The plaintiff filed a copy of that agreement in the Municipal Board, Allahabad and obtained the mutation of his name in respect of the properties attached to the Sangat. For many years, the defendant had no occasion to come down to Allahabad, but it appeared to the defendant that the plaintiff had taken to bad ways, soon after his appointment, as Mahant. He had started wasting and alienating the properties belonging to the Math. He had sold away, by means of various sale deeds, a number of houses belonging to the Sangat. The defendant then gives a list of the houses or parts of houses alleged to have been thus sold away by the plaintiff.

7. After the year 1948, complaints were made to the defendant about the way of life of the plaintiff and also about mismanagement of the Math and its proper-

ties. It was also communicated to the defendant that the plaintiff got himself married and was further under police surveillance. The defendant was also informed that the plaintiff had been arrested on serious charges of dacoity and other offences. It, therefore, became necessary for the defendant to come down to Allahabad in order to find out the state of affairs existing in the Sangat. He discovered that the Guru Samadhi and Guru Gaddi for worship and Puja Pratishtha of Baba Shri Chandraji was really occupied by people of wholly undesirable character, not only males but females as well. On making enquiry, the defendant came to know that the reputation of the Sangat had gone to gutters and the defendant, therefore, realised that the only possible method of regaining the reputation of the Sangat was by removing the plaintiff from Mahantship and by turning out the people who were then occupying the Sangat premises, and further by bringing back the Sadhus after making suitable arrangements for their residence and feeding. The defendant at once proceeded to assume the management of the Sangat and its properties and to remove the plaintiff from the Gaddi and from the possession of the properties of the Sangat. This the defendant is said to have done by the 10th May 1950. The defendant then met the plaintiff in jail and informed him of his removal and the action taken by the defendant. The defendant then approached the Municipal Board of Allahabad for removal of the name of the plaintiff from the Sangat properties and for mutation of his own name in its place. The defendant proposed not to appoint any other Mahant of the Gaddi till the affairs were brought back to their former condition and the reputation of the Sangat re-established.

8. With regard to the deed of relinquishment, the case of the defendant was that such a deed was necessary as the Municipal Board wanted a formal document showing that the possession of the properties had been given to the defendant and that the plaintiff had ceased to be in possession thereof. When defendant saw the plaintiff in jail for the first time the plaintiff pleaded for mercy, but finding that of no avail, the plaintiff pleaded for his wife and the two children to be permitted to remain and be maintained by the Sangat at least till the plaintiff returned from jail. To this proposal, the defendant agreed. The deed of relinquishment was not brought about by fraud or undue influence or inducement of any kind. The statement that the plaintiff had made at the time of registration was entirely at the instance of the people who were interested in not allowing new management to come into existence in the Sangat. Whenever, the de-

defendant had occasion to have a talk with the plaintiff in jail, it was always in the presence of jail officials and there could be no possibility of practising or exercising any fraud or undue influence. It is incorrect that the document was executed for the purpose of the management of the Sangat properties during the absence of the plaintiff in jail or was for the purpose of raising money for the prosecution of plaintiff's case. Both under the prevailing custom as well as under the terms of the agreement, the defendant had absolute right to appoint and remove a Mahant and to make arrangement for the management and up-keep of the Sangat and its properties. The income of the Sangat was to be spent in the worship and the feeding of the Sadhus. The main source of the income of the Sangat was from rent of the various houses owned by the Sangat. Soon after the plaintiff assumed management, income from property diminished considerably. This was so not only on account of transfers made by the plaintiff but also on account of neglect and disrepair of the Sangat properties. The defendant spent large sums of money in improving the property and the income as a result thereof increased. The defendant would have to be involved in various litigations for the recovery of the properties transferred by the plaintiff. Worship in the Sangat had been resumed and Sadhus had again come back to the Sangat. The plaintiff did not have any right to transfer any property of the Sangat and the management of the plaintiff had proved extremely detrimental to the interest of the Sangat. The plaintiff did not have the right to claim back the management. Further, in case the plaintiff reverts to the management, the transfers made by him would remain unchallenged. This again would be a further loss to the Sangat. The income from the properties was quite sufficient for all its legitimate purposes. There was absolutely no necessity at all for the plaintiff to dispose of any property of the Sangat. The defendant was entitled to remove the plaintiff from Mahantship and the plaintiff was no more entitled to get back either the Mahantship of the Sangat or possession of its properties. The removal of the plaintiff having been legally and finally effected, he ceased to have any right in the Sangat except that of an ordinary Sadhu of the Sampradaya. The plaintiff in view of his action and conduct had completely disentitled himself from claiming the relief set out in the plaint. Some of the items of the properties in Schedule II of the plaint were not found when the defendant took over the management and in case they did exist, the plaintiff is clearly accountable for the same to the Sangat.

9. On behalf of the plaintiff, attempt was made to file a replication but from the vernacular order-sheet of the court below dated 4th February 1954, it appears that the court did not accept the same, because on behalf of the defendant objection was raised to the filing of the same. On such pleadings, the learned Civil Judge, framed the following issues—

1 Whether the deed of relinquishment dated 10th January 1951 was got executed from the plaintiff by fraud and undue influence as alleged by him? If so, its effect?

2 Whether the plaintiff was appointed Mahant of the Udasin Sangat by the defendant in terms of the agreement dated 14th April 1942 as alleged by the defendant? If so its effect?

3 Whether the Sangat in question is the branch of Akhara Kashuwala of Amritsar as alleged by the defendant? If so, has the defendant a right of appointment or removal of the Mahant of this Sangat?

4 Has the defendant removed the plaintiff from the office of Mahant as alleged by him? If so, its effect?

5 Whether the property of Schedule II of the plaint existed and came in possession of the defendant as alleged by the plaintiff?

6 Whether defendant is liable to render accounts to the plaintiff? If so, in respect of which item of the property?

7. To what relief if any is the plaintiff entitled?

10. On Issue No. I, the learned Civil Judge took the view that what was agreed upon between the parties was that the plaintiff would execute a deed of management in favour of the defendant at the instance of the latter so that he could raise money from the Sangat properties and defend the plaintiff in the criminal cases pending against him. The defendant later on got a deed of relinquishment prepared on his own instructions without giving opportunity to the plaintiff to know really that he was relinquishing his right of Mahantship and the defendant got the signature of the plaintiff on the said deed. The plaintiff relying on the defendant that he would get the deed of management prepared as agreed upon between them, put his signature on the said deed knowing that it was the same about which there had been an agreement between the parties. The deed, therefore, is tainted with fraud and undue influence and is liable to be set aside at the instance of the plaintiff. The learned Civil Judge further found that the deed was also invalid on the ground that although it was in effect a gift-deed, it was not attested by two witnesses as required by Section 123 of the Transfer of Property Act.

The learned Civil Judge then held that the head of a Math did not have the right to alienate his office by sale, gift or will, nor could he appoint a successor unless authorised to do so by the deed of endowment or the usage of the institution. Alienation by way of gift or will of a religious or secular office without receiving any consideration was, however, permitted in favour of a person standing next in the line of succession. In this case, however, the learned Civil Judge found that the defendant Mahant Mandeo could not be said to be a person standing next in the line of succession. He could not be the successor of the plaintiff. No relinquishment of the office of Mahantship, therefore, could be validly made in favour of the defendant. This according to the learned Civil Judge was a further reason for coming to the conclusion that the deed of relinquishment is not binding on the plaintiff.

11. Issues Nos. 2 and 3 were dealt with together and although there is no definite finding on issue No. 3, during the course of discussion of those two issues, the learned Civil Judge has observed that from the deed of agreement dated 14th April 1942, it would appear that the Sangat of Daraganj was branch of Akhara Kashiwala Amritsar and was connected with the latter in that capacity. In respect of issue No. 2, the learned Civil Judge recorded the finding that the plaintiff was not appointed the Mahant of Daraganj Sangat by the defendant. On issue No. 4, the Court came to the conclusion that it was not proved that the defendant had removed the plaintiff as alleged by him. Issue No. 5 is said to have not been pressed and on issue No. 6, the Court below found that the defendant was liable to render accounts to the plaintiff.

12. As a result of its finding, the Court below decreed the plaintiff's suit for setting aside the deed dated 11th January 1951; for the ejectment of the defendant from Daraganj Sangat property mentioned in Schedule I of the plaint; for injunction restraining the defendant from interfering with the plaintiff's management of the Sangat in suit and its properties and for rendition of accounts during the period from 11th January 1951 till possession was delivered to the plaintiff over the Sangat property. It appointed Sri Bal Mukund, Vakil Commissioner for the purpose of taking accounts. It also directed that a copy of the decree be sent to the Sub-Registrar in whose office the deed dated 11th January 1951 had been registered under section 39 of the Specific Relief Act. Court-fee was directed to be recovered by the State Government from the defendant and a copy of the decree was ordered to be forwarded

to the Collector, Allahabad under Rule 14 Order 33 of the Code of Civil Procedure.

13. The first question in order of importance which needs consideration in this appeal is whether the deed of relinquishment dated 10th January 1951 was obtained from the plaintiff by practising fraud or by exercise of undue influence as alleged by the plaintiff. The specific fraud pleaded by the plaintiff is to the effect that although the plaintiff had agreed to execute a deed of management with a view to give the power of management to the defendant to look after the Sangat and its property during the absence of the plaintiff in jail, the defendant fraudulently got a deed of relinquishment executed without bringing the contents thereof to the knowledge of the plaintiff. As regards undue influence, the case of the plaintiff is that as he was in a distressed state of mind on account of his being in the lock up in connection with certain criminal cases and as it was necessary to raise fund to defend himself in those criminal cases and as the defendant promised to help the plaintiff in that matter and also to look after the management of the Sangat and the properties in his absence, the plaintiff was left with no option but to repose confidence in the defendant and to act upon his instructions. With a view to find out whether it was really a deed of management that was intended to be executed by the plaintiff, it is necessary to consider the contents of the terms of that deed. A certified copy of that deed is marked Ex. 1 in this case. The recital in the deed relevant for the purpose is as follows:—

"arsa chand mah se mere chand dushmanon ne ranjishan mujhe ek mukadma faujdari men phansa ker giraftar karadiya hai aur zer hirsat hoon lihaza intezam asthan Chhota Udasi Daraganj me khal-al waqe ho raha hai aur aenda bhi nuksan hone ka andesha hai niz yeh bhi andesha hai ki mere badkhwahan kisi hele se jaedad manqula wa ghairmanqula asthan mazkoor ko bhi nuksan pahncia wen jiski waja Nirvan Melaram sampati ko nuqsan hoga lihaza bakheyal intezam was tahaffuz jaedad Asthan Chhota Udasi Daraganj jo Nirvan Melaram sampati chal aur achal hai us se dast bardar hota hoon — Mahant Mandeoji, Mahant of Akhara Kashiwala Jinko asthan mazkoor ke mutalliq pura akhtiyar hasil hai woh jis taur se munasib samjhe uska intezam kare bad mere mukadma faujdari se bari hone per Mahant Mandeoji mazkoor chahe to mujhe mahanti wapas dewe ya jis taur se chahe faisla nirnain kare."

14. The necessity for the execution of the deed is, therefore, said to have arisen on account of the fact that the plaintiff had been wrongly involved in criminal cases and was under detention on account of which circumstance proper manage-

ment of the Asthan Chhota Udasi Daraganj and its properties was not possible. The purpose for executing the deed is said to be "bakhoyal intezam aur intanafluz jaedad Asthan Chhota Udasi Daraganj" i.e., to say for the management and maintenance of the Asthan, and its properties. Although this is said to be the purpose for executing the deed, it proceeds illogically to say "is se dast bardar bota hoon". Relinquishment was hardly necessary for fulfilling the purpose for which the document purports to have been executed, namely, proper management and maintenance of the property of the Asthan. Such purpose could logically be fulfilled by making arrangement for management and maintenance of the Asthan during the absence of the plaintiff. In spite of the use of the words "dast bardar" in the deed, the contents of the same do suggest that the idea behind the transaction was to make some effective arrangement for the proper management, upkeep and maintenance of the Asthan and its properties.

Further, the contents noted above go to suggest that the parties were contemplating to revert the plaintiff to the Asthan after his release from the jail or acquittal from criminal cases. In case, it was really intended to be a complete relinquishment of the office, the question of the plaintiff reverting to the Asthan really could not arise. Such a contemplation can very well fit in with an arrangement for the purpose of proper management, maintenance and upkeep of the Asthan during the absence of the plaintiff. The real intention of the parties is to be judged from the contents of the document as a whole and not from the use of any specific word or phrase therein. Reading the document as a whole, we do not find it possible to say that the appreciation of the contents and terms of the document made by the learned Civil Judge, is not correct. We agree with the learned Civil Judge that the tenor of the deed thus suggests that the real intention of the plaintiff was to make arrangement for the management of the Sangat and its properties during his absence.

15. The plaintiff made an attempt to clarify his intention when he made statement before the Sub-Registrar at the time of registration of the deed. It is unfortunate that the Sub-Registrar has not been examined as a witness in this case. The exact language used by the Sub-Registrar for indicating the objection of the plaintiff is as follows —

"Muqir Mahant Yaduvansh Deo ne bayan kiya ki Mukadma se bari hone ke bad mere malkana mere ko wapasa kar diya jae — intezam kar chahae ap rahe ya aur kisi ko mukarrar kare."

The manner in which the Sub-Registrar had made a note of that objection is high-

ly unsatisfactory. Ordinarily one would think that the whole statement that the plaintiff might have made before the Registrar would read something like this —

"mujh se veh tal hua tha ki mukadma se bari hone ke bad mera malkana mujhe wapasa kiya jawe"

The way in which the Sub-Registrar has reproduced the objection gives the impression that the plaintiff was making a prayer to the Sub-Registrar himself to return his malkana to him after his acquittal in the criminal cases. That, the plaintiff, could not do. We are, therefore, of the opinion that absolute reliance on the language used by the Sub-Registrar for noting down the protest of the plaintiff cannot be placed. There was also some controversy between the parties before us whether the words used by the Sub-Registrar are "rahe" or "rahen" and "kare" or "karen". That difference in the language, however, is not very material. What is obvious is this that after the contents of the deed were read over to the plaintiff by the Sub-Registrar as admitted by the plaintiff, the plaintiff did raise an objection to the contents of the deed and, that, that objection did relate to the question whether the contemplation of the parties was that the plaintiff on his acquittal in criminal case was to revert as a Mahant and to take possession and control of the Asthan and the properties or not. It is, therefore, clear that the plaintiff did indicate that the recitals made in the deed were at least in some sense not in conformity with what had been agreed upon.

If the plaintiff must be visited with the legal consequences of the registration of that deed, the protest raised by him before the Sub-Registrar must be read as a part of contents of the deed that was eventually registered. That episode does lend support to the case of the plaintiff to a certain extent. It is not disputed that the defendant did pay visits to the plaintiff in jail, the defendant did discuss matters relating to the Asthan with the plaintiff in jail, the document was got prepared by the defendant out of jail, and that when the defendant was taken to the office of the Sub-Registrar, he was in police custody. The plaintiff was undoubtedly in a distressed state of mind and, therefore, it was natural that he would welcome the offer of assistance from any quarter during that period. The court below also rightly gave some importance to the consideration, that immediately after his release from custody, the plaintiff started his attempts to get back possession of the Asthan and the properties. There is absolutely no proof of the fact that the statement given by the plaintiff before the Sub-Registrar was really at the instance of any other person as suggested on behalf of the defendant.

16. The circumstances mentioned above would by themselves not have led us to the conclusion in favour of the plaintiff, had it not been for the existence of certain other circumstances in the case which we now propose to discuss. The representations made in the deed of relinquishment do not fit in even with the state of affairs, which, according to defendant's own case, existed on that date. It may be recalled that according to the case of the defendant, the plaintiff had already been removed from the office of Mahant, and possession of the Asthan and its properties had already been taken by the defendant on the 10th May 1950. On the date when the deed of relinquishment was executed and registered, the plaintiff, according to the case of the defendant, was neither the Mahant, nor was he in possession and control of the management and properties of the Asthan. The plaintiff, therefore, on that date had no rights to relinquish and was not in possession of the Asthan and its properties to be handed over to the defendant.

There is no explanation on behalf of the defendant to explain the anomaly of this position. The only explanation that has been offered on behalf of the defendant is that a deed of relinquishment was necessitated because, the Municipal Board authorities would not record the defendant's name in the Municipal register unless a deed had been obtained from the plaintiff. There is no difficulty in rejecting the explanation at once. The Municipal Board was not at all concerned with the question of right and title to immovable property. It had only to find out as to who was in possession of the properties in question. Consent of the recorded owner, namely, the plaintiff would have been sufficient to compel the Municipal authorities to record the name of the defendant. Such a consent could validly be communicated through a letter or by means of some power of attorney. It is unthinkable that the name of the defendant could not be recorded in the Municipal register without there being in existence a regular and duly registered deed of relinquishment by the plaintiff. If the defendant had already dispossessed the plaintiff and had taken possession of the properties, there is no explanation why this real state of affairs was suppressed in the deed of relinquishment. Not only was that state of affairs suppressed but diametrically opposite state of affairs was shown to exist. It is, therefore, clear that the representations made in the deed of relinquishment do not really represent the true state of affairs that was in existence at that time.

It may be that this Court today after investigation comes to the conclusion that the case of the defendant, that he had re-

moved the plaintiff from the office and had taken possession of the properties, is not correct. But so far as the defendant is concerned according to him on the date when the deed of relinquishment was executed, such was the then existing state of affairs. Our suspicion against the validity of the deed of relinquishment is further strengthened by the consideration of the conduct of the defendant himself. It may be noted here that when Mahant Charandeoji died, the defendant made an application before the Municipal Board seeking his name to be recorded in place of the name of Mahant Charandeoji deceased. A copy of that application has been filed and has been marked as Ex. 21. It is dated 22nd March, 1942. In the first paragraph of that application, it has been said that the houses, the numbers of which were given above were the property of new Akhara and Mahant Gur Charandeo Udas was holding the same as a representative of the Naya Akhara. The second paragraph says that Mahant Gur Charan Deo died and that the said houses had, therefore, passed on to the representative of the Akhara i.e., the petitioner. In the third paragraph, it is urged that the petitioner was the nearest heir "chela" of the Mahant and was entitled to the mutation of his name in respect of the houses. In the fourth paragraph, it has been said that there was no person at Allahabad who could claim the right. In the fifth paragraph, it has been said that it was the recognised custom amongst the Udasis that the Chela who was nearest in degree and who was recognised in the Panchayat of Mahant, could succeed to the property of outgoing Mahant, and in the sixth and last paragraph, it has been said that Yadubans Deo (the plaintiff) was neither a chela of the Mahant nor did he have any right to the properties in question.

17. When the defendant was in the witness-box, he was confronted with this application. He conceded that he was not disciple of Guru Charandeo. He asserted that he had not described himself as the chela of Guru Charandeo in any application. He admitted that on 22nd March, 1942, he had filed an application in English in the municipality for getting his name recorded against the Sangat property. The contents of the application were then translated to the witness in vernacular, and the witness admitted that he had filed an application to that effect. He went on to say that he was the nearest heir of Mahant Charan Deo on account of his being a Shri Mahant, but that he was not a chela nor was he, his nearest heir on account of his being a chela. He then proceeded to add that he did not get himself described as chela. He, however, did not recollect by whom he got the application written out. He did

not know whether the scribe was a friend of Yadubansh Deo Mahant. He continued that he got it mentioned in the application that Yaduvansh Deo was not the disciple of Charandeoji. He then proceeded to say that ten or twenty days before the execution of the agreement of 1942, he came to know for the first time that Yaduvansh Deo Mahant was a disciple of Charandeoji. It is, therefore, not possible to give credit of truthfulness to the defendant. We further agree with the learned Civil Judge that the deed of relinquishment cannot be given effect to as a gift for want of attestation according to law as well as on account of the fact that the relinquishment of the office of Mahantship could not be made in favour of a person other than the person who would be next entitled to succeed.

17A We are, therefore of the opinion that the finding arrived at by the learned Civil Judge that the deed of relinquishment is tainted with fraud and undue influence is correct and the deed is therefore, liable to be set aside and quashed.

18 The next question that arises for consideration in this appeal is as to what really is the effect of the agreement dated 14th April 1942, arrived at between the plaintiff and the defendant. The original agreement has been filed in this case by the defendant and has been marked Ex. A 5. It is necessary to quote some portions of the actual language used in that document. It has been executed by Mahant Yaduvansh Deo (plaintiff) chela of Mahant Charandeo. It begins by reciting—

"Jo ke mere Guru Mahant Charandeo Ji Marhoom ka bai-kunth vas 5 December 1941 ho gaya (it is agreed by the parties that the correct year is 1940 and not 1941) choorki mere guru ke taluqaat devon... samperdai Mahant Mandeo Ji Chela Harbans Deoji ke akhara Kashiwala... Shahar Amritsar hai jo ke Akhara Baba Malaram ki shakh hai Mahant Charandeo ka Chela Taslim kiya aur mana aur minjanub Akhara Kashiwala waqe shahar Amritsar Mamlooka rasm wa rawaj Udasi saro pao diya isliwa badurusti iqrar karta hoon jaisa ke mahant Hargayan Deo Ji se Mahant Charan Deo Ji ke hath rasm wa rawaj kar ke Mahant kiya tha aur har tarah se ab main musmni Mahant Yaduvansh Deo ko karta honn—

(1) Yeh ke main bhi qabl apne Guru Charan Deo Ji ke Akhara Kashiwala waqe Amritsar se tulluq rakhkhon ga aur rahoon ga aur na Asthan misl sabiq badastoor sabiq rasm wa rawaj karta Akhara ke rakhkhon ga Akhara Kashiwala waqe Amritsar darwaja Sultanpind se rahe ga.

(2) Yeh ke Akhara mazkoor is wasool ke mutabiq me rahega aur shadi no Farooonga aur har tarah se nek chalan rahkar

apne Guru ki Gaddi ka nam nishan qaem rakhkhooonga

(3) Yeh ke Daraganj Gaddi ki kisi jaedad ko kisi tarah se talaf no karoonga aur na usko kisi ke inteqal se muntaqil na karoonga.

(4) Yeh ke dar soorat karne khelaif warzi shariat maskoor ba daffat number 1, 2, 3 ke mutazakkera bala Mahant Mandeo Ji chela Mahant Harbansdeo Sadhu Udasi ko minjanub wa nuz ke Mahant Mandeo Ji ko akhtiyar hasil hoga bar taraf kerdeven manmuqir Mahant Yaduvans Deo Ji ka yeh kahna hai ki is iqrar name ke wasool per main batariq wa qaeda ki mutabiz kerta rohoon ga aur is men koi dusra haqdar gaddi ka Mahant hoga aur agar hamko waqt zarurat kabhu zarurat hogi to main Mahant Mandeo Ji ke rai se kam anjam kerta rahoonga aur jo kuchh ke main karoonga Mahant Mandeo Ji ke rae se karoonga agar main bhi rai liye hoe Daraganj ki kisi jaedad ko rahen wa bai karaonga to najaez tasawwar hoe aur agar koi shukayat kare to bila janch ke na manijawe aur jo kuchh pahle ya is iqrar name ke bad likoon ya likh chuka hoon woh sab najaez samjha jawe lihaza yeh chand kalma batariq iqrar name ke likh diya ke sanad rahe aur bawagt zarurat kam awe faqat "

This document is an unregistered one. Both the language and the import of the document are vague and full of mistakes. It may be recalled that the case of the defendant is that the plaintiff was for the first time appointed the Mahant of Daraganj Asthan by means of the above agreement. On the other hand, the case of the plaintiff is that he had already been duly appointed Mahant on the death of Mahant Charandeo Ji being his only chela. The tenor of the document, however, suggests that the plaintiff who had described himself, in this document as Mahant Yadubansh Deo had already become the Mahant of the Daraganj Asthan when this agreement was executed. At any rate, it is clear that there is nothing in the language of the same which suggests that it was by means of this document that the plaintiff was appointed the Mahant of the Daraganj Asthan for the first time. It is equally clear from the materials on the record that according to the custom of the institution, it was the chela of the outgoing Mahant who would ordinarily succeed to the Gaddi. The case of the defendant to the contrary does not appear to be correct. Had it not been so, the defendant would not have felt it necessary to say in his application dated 22nd March, 1942 (Ex. 21) which he had filed before the Municipal Board, Allahabad to which we have already made a reference earlier, that he was the nearest heir (Chela) of the Mahant and entitled to the mutation of his name in respect of

the houses. He realised that in order to succeed to the Gaddi on the death of Gur Charan Deo, it was necessary that the aspirant should be his chela. It is not in controversy now that the plaintiff is the chela of Mahant Gur Charan Deo, although in his application (Ex. 21), the defendant had falsely alleged that Mahant Yadubansh Deo was neither the chela of the Mahant Gur Charan Deo, nor had he any right to the property. It has not been suggested why the plaintiff as the sole chela of the deceased Mahant could not succeed to the Gaddi on the death of his Guru, Gur Charan Deo. In view of such circumstances, we are of the opinion that the case of the defendant that the plaintiff was appointed Mahant of Daraganj Asthan by means of this agreement, is not correct. On the other hand, we find that the plaintiff had already been appointed Mahant of the Asthan when this deed of agreement dated 14th April 1942 was executed.

19. The other recital in the agreement is that there were some sort of talluqat between Mahant Gur Charan Deo and Mahant Mandeo (defendant) of Akhara Kashiwala at Amritsar. What was the extent of the connection and what powers did the defendant have over the affairs of the Daraganj asthan on account of this connection, are not at all clear from the recitals of the agreement. The mere use of the word "talluqat" at any rate, does not establish that the Daraganj Asthan is a branch of which the parent institution is Akhara Kashiwala of Amritsar. On the recital in this agreement, therefore, it cannot be said that the Daraganj Asthan has been shown to be a branch of Akhara Kashiwala of Amritsar. It is also not clear from the language of the agreement whether Mahant Mandeo the defendant and the Mahant of Akhara Kashiwala at Amritsar had the power to remove the Mahant of Daraganj Asthan. It may also be noted in this connection that beyond the uncorroborated testimony of the defendant, there is no reliable evidence to prove that the Daraganj Asthan is really a branch of the parent Math at Amritsar or that Shri Mahant of Amritsar has the power to appoint and remove the Mahant of the Daraganj Sangat.

20. Mahant Mandeo in the witness-box stated that he was Sri Mahant of Naya Akhara Kashiwala Amritsar; that that Akhara was established by Sri Nirwana Mela Ram Udasin; that Daraganj Sangat is its branch; that there are other branches also; that his Guru was Sri Mahant Harbans Deo; whose Guru was Mahant Tarun Deo; that Daraganj Sangat was also established by Mela Ram; that the property of all the branches of Naya Akhara Amritsar belonged to Naya Akhara, Kashiwala, Amritsar and that

Shri Mahant of Amritsar has got a right to appoint and remove the Mahants of the Sangats and the branches. This statement of the defendant has not been corroborated by any other independent evidence. It may be that the Daraganj Sangat is a branch of the Amritsar institution but the materials on the record of this case are wholly insufficient to persuade us to give a finding to that effect.

In the absence of evidence, we are bound to hold that it has not been proved in this case that Daraganj Sangat is really a branch of the Amritsar institution Kashiwala or that Sri Mahant of Amritsar has the power to remove the Mahant of the Daraganj Sangat. All that has been recited in the agreement aforesaid is that Mahant Yadubansh Deo will continue have connection with the Amritsar institution. An undertaking has been given in that agreement that he will not marry and that he will maintain proper conduct. There is a further undertaking that the plaintiff will not dissipate the properties of the Sangat nor will alienate the same. It is also recited that in case of breach of conditions 1, 2 and 3 given in the agreement, Mahant Mandeo Ji would have the right to remove him. There is a further term to the effect that if any complaints are made against the plaintiff, it will not be accepted as correct without enquiry.

21. The learned counsel for the respondent has urged that the plaintiff had succeeded to the office of Mahant not by virtue of this agreement but by virtue of the fact that he is the chela of deceased Mahant Charandeo. The terms and conditions given in that agreement, therefore, according to him cannot really be treated as the terms and conditions of his succession to the office of Mahant as the chela of his Guru deceased Mahant Charan Deo. According to him, it was not open to the plaintiff and the defendant to enter into an agreement of this nature which may have the effect of altering or modifying the original terms and conditions of the succession of the plaintiff to the office of Mahant of the Daraganj Asthan. The agreement according to him, cannot have the effect of repealing the original conditions and terms on which the office was held by the plaintiff.

22. In support of his contention, Mr. Ambika Prasad has placed reliance on a decision of the Patna High Court in the case of Krishna Dayal Gir v. Laldhari Gir 40 Ind Cas 276 = (AIR 1917 Pat 382). The facts of that case were that the appellant Mahant Krishna Dayal Gir of Bodh Gaya was the Mahant of a Math of Hindu sect of Girs. That Math was close to Buddhist temple at Bodh Gaya. Mahant Krishna Dayal Gir somehow was also the superintendent of the Bodh Gaya temple. The respondent Laldhari Gir was the

Mahant of a Math of the same sect at Village Bakrour, a mile or two away on the other side of the river Phalgu. The appellant claimed that Bakrour Math was a subordinate Math of Bodh Gaya, and that the Mahant of Bodh Gaya was the malik of all the property of Bakrour Math and that further the Mahant of Bodh Gaya was entitled to appoint and for good cause shown, dismiss the Mahant of Bakrour. It was alleged that as the Mahant of Bakrour had taken to immoral ways, he had been dismissed by Mahant of Bodh Gaya sometime in May 1912. The respondent, however, refused to give possession. On such allegations, the appellant claimed the removal of the respondent and the possession of the Bakrour Math and its properties. The respondent denied all the material allegations of the appellant and all that he admitted was that the Mahant of Bodh Gaya used to take a leading part in the election of the Mahant of Bakrour.

The suit was dismissed by the subordinate Judge. The Subordinate Judge had found that it had not been proved that the Bakrour Math was in any way subordinate to Bodh Gaya Math or that the respondent had taken to immoral ways. He also found that two agreements of the years 1897 and 1900 on which reliance had been placed by the appellant, had been obtained by undue influence and further that a compromise between the parties in the year 1906 and the decree founded thereon were not binding on the respondents. Chamber, C J surveyed previous decisions relevant to the question which was a question similar to the one that we are now considering in the instant appeal and observed, that those cases illustrated the rule that the head of a religious or charitable institution has no power to bargain away his office or alter the constitution of the institution of which he was in charge. His Lordship proceeded to observe that the right to remove the Mahant of Bakrour Math had never rested with the appellant in the past and he could not acquire that right or take it out of the hands of the Court or other lawful authority by inducing the Mahant for the time being to agree to surrender that right to him.

23 We have already pointed out that independently of the agreement, there is no evidence in this case to show that Sri Mahant of Amritsar had the power to remove the Mahant of the Daraganj Sangat. We have also expressed the view that this agreement itself is not the transaction which brought about the appointment of the plaintiff as Mahant of the Daraganj Sangat. The agreement, therefore, is hit by the principle of law laid down in the case of 40 Ind Cas 276: (AIR 1917 Pat 382) (supra) by the Patna High Court.

24. The above view also finds support from the observations of the Supreme Court made in the case of Abdul Kayum v. Mulla Alibhai, AIR 1963 SC 309. The facts of the case before the Supreme Court were, however, different from the facts of the instant case but it was observed that trustees cannot transfer their duties, functions and powers to some other body of men and create them trustees in their own place unless this is clearly permitted by the trust deed, or agreed to by the entire body of beneficiaries. It was also observed that a person who is appointed a trustee is not bound to accept the trust, but having once entered upon the trust he cannot renounce the duties and liabilities except with the permission of the Court or with the consent of the beneficiaries or by the authority of the trust deed itself. Our reference to observation of the Supreme Court in the aforesaid case, however, should not be taken to mean, that we are equating the status of the Mahant as a trustee simpliciter.

25 It has already been noted that another term of the agreement is, that, in case any complaint against the reigning Mahant of Daraganj Sangat was made to Sri Mahant at Amritsar, the same shall not be accepted as correct without enquiry. The defendant does not claim to have made any enquiries from the plaintiff in respect of any specified complaint although in his written statement, he has alleged that he received complaints. We are, therefore, unable to hold that the recital of the agreement by itself establishes that the Daraganj Sangat is a branch of the Kashiwala institution at Amritsar or that the defendant held the right to remove the plaintiff from the office of Mahant of Daraganj Sangat. We also hold that the plaintiff was not appointed Mahant by the aforesaid agreement but that on the date when the agreement was executed, he was already holding that office. It is, however, not necessary for us to enter into the question as to how and by whom was that appointment made. All that we feel sure of, is that the plaintiff is the sole chela of Charandeo deceased and that according to custom of the institution, he had a right to succeed to the office of Mahant after the death of his Guru Charandeo.

26 The last question that must be considered in this case is whether in spite of the fact that the deed of relinquishment has been found to be not binding on the plaintiff and has been found to be one which is liable to be cancelled and set aside, no decree for possession be passed in favour of the plaintiff, as according to defendant, the plaintiff has forfeited the right to the office on account of his having become patit by marriage and on account of his having committed breach

of trust by denying the existence of the trust itself, on account of the fact that he has alienated and transferred some of the trust properties and also on account of the fact that he is guilty of negligence in the performance of his duties as Mahant, and further on account of the fact that he is now placed under police surveillance.

27. On the one hand, it has been urged on behalf of the defendant-appellant that it has been fully established by reliable evidence that the plaintiff has entered into matrimonial alliance in spite of celibacy being a condition precedent for holding the office of Mahant, and that he had procreated two sons; he has dissipated and transferred the properties of the Asthan; and finally that he had denied the very existence of the trust by claiming to be full owner of the properties of the trust. All the above considerations so also the consideration that he is a person who has been kept under police surveillance, according to defendant, result in plaintiff's forfeiting the right to the office of Mahant, and that, therefore, he is not entitled to regain possession over the trust and its properties. It has been further contended that the defendant has also established that the plaintiff has already been removed by the defendant and that possession of the Asthan and its properties had already been taken by the defendant. On the basis of the last mentioned submission, it has been urged that the question of removal of the plaintiff does no more arise.

28. On the other hand, on behalf of the plaintiff-respondent what has been urged is that the defendant has failed to establish the charges brought by him against the plaintiff, and that the defendant has failed to prove that the plaintiff had been removed from the office of Mahant as alleged by the defendant. The last submission in this connection made on behalf of the plaintiff is that the suit giving rise to this appeal, not being one under Section 92 Civil Procedure Code, it is not open to the defendant to ask this Court to remove the plaintiff from the office of Mahant after making enquiries into the charges of misconduct and breach of trust brought against him. Likewise, it has been urged that the plaintiff could be refused a decree for possession over the trust and its properties only after the court has made enquiries into the charges of misconduct and breach of trust brought by the defendant against the plaintiff, and as such an enquiry cannot be made in the present case, this Court cannot refuse to pass a decree for possession in favour of the plaintiff. It has then been urged that the defendant is himself not a person who was ever entitled to obtain or retain possession over the Asthan and its properties, and in that

view of the matter also, the plaintiff cannot be denied the relief for possession over the Asthan and its properties by dispossessing the defendant.

29. The plea thus raised by the defendant is one of confession and avoidance. It is undoubtedly open to a defendant to raise special defence by raising plea in confession and avoidance. For instance, in a suit on the basis of a contract, it is open to the defendant to admit the contract and the contractual liability and to avoid the effect of that admission by raising the plea of frustration or performance. In that case, it will always be for the defendant to affirmatively establish that the contract had either been frustrated or performed. If the defendant succeeds in doing that, he would certainly be entitled to relief for the obtaining of which such a plea was raised. The Court is bound to consider such a plea of avoidance, provided the Court is competent to go into the questions on which that plea is based in that particular proceeding. In case, a consideration of that plea necessitates going into question which the particular court is not competent to go into in that proceeding, the Court must refuse to entertain that plea or to enquire into those pleas.

So far as the instant case is concerned, it may be borne in mind that this is not a suit under Section 92 of the Code of Civil Procedure. According to that provision, the question whether a particular trust is a public or private trust or whether the trustee or Mahant is guilty of misconduct and breach of trust or the question whether the Mahant has forfeited right to the office on account of misconduct and breach of trust are all questions which have to be gone into in a properly constituted suit under Section 92 of the Code of Civil Procedure. Sub-section (2) of Section 92 of the Code lays down:—

"Save as provided by the Religious Endowments Act, 1863 (or by any corresponding law in force in the territories which, immediately before the 1st November, 1956, were comprised in Part B State), no suit claiming any of the reliefs specified in Sub-section (1) shall be instituted in respect of any such trust as is therein referred to except in conformity with the provisions of that Sub-section."

Sub-section (2), therefore, makes it clear that a suit for removal of a trustee; or for appointment of a new trustee; or for vesting any property in a trustee; or for directing a trustee who has been removed or a person who has ceased to be a trustee to deliver possession of any trust property in his possession to the person entitled to the possession of such property; or for directing accounts and inquiries, or for declaring what proportion of the trust property or of the interest therein shall be

allocated to any particular object of the trust; or for authorising the whole or any part of the trust property to be let, sold, mortgaged or exchanged, or for settling a scheme, or for granting such further or other relief as the nature of the case may require, cannot be filed except under Clause (1) of Section 92 of the Code of Civil Procedure.

30 The question in this case, however, is whether a special defence raised in a suit, which is not a suit under Section 92 of the Code of Civil Procedure and which requires the Court to enter into an enquiry of questions which are covered by the provisions of Section 92 of the Code of Civil Procedure could be entertained and enquired into. We are of the opinion that the principle underlying Section 92 Clauses (1) and (2) of the Code of Civil Procedure is equally applicable to defence also. Our first reason for arriving at that conclusion is that there does not appear to be any rational basis for holding the view that a defence by which a defendant seeks to obtain such relief as can be granted to a plaintiff only in a suit under Section 92, Code of Civil Procedure should not be equally barred in a suit which is not a suit under Section 92 Civil Procedure Code. We are at present not considering the question whether such a defence can or cannot be entertained in a suit, which is a suit under Section 92 Civil Procedure Code as such a question does not arise in this appeal. The other reason for our arriving at the above conclusion is that in our opinion when a plea in confession and avoidance is raised by the defendant, his position is analogous to the position of a plaintiff, particularly in relation to the plea of avoidance. It is for the defendant in such a case to establish the correctness of the plea, and it is only when that is done that he would be entitled to the relief which he seeks by raising that defence.

The relief that the defendant seeks in the instant case by raising that defence is that his possession over the trust and its properties be maintained. In that view of the matter also, we consider that it is not open to us to enter into an enquiry of questions which are required to be gone into in a suit under Section 92 of the Code of Civil Procedure. The conclusion at which we have arrived finds support from the decision of this Court in the case of *Ram Dayal v. Mt. Saraswati*, AIR 1927 All 526. We are, therefore, of the opinion that after having arrived at the finding that the deed of relinquishment is liable to be set aside and cancelled, we cannot refuse a decree for possession to the plaintiff, nor can we enquire into the correctness of the charges of misconduct and breach of trust brought forth by the defendant against the plaintiff in this suit.

31. There is yet another consideration for arriving at the above conclusion. We have already expressed the view that on the materials in this case, it is not established that the defendant was a person who was entitled to remove the plaintiff from the office of Mahant in spite of agreement between the parties, which is relied upon by the defendant. If the defendant himself is not a person who was entitled to obtain and retain possession, after the exit of the plaintiff, there does not appear to be any good reason for refusing a decree for possession over the trust and its properties to the plaintiff. The plaintiff has not been dispossessed by a person holding any better title. The submission such as the one which has been made on behalf of the defendant could have some force in a case where the plaintiff had been dispossessed by a person who was entitled to take and retain possession after the plaintiff had been removed or had ceased to have the right to retain possession.

In case the plaintiff is liable for removal from the office of Mahant on the ground that he has become patit having married himself, or on the ground that he is guilty of breach of trust or on the ground that he is placed under police surveillance, it would certainly be open to persons having interest in the trust, to file a properly constituted suit under Section 92 Code of Civil Procedure after obtaining necessary sanction from the Advocate General of the State, for his removal and for all other reliefs which could possibly be claimed in such a suit. That result cannot be achieved in an indirect manner by raising special plea in defence in this suit, which is not a suit under Section 92 of the Code of Civil Procedure.

32. We have next given serious thought to the question whether after arriving at the conclusion at which we have arrived, it would be appropriate for us to enter into enquiry with regard to the correctness of the charges brought by the defendant against the plaintiff in this case. The important consideration for our refusing to enter into those questions in this case is that any finding given by us in respect of those charges may result in some prejudice to the cause of the parties in future.

33. We have, therefore, decided not to enter into those questions in this case and leave them to be decided in a properly constituted suit under Section 92 of the Code of Civil Procedure.

34. For all the above reasons, the appeal is liable to be dismissed.

35. The appeal is dismissed and the judgment and decree of the court below are confirmed. The respondent will get the costs of this Court from the appellant.

Court-fee will be recoverable from the defendant as directed by the court below.

JHS/D.V.C.

Appeal dismissed.

AIR 1969 ALLAHABAD 583 (V 56 C 110)

M. CHANDRA AND GANGESHWAR PRASAD JJ.

Laltu, Accused, Applicant v. Ram Lal, Complainant, Opp. Party.

Criminal Revn. No. 1798 of 1963, D/- 13-8-1968, against judgment of I Temporary Civil and S. J., Kanpur, D/- 31-7-1963.

Criminal P. C. (1898), S. 256 — 'Any remaining witnesses for the prosecution' — Meaning of.

The words 'any remaining witnesses for the prosecution' in Section 256 Cr. P. C. do not refer only to those witnesses whose names have been given by the complainant under sub-section (2) of Section 252 of Cr. P. C., but also include all such witnesses as may be produced by the complainant in support of the prosecution even though they have not been summoned or named before the framing of the charge. Case Law Discussed.

(Para 18)

Cases Referred: Chronological, Paras

- (1965) AIR 1965 All 131 (V 52)=
1964 All LJ 335: 1965 (1) Cri LJ 275, Giriraj Singh v. State 5
(1961) AIR 1961 Madh Pra 47
(V 48)=(1961) 1 Cri LJ 271, Mt. Sulki v. Mohanlal Adku 4
(1960) AIR 1960 All 443 (V 47)=
1960 Cri LJ 881, Nazim Ali v. Wazir 5
(1960) AIR 1960 Bom 513 (V 47)=
1960 Cri LJ 1569, State of Bombay v. Janardhan 4
(1959) AIR 1959 Mys 238 (V 46)=
1959 Cri LJ 1196, State of Mysore v. Babasaheb 4
(1958) AIR 1958 Mad 341 (V 45)=
1958 Cri LJ 904, Somasundaram v. Gopal 4
(1955) AIR 1955 Raj 113 (V 42)=
1955 Cri LJ 1106, Rewachand v. The State 4
(1950) AIR 1950 Ori 245 (V 37)=
ILR (1950) Cut 129, Hadi Bandu Misra v. King 6
(1945) AIR 1945 Lah 201 (V 32)=
47 Cri LJ 143 (FB), Heman Ram v. Emperor 6, 14
(1945) AIR 1945 Nag 286 (V 32)=
ILR (1945) Nag 995, Abdul Razake v. Haji Hussain 4
(1944) AIR 1944 Mad 169 (V 31)=
45 Cri LJ 401, Crown Prosecutor Madras v. C. V. Ramanujulu Naidu 4

FN/BM/A774/69/D

(1942) AIR 1942 Bom 214 (V 29)=
43 Cri LJ 761, Emperor v.

Nagindas Nurottamdas 4, 6

(1940) AIR 1940 Nag 390 (V 27)=

1940 Nag LJ 449, Hansraj

Harijwan Bhate v. Emperor 4

(1937) AIR 1937 All 189 (V 24)=

38 Cri LJ 394, Raghubir Sahai

v. Wali Hussain Khan 5, 6

(1935) Cri. Revn. No. 272 of 1935

D/- 20-7-1935 (All), Emperor

v. Madan Gopal 5

(1934) AIR 1934 Nag 156 (V 21)=

35 Cri LJ 1163, Hajari Tika Lodhi

v. Emperor 4

(1909) 11 Bom LR 1153= 4 Ind

Cas 268, Emperor v. Percy 'Henri'

Burn 4

V. K. Barman, for Applicant; M. N.

Shukla, for Opp. Party.

GANGESHWAR PRASAD, J.:— This application in revision came up before us upon a reference made by Tripathi, J.

2. The relevant facts may be briefly stated. One Ram Lal filed a complaint against Laltu applicant under Section 325 I. P. C. in the court of a Magistrate 1st Class at Kanpur. After recording the statements of some witnesses produced by the complainant, the Magistrate framed against the applicant a charge under Section 325 I. P. C. on 22-1-1963. The Magistrate then fixed 5-2-1963 for recording evidence under Section 256 Cr. P. C., noting in his order that the applicant desired to cross-examine all the witnesses examined by the complainant before the framing of the charge. It appears from the record that on 23-1-1963 the complainant filed a list containing the names of six witnesses proposed to be examined by him under Section 256 Cr. P. C. and the Magistrate ordered summonses to be issued for the said witnesses. The list included the name of one Sri Sinha. Sri Sinha was actually examined on behalf of the applicant on 27-2-1963. On the same day an application was moved before the Magistrate on behalf of the applicant stating that as Sri Sinha had not been named in the list submitted by the complainant under Section 252 Cr. P. C., he could not be examined under S. 256 Cr. P. C., and praying that his evidence be discarded. After hearing arguments on the said application the Magistrate, by his order dated 19-3-1963, held that the complainant was entitled to produce "further evidence under Section 256 Cr. P. C.," meaning thereby that he was entitled to produce Sri Sinha although he was not mentioned in the list. Against this order the applicant filed a revision in the court of Session but it was dismissed. Thereupon he came in revision to this Court.

3. The learned single Judge before whom this application originally came up for hearing found a sharp cleavage of

Judicial opinion on the meaning of the words "any remaining witnesses for the prosecution" occurring in Section 256 Cr P C., and he, therefore, thought it expedient that the matter be considered by a larger Bench. The main question for determination before us is whether the words "any remaining witnesses for the prosecution" in Section 256 Cr P C refer only to those witnesses whose names have been given by the complainant under Section 252(2) Cr P C., or whether they are comprehensive enough to cover even those witnesses whose names have not been given under the aforesaid provision.

4. The earliest reported case to which reference is found in the authorities dealing with the question is *Emperor v Percy Henri Burn*, (1909) 11 Bom LR 1153. In that case a Division Bench of the Bombay High Court rejected the contention that the expression "any remaining witnesses" is necessarily limited to those witnesses who, as required by Clause (2) of Section 252 Cr P C., have been named by the complainant and summoned by the Magistrate before the framing of the charge, and held that the expression is wide enough to include any witness who, according to the prosecution is able to support its case, though he has not been summoned provided that he is not sprung upon the defence all of a sudden and sufficient opportunity is given to the latter to prepare for the cross-examination of the witness. In *Emperor v Nagindas Narottamdas* AIR 1942 Bom 214 another Division Bench of the Bombay High Court expressed the same view regarding the meaning and scope of the expression and referred to the earlier case in support of its view. That view was, however, regarded as no longer acceptable by a learned Judge of that court in *State of Bombay v. Janardhan*, AIR 1960 Bom 513 a case which arose after the insertion of Clause (I-A) in Section 204 Cr. P. C by Act XXVI of 1955. He certainly referred to AIR 1942 Bom 214, (supra), and felt bound by that decision, but observed that after the introduction of Section 204 (I-A) other sections of the Cr P. C. and in particular Section 256 have to be read along with Section 204 (I-A) and, therefore in cases instituted otherwise than on police report the complainant is restricted to the examination of witnesses whose names are given in the list under Section 204 (I-A). The learned Judge, however, proceeded to say that in proper cases if an application is made the complainant may be permitted to add names to the list given by him under Section 204 (I-A). The Madras High Court in *Crown Prosecutor, Madras v C V Ramanujulu Naidu* AIR 1944 Mad 169, expressed its agreement with the interpretation given to the expression "any remaining witnesses for

the prosecution" in (1909) 11 Bom LR 1153 (supra) and held, that it presumably means the remaining witnesses that the prosecution wishes to examine. The learned Judge who decided the case observed that it seemed to him a general rule of law and equity that the prosecution is at liberty to examine whosoever it pleases until the prosecution case has been closed and that the prosecution case is not closed until the defence begins. In *K. Somasundaram v Gopal*, AIR 1958 Mad 341 Section 256 Cr P C did not come up for consideration, but Section 204 (I-A) was directly involved and in dealing with that provision the Division Bench which decided the case observed that the phrase "take all such evidence as may be produced in support of the prosecution" in Sections 244(1) and 252(1) Cr P C. shows the ample powers of the Court in that respect. In *State of Mysore v Babasaheb* AIR 1959 Mys 238 the Mysore High Court in a case in which the trying Magistrate had rejected the complainant's application to summon additional witnesses under Section 256 Cr. P C., on the ground that the complainant was not entitled to summon and examine any witness that he had not cited in his complaint or included in the list filed by him under Section 252 (2) Cr. P C., held that the order of the Magistrate was illegal and could not be supported. The learned Judge deciding the case did not refer to the authorities hearing on the point but he expressed the opinion that the words "any remaining witnesses" in Section 256 Cr P C., are wide enough to include any witness who, according to the complainant, is able to give evidence in support of his case. The legal position emerging from the reported decisions of the Nagpur High Court cannot be said to be definite. In *Hansraj Harijwan Bhat v Emperor*, AIR 1940 Nag 390 Gruer J preferred the view of the Bombay High Court in (1909) 11 Bom LR 1153 (supra) to the contrary view taken in a case of this court to which we will refer at a later stage, but the observation made by him was that if witnesses have been accepted by the court as competent for the prosecution at any stage before the point for further cross-examination under Section 256 arises, even if that stage is after charge, they come under the category of "any remaining witnesses". It will be noticed that the power of the complainant to produce additional witnesses was held not to be unfettered but to be subject to a very important condition. The question again arose before the Nagpur High Court in *Abdul Razake v Haji Hussain*, AIR 1945 Nag 286 where the observation made in *Hansraj Harijwan Bhat* AIR 1940 Nag 390 (supra) was quoted apparently with approval and as lending support to the view that the

examination of the additional witnesses who were sought to be produced in that case was not permissible. The learned Judge deciding that case also made reference to the still earlier decision of that court in *Hajari Tika Lodhi v. Emperor*, AIR 1934 Nag 156 in which it had been held that the prosecution was not entitled in law to have an adjournment for the purpose of examining witnesses not named in the Challan and it had been observed that the prosecutor must come with his case fully prepared and there is no section in the Code which authorises him to file a fresh list of prosecution witnesses. In *Rewa Chand v. The State*, AIR 1955 Raj 113, a Division Bench of the Rajasthan High Court, after referring to the relevant cases and the divergence of opinion, agreed with the view taken by the Bombay High Court in (1909) 11 Bom LR 1153 (supra). The Madhya Pradesh High Court in its Division Bench case of *Mst. Sulki v. Mohanlal Adku*, AIR 1961 Madh Pra 47, after referring to some of the cases dealing with the question, held that witnesses who had not been named in the list under Section 252 (2) are not covered by the expression "any remaining witnesses" in Section 256 and the complainant has no right to insist upon calling fresh witnesses, although the request of the complainant to call additional witnesses may be considered where justice so requires.

5. Coming now to the cases of this court, we have to first refer to the unreported decision of Allsop J. in Criminal Revn. No. 272 of 1935 (decided on 20-7-1935 (All)). In that case, after the trying Magistrate had issued summonses for the prosecution witnesses who were to be cross-examined, he was requested by the prosecution to examine three other witnesses and he passed orders that they should be examined. It was urged in revision before this court on behalf of the accused that the Magistrate was not competent to pass the above order after the prosecution had intimated, as it had done, that its case was closed. Dealing with the above objection the learned Judge observed:

"In my opinion there is no force in this objection. No doubt, the prosecution after the accused has been called to enter upon his defence are not entitled as of right to summon any further witnesses but there can be no doubt that there is a power in the Magistrate himself to summon any evidence which he has reason to suppose is necessary for the proper decision of the questions which are before him and, indeed, under Section 540 of the Code of Criminal Procedure there is a duty cast upon him to see that all relevant and available evidence is produced. It seems to me to make no real difference

whether the witnesses are ostensibly summoned as witnesses for the prosecution or as witnesses under the provisions of Section 540 of the Code of Criminal Procedure. I do not think that it can ever be said that an accused person has any right to prevent the production of any evidence which may have a bearing upon the case. He certainly should be given every right to meet it and rebut it if he can, but he cannot insist that any particular witness should not be examined as against him."

The next case of this court is *Raghubir Sahai v. Wali Hussain Khan*, AIR 1937 All 189 in which the facts were that after the cross-examination of the witnesses for the prosecution was over, the complainant claimed that he could summon an entirely new witness whom he had not previously mentioned. The Magistrate refused to allow the complainant to produce the new witness. Upon a revision filed by the complainant in this court Bennet, J. said:

"It appears to me under Section 252(2) the complainant is required to give a list of prosecution witnesses. Under Section 254 the Magistrate may examine all those witnesses and then frame a charge-sheet or he may frame a charge-sheet before he has examined all those witnesses. If he adopts the latter course and witnesses remained from the list who had not been examined then those witnesses are the remaining witnesses under Section 256(1) and the complainant has a right to produce them after the cross-examination of those witnesses who have been previously examined. But if the Magistrate has examined all the witnesses for the prosecution in the list under Section 252 (2) and has then framed a charge-sheet, in my opinion there are no witnesses remaining who could come under the description in Section 256(1). This view of the law has been taken by Allsop, J. in *Emperor v. Madan Gopal* (Criminal Revn. No. 272 of 1935 D/- 20-7-1935 (All))."

The third case is *Nazim Ali v. Wazir*, AIR 1960 All 443 where the Magistrate had not permitted the complainant to examine a witness not mentioned in the list submitted under Section 204 (I-A) Cr. P. C. Upon a reference made by the Sessions Judge for setting aside the order of a Magistrate and permitting the complainant to examine the witness D. S. Mathur, J. accepted the reference and observed:

"The list cannot be held to be such that the complainant cannot be permitted to go beyond the list while adducing his evidence."

The provision involved in that case was Section 204 (I-A), but since it has to be seen whether Section 204 (I-A) Cr. P. C. affects in any manner the interpretation of Section 256 Cr. P. C. the case has a bearing on the question before us. *Giriraj*

Singh v. State 1964 All LJ 335 (AIR 1965 All 131) is the last case of this court to which reference was made in the course of arguments before us. That was again a case decided by D. S. Mathur, J. and there the learned Judge considered in some detail the provision of Criminal Procedure Code relating to the production and summoning of witnesses in trials before Magistrates. In regard to Sub-section (I-A) of Section 204 Criminal Procedure Code he observed,

"Sub-section (I-A) of Section 204 Criminal Procedure Code does lay down that no summons or warrant shall be issued against the accused under sub-section (1) unless a list of the prosecution witnesses has been filed. But the subsequent provisions do not disentitle the complainant or prosecutor from examining witnesses outside the list."

Referring then to Section 244 Cr P C whose Sub-section (1) has words similar to those used in Section 252(1) Cr P C the learned Judge said

"The words 'as may be produced in support of the prosecution' used in Section 244(1) and the word 'any' used in Section 244(2) are general and shall include witnesses not cited in the list furnished under Section 204 (I-A) Cr P C."

Proceeding further, he also observed,

"Section 252(1) Cr P C has been worded on the lines of Section 244 (1) Cr P C, and it is nowhere laid down that the Magistrate can examine only such witnesses who are cited by the complainant in the aforementioned list (the list furnished under Sub-section (I-A) of Section 204 Cr P C.)" (Words in brackets ours)

6. We will now refer to the two cases in which the question received an elaborate treatment that also covered the history of the legislation relating to the subject. Diametrically opposite views in regard to the meaning of expression "any remaining witnesses" were taken in those cases. The first is a Full Bench case, *Heman Ram v. Emperor*, AIR 1945 Lah 201 (FB) in which Munir, J. delivering the judgment of the Bench agreed with the view of Bennet, J. in AIR 1937 All 189 (supra) and observed

"When the names of all the witnesses for the prosecution have been ascertained by the complainant or the officer in charge of prosecution giving the list of witnesses or by producing them in court, and by the Magistrate performing the function imposed on him by Section 252 (2) Cr P C no fresh witnesses can be examined by the prosecution as of right after the charge is framed and the only power left in the Magistrate to examine other witnesses for the prosecution under Section 540 of the Code under which he has a discretion in the matter"

The second case is *Hadi Bandhu Misra v. King*, AIR 1950 Orissa 245 in which Ray C. J. dissented from the view expressed in the abovementioned Full Bench decision of the Lahore High Court and said that he was entirely in accord with the view of Sir John Beaumont C. J. in *Nagindas Narottamdas Gandhi*, AIR 1942 Bom 214 (supra) where he held that the learned Sessions Judge was wrong in thinking that remaining witnesses means (in Section 256) those who were in the list of witnesses who could have been examined by the prosecution in the first instance but were not actually examined under Section 252 and observed

"It seems to me that there is no justification for limiting the words in that sense. I think that Section 256 clearly enabled the Crown (prosecution) to examine witnesses who have not been examined and whose names have not been disclosed before the charge was framed."

7. This is a resume of all the cases which were cited before us. They, indeed, disclose a sharp conflict of opinion. Upon an examination of the relevant provisions of the Code of Criminal Procedure however, we venture to think that they furnish a clear answer to the question before us and that answer is also in consonance with principles which are fundamental to all trials.

8. Chapter XXI of the Code which deals with the trial of warrant cases by a Magistrate begins with Section 251. The section provides that the Magistrate shall in any case instituted upon police report follow the procedure specified in Section 251-A, and in any other case the procedure specified in the other provisions of the Chapter. The procedure relating to cases instituted otherwise than upon police report is therefore, contained in Ss 252 to 259. Section 252 the first in this group opens with a recognition in Sub-section (1) of the right of the complainant, if any to be heard and to produce all such evidence as may support his case. In fact, the Sub-section is cast in the form of an obligation making it imperative for the Magistrate to hear the complainant, if any and to take all such evidence as may be produced in support of the prosecution. The imperative nature of the obligation contained in sub-s (1) becomes emphasised in the proviso to that sub-section which says that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a court. The proviso thus clearly indicates that the word "shall" in Sub-section (1), which governs "hear the complainant" and also "take all such evidence", makes the Magistrate "bound" to carry out the directions of the sub-section except only in cases and to the extent specified in the proviso. The provision contained in Sub-

section (1) of Section 252 is, therefore, the key provision in the Code as to the right of the complainant to produce evidence and the duty of the Magistrate to take it, and all other provisions dealing with that matter in the above group of sections have to be read in the light of the aforesaid sub-section. Sub-section (2) of Section 252 does not in any manner limit the right recognized and the obligation imposed by sub-section (1) and it is not possible to read it as restrictive of sub-section (1). Sub-section (2) is really subservient to sub-section (1) and is designed to further its object, inasmuch as it imposes a further obligation upon the Magistrate of ascertaining from the complainant or otherwise the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution and of summoning such of them as he thinks necessary. Sub-section (1) only requires the taking of all such evidence as may be produced in support of the prosecution, and that requirement does not become fully effective unless the Magistrate is also required to employ the machinery of the court for securing the attendance of witnesses who are able to give the evidence. The latter requirement is contained in sub-section (2). The ascertainment from the complainant of the name of any person likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution also serves the very salutary purpose of acquainting the accused with the names of persons likely to be examined as witnesses for the prosecution; but there is nothing in it which may have the effect of curtailing the right conferred upon the complainant or the duty imposed upon the Magistrate by sub-section (1). The statutory effect of the non-disclosure by the complainant of the name of a witness under sub-section (2) of Section 252 is only this that the Magistrate is not bound under that provision to summon such witness to give evidence, but the right of production of such witness is not affected thereby. The right to produce a witness and the right to have him summoned or, speaking in terms of the Court, the duty to take the evidence of a particular witness and the duty to summon him for evidence are not identical things and should not be confused.

9. We may refer in this connection by way of analogy, to Sections 207-A, 211, 216 and 291, Cr. P. C. Sub-section (9) of Section 207-A requires the accused in an inquiry under Chapter XXI of the Code to give orally or in writing a list of the witnesses whom he wishes to be summoned to give evidence on his trial and Sub-section (11) of the section makes it the duty of the Magistrate to summon such witnesses, subject to the provisos added thereto. Similarly Section 211 makes pro-

vision for the giving of a list of witnesses by the accused and Section 216 makes it obligatory for the Magistrate to summon them, subject to its proviso. Section 291 then lays down that the accused shall be allowed to examine any witness not previously named by him if such witness is in attendance, but he shall not, except as provided in Sections 207-A, 211 and 231, be entitled of right to have any witness summoned other than the witnesses named in the list delivered to the Magistrate. It is true that the trial court has under Section 540 the power to summon a witness, even when no list has been given under Section 207-A (9) or Section 211 or when the witness is outside the list, and it has also the duty to summon and examine him if his evidence appears to it essential to the just decision of the case. But the power and the duty of the court in the above respect are different from the right of the accused, as the words "to be entitled of right" in Section 291 clearly show. The right to produce a witness does not, therefore, necessarily include the right to have summoned if the statute specifically provides as to when and how witnesses have to be summoned.

10. Reverting then to Chapter XXI with which we are concerned in the present case, we find that the Code has there too provided what witnesses shall be summoned by the Magistrate in the course of the trial before him. Sub-section (2) of Section 252 makes it incumbent upon the Magistrate to summon such of the witnesses ascertained from the complainant or otherwise as he thinks necessary. In like manner, Section 257 makes it incumbent upon him, except in the situation indicated therein, to summon witnesses desired to be produced by the accused. If, therefore, upon an ascertainment done by the Magistrate under Sub-section (2) of Section 252 the name of a witness is not mentioned, the complainant is not "entitled of right" (to borrow the words of Section 291) to have the witness summoned, although the Magistrate has still under Section 540, the discretion to summon him and, in case he considers the evidence of the witness essential to the just decision of the case, he is under a duty to summon and examine him. The loss of the right to have the witness summoned, is, as we have said, the only statutory effect of the non-disclosure of the name of a witness under Sub-section (2) of Section 252 and the complainant is not deprived of his right to produce him nor is the Magistrate relieved of his obligation to take the evidence of such witness if he is produced by the complainant.

11. We may now pass on to S. 253. It will be noticed that Sub-section (1) of that section empowers the Magistrate, in

the circumstances mentioned therein, to discharge an accused person not upon merely examining the persons named by the complainant under Sub-section (2) of Section 252 but upon taking all the evidence referred to in Section 252. The words "all the evidence" referred to in Section 252" used in Sub-section (1) of Section 253 obviously refer to the evidence mentioned in Sub-section (1) of Section 252, and they mean not only the evidence of such persons whose names have been given under Sub-section (2) of Section 252 and who have consequently been summoned but also of such witnesses as have not been summoned but are produced by the complainant. If it had been intended by the legislature that the words "all the evidence" in Sub-section (1) of Section 253 should have reference only to the evidence of such persons as have been summoned under Sub-section (2) of Section 252, the language of Sub-section (1) of Section 253, would surely have been different. The legislature has, however, taken care to provide in Sub-section (2) of Section 253 that if the Magistrate considers the charge to be groundless, he can discharge the accused even though he has not taken all the evidence referred to in Section 252. Evidently, this power was conferred upon the Magistrate to save the accused from the unnecessary hardship and harassment involved in the continuance of a trial on a charge which is groundless. If an order of discharge is passed, the trial comes to an end and no question of taking any further evidence then arises. If, however, a charge is framed the obligation under Sub-section (1) of Section 252 to take all such evidence as may be produced in support of the prosecution continues. The Magistrate is relieved of the obligation to take all such evidence as may be produced in support of the prosecution only when he considers the charge to be groundless and discharges the accused on that account. But the power not to take all such evidence as may be produced in support of the prosecution terminates upon the framing of a charge and is not exercisable thereafter.

12. Then, we come to Section 254. The words "such evidence" in the section obviously mean the entire evidence referred to in Section 252. But the section does not compel the Magistrate to postpone the framing of the charge till all such evidence as may be produced in support of the prosecution has been taken, and it authorises him to frame a charge at any previous stage i.e., before all the aforesaid evidence has been taken, if he is of opinion that there is ground for presuming that the accused had committed an offence triable under Chapter XXI of the Code. There is nothing in the Code to warrant the conclusion that the right

of the complainant to produce all such evidence as may support the prosecution or the duty of the Magistrate to take all such evidence as may be produced in support of the prosecution comes to an end with the framing of a charge and it would, indeed, be strange if it did. No blame attaches to the complainant if the Magistrate, even before he has taken all the evidence desired to be produced by the complainant, forms the opinion necessary for framing a charge and consequently frames a charge. Framing of a charge should only increase the obligation of the Magistrate to take all such evidence as may be produced in support of the prosecution and it cannot, either on the terms of the relevant provisions or on principle, bring that obligation to an end. Can a complainant insist that all the evidence intended to be produced by him should be taken by the Magistrate before a charge is framed? The answer can only be in the negative and the words "or at any previous stage of the case" in Section 254 completely rule out any other answer. The only conclusion that follows is that the right of the complainant or the duty of the Magistrate under Sub-section (1) of Section 252 does not cease on account of the framing of a charge under Section 254.

13. Omitting Sections 255 and 255-A, we may now take up Section 256 in which the words "any remaining witnesses for the prosecution" occur. If the legal position upto the framing of the charge under Section 254 is what we have stated it to be, it does not, to our mind, admit of any doubt that the words "the evidence of any remaining witnesses for the prosecution" mean the evidence of such other witnesses, besides those who have already been examined, as may be produced by the complainant in support of the prosecution. We have shown that the right of the complainant or the duty of the Magistrate under Sub-section (1) of Section 252 does not terminate upon the framing of a charge under Section 254 and, that being so there is nothing in the sections that follow to bring about its termination. Of course, as we have said above, the right is confined to the production of evidence and the duty too is confined to the taking of the evidence produced. The right of the complainant does not extend to getting a witness summoned nor does the duty of the Magistrate extend to the summoning of a witness whose name has not been disclosed upon an ascertainment done under Sub-section (2) of Section 252. Certainly, the Magistrate has, even in that case, a discretion to summon such witness and, if his evidence appears to be essential for the just decision of a case, a duty to summon and examine him under Section 540; but that is a different thing altogether.

14. The above construction of the relevant provisions of the Code gives full effect to all of them and it does not either restrict or enlarge the scope of Sub-sections (1) and (2) of Section 252, and, Section 256 in a manner not justified by the language used by the statute. In AIR 1945 Lah 201 (FB) (supra) the Lahore High Court said that the very use of the words "remaining witnesses for the prosecution" clearly indicates that at the stage to which these words refer the names of the witnesses must be known. It further observed that the section does not say that the evidence of any other witnesses for the prosecution shall next be taken but that the evidence of the "remaining" witnesses for the prosecution shall be taken. We may point out that the words used in Section 256 are not "the remaining witnesses" but "any remaining witnesses", and the proper construction of the words would not be to regard them as limited to such witnesses only whose names have been given under Sub-section (2) of Section 252 but who remain to be examined. We may, also, with great respect, observe that the word "remaining" does not appear to postulate or have reference to a previously fixed number and to previously ascertained names. We find no reason why the words should signify only such witnesses as have remained unexamined out of those whose names have been given under Sub-section (2) of Section 252 and should not cover all such witnesses whose evidence the complainant desires to be taken in support of the prosecution but whose evidence has not yet been taken. The latter class of witnesses also may, in our opinion, be quite appropriately described as remaining witnesses. It should be noted that the relevant words in Section 256 are not that "remaining witnesses shall be examined" but that "the evidence of any remaining witnesses for the prosecution shall be taken." If we compare these words with the words "take all such evidence as may be produced in support of the prosecution" occurring in Sub-section (1) of Section 252, it becomes manifest that the former have reference to the latter, and that Section 256 requires the Magistrate to take the evidence of all such witnesses whom the complainant produces in support of the prosecution.

15. We have now to see whether the insertion of Sub-section (1-A) in Section 204 by Act XXVI of 1955 has in any manner altered the situation. Chapter XXII of the Code in which Section 204 occurs deals with the commencement of proceedings before Magistrates. The procedure relating to trial of warrant cases has been dealt with in Chapter XXI and it is not possible to regard the provisions relating to the trial as controlled by the provisions relating to the manner

of commencement of proceedings, or to construe the former provisions in the light of the latter. Sub-section (1-A) of Section 204 only imposes a condition precedent to the issuing of summons or warrant against the accused, and there is nothing in that provision or in any other to bar the production or the summoning of a witness not mentioned in the list required to be filed thereunder. If the list so filed had been intended to limit the witnesses whom the complainant in a warrant case is entitled to produce and whose evidence the Magistrate is bound to take, the obvious course for the legislature would have been to express that intention by introducing an amendment in Section 252 to that effect. The legislature made no reference to Section 204 (1-A) in Sections 252 to 256, even though by the same amending Act it made a change in the opening words of Section 252. The generality of the words used in Sub-section (1) of Section 252, therefore, remains wholly unaffected by Sub-section (1-A) of Section 204. We may also point out that if the list furnished under Sub-section (1-A) of Section 204 was intended to operate as a bar to the production by a complainant of witnesses outside the list, there was no point in retaining in Sub-section (2) of Section 252 a provision for the ascertainment of the names of witnesses from the complainant. Sub-section (1-A) of Section 204 does not, therefore, appear to us to be relevant for an interpretation of the provisions under consideration.

16. The object underlying Sub-section (1-A) of Section 204 obviously is to create some check upon the institution of false and frivolous cases and upon the production of untrue evidence. The provision also serves to give the accused at the very start of the case some idea of the evidence which is likely to be produced against him. It cannot, however, be urged that since the object of that provision may to some extent be defeated if a complainant is left free to produce witnesses outside the list furnished by him, the provision should be interpreted as precluding him from producing a witness not mentioned in the list. A bar against the production by the complainant of any evidence before he closes his case cannot be spelled out on the basis of this consideration. The fact that the name of a witness has not been disclosed in the list filed under Sub-section (1-A) of Section 204 will be a matter to be considered in judging the truth and value of the testimony of the witness, but it cannot deprive the complainant of legal right to produce that witness and relieve the Magistrate of the obligation to take his evidence. What we have said above in regard to the effect of Sub-section (1-A)

of Section 204 holds good in regard to the effect of Sub-section (2) of Section 252 as well. The fact that the name of a particular witness has not been given by the complainant under Sub-section (2) of Section 252 will likewise be a factor to be taken into account in judging the truth and value of his testimony, but it cannot curtail in any manner the right conferred upon the complainant and the duty cast upon the Magistrate by Sub-section (1) of Section 252. As we have said at an earlier stage of our judgment, the only statutory effect of the name of a witness not having been given under Sub-section (2) of Section 252 is that the complainant is not entitled as of right to have him summoned.

17 On general principles too the conclusion reached by us seems to be the proper conclusion. The party to a proceeding in a court should be entitled to produce all such witnesses as may support his case and this right should remain exercisable by him till he has closed his case. That he did not disclose the name of a particular witness at an early stage of the case or before the production of the witness in court may be a legitimate ground of criticism against the testimony of that witness, but it should not act as a bar to his production, unless, of course the statute regulating the proceeding clearly imposes such a bar. Now, in a trial under Chapter XXI of the Code of Criminal Procedure it is not until the "evidence of any remaining witnesses" has been taken under Section 256 that the prosecution case is closed, and it is only thereafter that the accused is called upon to enter upon his defence. Till then therefore, the complainant should have a right to produce his witnesses. It is true that the court should be anxious to ensure the fairness of all proceedings against the accused and to see that he is in no manner prejudiced in his defence. But, consistently with this, the court has also to see that all evidence bearing on the case is brought before it so that justice may be done. Neither of these principles can be overlooked. The production, after the framing of the charge, of a witness whose name has not been previously disclosed does not make the trial unfair or operate to the prejudice of the accused. The accused has the opportunity of cross-examining such a witness and of saying in his examination under Section 342 all that he has to say in explanation of the evidence given by the witness. He has, thereafter, the same opportunity of controverting the evidence of that witness as he has in respect of the evidence of any other witness. If he finds that the witnesses who have been cross-examined before the production of such a witness have to be cross-examined further in the light of the

statement made by the new witness, he may move the Magistrate under sub-s (1) of S 257 and if he satisfies the Magistrate that further cross-examination is necessary for the purposes of justice the Magistrate shall call the witness for further cross-examination. We may here observe that sub-section (2) of Section 252 enables the accused to know only the name of a prosecution witness and not the nature of the evidence that he will give and therefore, there is no substantial difference in the position of the accused in regard to a witness whose name has not been previously disclosed. Let us then look at the other side of the picture. The complainant might have inadvertently or on account of an inadequate realisation of the importance of a particular piece of evidence omitted to give the name of a witness under Sub-section (2) of Section 252. Again, the need of examining a witness may be felt as a result of the plea taken by the accused under Section 255 or the trend of the cross-examination of prosecution witnesses and the line of defence appearing therefrom. Having regard to these considerations, it is but proper and just that the complainant should have the opportunity to produce such other witnesses as may support his case. In affording him that opportunity the Court only gives to the complainant, in the words of Ray, C.J. in the Orissa case referred to above, a square deal. We may here draw attention to Section 251-A which regulates the trial of warrant cases instituted on a police report. Sub-section (7) of Section 251-A provides that the Magistrate shall take all such evidence as may be produced in support of the prosecution and it places no restraint at all upon the right of the prosecution in respect of production of evidence. An investigation by the police in which witnesses have been ascertained and examined precedes the institution of a case on a police report and yet the legislature makes it obligatory for the Magistrate to take all such evidence as may be produced in support of the prosecution. There seems to be no reason why a complainant in a case instituted otherwise than on police report should stand on a different footing. Further, in cases governed by Section 251-A too situations may arise when the accused has already cross-examined the prosecution witnesses, whose names are mentioned in the charge-sheet submitted by the police and copies of whose statements during investigation have been supplied to him, without having been made aware of the names of other witnesses who are later produced against him. If in such situations the accused feels the necessity of cross-examining the former set of witnesses with reference to the testimony of the latter set he can move the Magistrate

for recalling them and the Magistrate may recall them for further cross-examination. On the view taken by us, the position of the accused in regard to the above matter in the trial of a warrant case instituted otherwise than upon police report does not as we have shown above, differ from that of an accused in a case instituted upon police report. We must in the end also state that the question as to the true meaning of the words "any remaining witnesses for the prosecution" has in the first instance and primarily to be determined on the basis of the relevant statutory provisions, and it is only when they do not yield a clear answer that general principles may be called in aid. In our opinion, the relevant statutory provisions do not at all leave the meaning of the said words in doubt, and we have only tried to show here that the conclusion which we have reached as to that meaning is also in complete accord with principles of justice.

18. For the reasons discussed above we hold that the words "any remaining witnesses for the prosecution" in Section 256 Cr. P. C. do not refer only to those witnesses whose names have been given by the complainant under Sub-section (2) of Section 252 of Cr. P. C., but also include all such witnesses as may be produced by the complainant in support of the prosecution even though they have not been summoned or named before the framing of the charge. The complainant in the instant case was, therefore, entitled to produce Sri Sinha after the framing of the charge. We have not been able to find anything on record showing that the Magistrate had actually ascertained the names of witnesses from the complainant under Section 252(2) Cr. P. C. But, assuming that he had done so, the only effect of not mentioning the name of Sri Sinha was that the complainant could not, as a matter of right, have him summoned. The Magistrate had, however, the power to summon him and he thought it fit to exercise that power. In taking the evidence of Sri Sinha the Magistrate acted in conformity with law and there was no illegality, irregularity or impropriety involved in it.

19. We may also point out that Sri Sinha was actually produced, examined and cross-examined. The Magistrate had, undoubtedly, the jurisdiction to take his evidence, and the prayer of the accused that the evidence be discarded was entirely misconceived and unworthy of being entertained.

20. The revision has no force and we accordingly reject it.
RSK/D.V.C. Revision dismissed.

AIR 1969 ALLAHABAD 591 (V 56 C 111)

S. D. SINGH, J.

Bimal alias Bishnu Das, Applicant v. The State, Opp. Party.

Criminal Revn. No. 963 of 1966, D/-15-12-1967, against Order of Temp. Civil and S. J., Etah, D/- 27-5-1966.

Criminal P. C. (1898) S. 202 — Scope — Issue of warrant against accused before conclusion of enquiry under S. 202 (1) — Not proper — Procedure to be adopted where it is necessary to put up person named as accused for identification — (Evidence Act (1872), S. 9) — (Constitution of India, Art. 20(3)).

Sub-section (2) of Section 202 of Criminal P. C. is intended to invest the person making the enquiry, including a Police Officer, with powers of an officer in charge of a Police Station in connection with a particular enquiry or investigation, and then it goes on to restrict that power by saying that he shall not be entitled to arrest any person without warrant. Sub-section (2), therefore, merely restricts the powers of the person making the enquiry or the investigation under it. Whether or not it would be necessary during the course of that enquiry to arrest a person, will be a matter which will have to be looked into by the Magistrate, who is asked to issue warrants for the same. Sub-section (1) of Section 202, however, does not reserve the power to issue a bailable or non-bailable warrant in the Magistrate who is making the preliminary enquiry before this enquiry is completed. (Para 3)

One can contemplate a case, in which it may be necessary to put up a person named as an accused for identification for the proof of his guilt, but if the Magistrate is of opinion that a particular case is of that type, a more proper procedure for him might be to direct an investigation in the case by a Police Officer, who will then, in the course of the investigation, be able to obtain warrants under Sub-section (2) of S. 202, and arrange for the identification of the accused in due course. If the Magistrate does not direct an investigation by a Police Officer, he may examine such evidence as is produced before him by the complainant and, in the course of that examination, require the witnesses, who are supposed to be able to identify the accused, to give as much information about the features of the accused as they possibly can and, when summons or warrants are ultimately issued against the accused under Sub-section (1) of Section 204, he may instruct him or them to appear in court duly covered, so that he may not be seen by the witnesses, who come to give evidence against him. It may also be open to the Magistrate merely

to issue summons against the accused to appear before him during the enquiry under Sub-section (1) of Section 202 itself duly covered, but that will have to be merely for the purpose of his identification and that too at the option of the accused to appear and get himself identified, and secure the advantage of an order being passed in his favour at an earlier stage if the witnesses fail to identify him. The accused may not be agreeable to take any risk and, in that case, he cannot be compelled to appear before the court so long as the Magistrate does not decide to proceed against him under Sub-section (1) of Section 204. AIR 1951 Kutch 82 & AIR 1957 Andh Pra 472, Disting., AIR 1927 Mad 19 (FB), Rel on (Para 4)

Cases Referred: Chronological Paras

- (1957) AIR 1957 Andh-Pra 472
(V 44)= 1957 Cri LJ 937, K. Savaranna v State 5
(1951) AIR 1951 Kutch 82 (V 38)= 5
1952 Cri LJ 27, Karsandas Naranji v Ramji Dosa 5
(1927) AIR 1927 Mad 19 (V 14)= 5
28 Cri LJ 129 (FB), Appa Rao Mudaliar v. Janakiammal 5

Keshav Sahai, for Applicant, A. G. A., for Opp Party

ORDER:— This is an application in revision filed against an order of the Temporary Civil & Sessions Judge, Etah, dated 27th May, 1966, by which he disposed of three revision applications Nos. 16, 17 and 18 of 1966 filed in his Court.

2. The applicant Bimal is named as an accused in a complaint filed under Section 302 read with Section 34 of the Indian Penal Code by one Pt Bihari Lal. The complaint is, in fact, against two persons, Sri Raghuraj Singh, a Sub-Inspector of Police and the present applicant, Bimal. On the complaint being presented, the statement of the complainant was recorded under Section 200 of the Code of Criminal Procedure, and then the complainant was directed to produce evidence under Section 202 of the Code. No additional evidence has been examined so far on behalf of the complainant. An application was, however, moved by him on 17th September, 1955 in which it was stated that the accused Bimal was required to be identified by his witnesses and that he might, therefore, be summoned by the issue of non-bailable warrants against him. The Magistrate passed an order that non-bailable warrants be issued against Bimal and that instructions may also be issued that he was to be kept duly covered. But the Magistrate has not given any reason why and how he was satisfied that the issue of non-bailable warrants was necessary. The question is if it was within his jurisdiction to issue non-bailable warrants, when the

evidence under Section 202 of the Code of Criminal Procedure was yet to be examined.

3. Sub-section (1) of Section 202 of the Code of Criminal Procedure clearly states that for reasons to be recorded in writing, the Magistrate may "postpone the issue of process for compelling the attendance of the person complained of" and then proceed to enquire into the case himself. This is what the Magistrate did, when he directed the complainant to produce evidence under Section 202 of the Code of Criminal Procedure. It means, therefore, that, by implication, he postponed the issue of process for compelling the attendance of Bimal aforesaid, within the meaning of Sub-section (1) of Section 202 of the Code. If the issue of process against Bimal was postponed by the Magistrate, the question remains whether the Magistrate could, at a later stage in the same proceeding before any evidence was examined by him under Section 202, issue a warrant of arrest against Bimal and that too a non-bailable one. The first impression, which one gets on reading sub-section (1) of Section 202, is that the Magistrate has no such power. The Sessions Judge has referred to Sub-section (2) of Section 202, which relates to an enquiry or investigation by a person other than the Magistrate, or a Police Officer, and provides that such person shall exercise all the powers conferred by the Code of Criminal Procedure on an officer in-charge of a Police Station except that he shall not have the power to arrest without warrant. The Sessions Judge has read this sub-section as meaning that even when an enquiry or investigation is being held under Sub-section (2), the person making the enquiry will have the power to arrest with a warrant and he has, therefore, inferred that a Magistrate who is himself making an enquiry under Sub-section (1), may issue a warrant for the arrest of the person accused. I do not, however, find it possible to agree with this interpretation of Sub-section (2) of S. 202 of the Code of Criminal Procedure. Sub-section (2) is intended to invest the person making the enquiry, including a Police Officer, with powers of an officer in-charge of a Police Station in connection with a particular enquiry or investigation, and then it goes on to restrict that power by saying that he shall not be entitled to arrest any person without warrant. Sub-section (2), therefore, merely restricts the powers of the person making the enquiry or the investigation under it. Whether or not it would be necessary during the course of the enquiry to arrest a person, will be a matter which will have to be looked into by the Magistrate, who is asked to issue warrants for the same. Sub-section (1) of

Section 202, however, does not reserve the power to issue a bailable or non-bailable warrant in the Magistrate who is making the preliminary enquiry before this enquiry is completed. If the Magistrate is not satisfied with the statement of the complainant and the statements of such of the witnesses as are present and examined under Section 200 of the Code, it is only then that he directs some enquiry or investigation under Section 202(1). The Magistrate having decided that, before the accused persons may be summoned, it is necessary to undertake such enquiry or investigation, postpones the issue of process for compelling his attendance. It would be reversing the process of the proceedings before him, if he, even though the evidence under Sub-section (1) of Section 202 still remains to be produced, decides to issue non-bailable, or even bailable, warrants against him.

4. One can contemplate a case, in which it may be necessary to put up a person named as an accused for identification for the proof of his guilt, but if the Magistrate is of opinion that a particular case is of that type, a more proper procedure for him might be to direct an investigation in the case by a Police Officer, who will then, in the course of the investigation, be able to obtain warrants under Sub-section (2) of Section 202, and arrange for the identification of the accused in due course. If the Magistrate does not direct an investigation by a Police Officer, he may examine such evidence as is produced before him by the complainant, and, in the course of that examination, require the witnesses, who are supposed to be able to identify the accused, to give as much information about the features of the accused as they possibly can and, when summons or warrants are ultimately issued against the accused under Sub-section (1) of Section 204, he may instruct him or them to appear in court duly covered, so that he may not be seen by the witnesses, who come to give evidence against him. It may also be open to the Magistrate merely to issue summons against the accused to appear before him during the enquiry under Sub-section (1) of Section 202 itself duly covered, but that will have to be merely for the purpose of his identification and that too at the option of the accused to appear and get himself identified, and secure the advantage of an order being passed in his favour at an earlier stage if the witnesses fail to identify him. The accused may not be agreeable to take any risk and, in that case, he cannot be compelled to appear before the court so long as the Magistrate does not decide to proceed against him under Sub-section (1) of Section 204. It appears to me that the issue of the warrants against the

present applicant at the stage of an enquiry under Sub-section (1) of Section 202 of the Code of Criminal Procedure was altogether without jurisdiction.

5. A few cases were cited before me on behalf of the applicant. The first case relied upon was *Karsandas Naranji v. Ramji Dosa*, AIR 1951 Kutch 82. But it does not seem to have any application to the facts of this case. All that was decided in that case was that once a Magistrate takes cognisance of an offence and issues process against the person complained against, he cannot subsequently direct the Police to make an enquiry against him. *K. Savaranna v. State*, AIR 1957 Andh Pra 472, is a case the facts of which appear to be reverse to what they are in the present case. What has been held in that case is that once a process compelling the attendance of the accused is issued by the Magistrate, he cannot avail of the provisions of Section 202 of the Code of Criminal Procedure for making an enquiry against him. The view taken in the case may be interpreted to mean that since an enquiry under sub-section (1) of Section 202 cannot be made after the issue of a process compelling the attendance of an accused, the process may not be issued (if the issuing of such process has been postponed and an enquiry taken up by the Magistrate), so long as that enquiry is not completed by him. The decision in *Appa Rao Mudaliar v. Janakiammal*, AIR 1927 Mad 19 (FB) is directly in point. In this case the question whether an accused person may be summoned to appear before the enquiry under sub-section (1) of Section 202 is concluded, was considered by a Full Bench of the Madras High Court. It was held that summoning of an accused before the conclusion of an enquiry under Sub-section (1) of Section 202 may sometime turn out to be to the advantage of the accused himself as the Magistrate may, on hearing the accused, find it impossible to rely upon the evidence, which is presented before him on behalf of the complainant, but, even so, that procedure was not warranted by the provisions of the Code. It was observed:—

"The object of the chapter of the Code in which Section 202 appears is to prevent accused persons being harassed at all or asked to appear if in the opinion of the Magistrate no prima facie case is made out; and in my opinion, the Code never contemplated that at that stage they should either be asked or permitted to state their cases".

6. I, therefore, find it impossible to agree with the view of the Sessions Judge that the Magistrate could issue non-bailable warrants against the present applicant for the purposes of his being put up for identification by the witnesses

which were to be examined by the complainant. It is true that the witnesses, whom the complainant may be producing in court, if those witnesses do not know the applicant by name, will not be in a position to give direct evidence against him, but how and in what manner the complainant is to satisfy the Magistrate that a prima facie case is made out for purposes of Section 202(1), is for the complainant to decide. As I have already said, one of the ways for doing this might be that the witnesses describe the features of the accused person in detail in their statements and the Magistrate may, by some evidence, which may be placed before him (may be the statement of the complainant himself) satisfy himself that the person so described by the witnesses is the person named as accused in the complaint, and then may issue the necessary process against him under Section 204(1).

7. The issue of warrants for the arrest of the applicant and his production in the court of the Magistrate was, therefore, not warranted by the provisions of the Code, and the order to that effect passed by the Magistrate on 17th September, 1965, has to be set aside. The other two orders, which were challenged before the Sessions Judge, are liable to be set aside on the ground that the Magistrate has refused to pass orders on those applications unless the applicant decided to appear in his court. It was undesirable for the Magistrate to require the appearance of the applicant in his court. It is all the more undesirable for him to indirectly compel his attendance by refusing to pass orders on the applications which could be legitimately moved on his behalf in the court.

*8 The application is allowed. The three orders passed by the Magistrate dated 17th September, 1965, 12th October, 1965 and 14th February, 1966, are set aside. The applicant shall not be compelled to appear in the court of the Magistrate till he decides to summon him under Section 204 of the Code of Criminal Procedure. Regarding the request of the applicant that he may be put up for identification at Farrukhabad instead of Etah, the Magistrate will pass orders on merits without laying down any condition regarding the appearance of the applicant in his court first.

RSK/D V C.

Revision allowed

AIR 1969 ALLAHABAD 594 (V 56 C 112)

FULL BENCH

V. G. OAK C. J., G. C. MATHUR AND T. P. MUKHERJEE, JJ

Beharji Dass, Civil & Sessions Judge, Sultanpur and others, Appellants v Chandra Mohan, Civil & Sessions Judge, Fatehpur, and others, Respondents

Special Appeals Nos 1054 of 1967 with 30 and 87 of 1968 D/- 6-1-1969 against judgment of Satish Chandra J reported in AIR 1969 All 230

(A) Constitution of India, Arts. 233(2) and 236(b) — Expression "the service" in Art 233(2) can only mean 'judicial service' as defined in cl (b) of Art. 236 — Judicial Magistrate is not in "the service" within meaning of cl. (2) of Art. 233 — AIR 1966 SC 1987, Foll. — (Words and Phrases — "Service") (Para 13)

(B) Constitution of India, Art 233(2) — Judicial Magistrate, a pleader for not less than 7 years before his appointment to Higher Judicial Service — He is not already in the service of State within meaning of Art 233(2) and is eligible for appointment as District Judge under cl. (2) of Art. 233. AIR 1967 SC 442 Rel on. (Paras 10, 18).

(C) Constitution of India, Arts. 233A, 233, 368 Proviso, 141, 142, 144, 245, 246, 31A and 31B — Constitution (Twentieth Amendment) Act (1966) — Validity — Provision is valid — Amendment of Constitution by inserting Art. 233A was within competence of Parliament — Object of Art. 233A was to validate appointments which were declared invalid on ground of contravention of Art. 233 — Neither Art. 233 nor Art. 233A involves fundamental rights — Inserting Art. 233A has not the effect of amending Art. 142 or 144 directly or indirectly — Proviso to Art. 368 is not attracted — American doctrine of separation of legislative and judicial powers does not apply in India. AIR 1969 All 230, Reversed.

Amendment of Constitution by inserting Art 233A was within competence of Parliament. Art 233A is in the nature of a proviso to Art 233. The object underlying Article 233A was to validate certain appointments, which were invalid on the ground that the appointments contravened Article 233. By inserting Article 233A in the Constitution, Article 233 has been modified. Neither Article 233 nor Art 233A involves fundamental rights. The American doctrine of well-defined separation of legislative and judicial powers has no application in India. It cannot be said that an Indian statute which seeks to validate invalid actions is bad if the invalidity has already

been pronounced upon by a Court of law. Case law discussed.

(Paras 20, 21, 31 and 35)

It is the settled legislative practice in India that whenever a decision of a court creates practical difficulty, such difficulty may be overcome by appropriate legislation. This has been the practice in India both before and after the commencement of the Constitution. Arts. 31A and 31B were inserted in the Constitution in order to get over difficulties created by decisions of courts. Case law discussed. (Para 22)

Further, Article 141 does not prevent the appropriate legislature from amending the law. Nor does Art. 141 take away Parliament's power to amend the Constitution according to the prescribed procedure. Articles 233 and 233A fall under Chapter VI of Part VI of the Constitution. This Chapter is not covered by the proviso to Article 368. So, it was not necessary in the case to follow the special procedure laid down in the proviso to Article 368. The ordinary procedure laid down in the main part of Article 368 was followed. That was sufficient. Therefore, the Constitution (Twentieth Amendment) Act, 1966 is valid. Inserting Art. 233A in the Constitution had not the effect of amending Art. 142 or Art. 144 directly or indirectly. AIR 1969 All 230 Reversed. Case law discussed. (Paras 32, 36, 40, 43)

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1940 FCR 110, United Provinces
v. Atiqa Begum | 23 |

Shanti Bhushan, Rajaram Agarwal, for Appellants; H. N. Seth, B. D. Agarwala, J. Swarup and N. Lal, for Respondents.

OAK, C. J.—The question for consideration in these connected appeals is whether certain persons should be prohibited from functioning as District Judges in Uttar Pradesh. The three appeals arise out of a writ petition filed in the year 1967 by Shri Chandra Mohan against the State of Uttar Pradesh and 15 others.

2. Several years ago, the State Government established U. P. Higher Judicial Service. This service consists of two grades: (1) District & Sessions Judges, and (2) Civil & Sessions Judges. Under Article 309 of the Constitution, the Governor framed rules for appointment to U. P. Higher Judicial Service. These rules are known as U. P. Higher Judicial Service Rules, 1953 (hereafter referred to as the Rules). The Rules provide two separate methods for appointment of Civil & Sessions Judges. The first method is by promotion from the Uttar Pradesh Civil Service (Judicial Branch). The second method is by direct recruitment of advocates and Judicial Magistrates as Civil & Sessions Judges. Under these Rules, a number of persons were appointed to the U. P. Higher Judicial Service between 1953 and 1964.

3. Sri Chandra Mohan is a member of the Uttar Pradesh Civil Service (Judicial Branch). In the year 1965 he was officiating as Civil & Sessions Judge. He apprehended that direct recruitment of advocates and Judicial Magistrates to U. P. Higher Judicial Service was likely to affect his chances of promotion adversely. So, he filed a writ petition challenging the appointment of advocates and Judicial Magistrates to U. P. Higher Judicial Service. That was Writ Petition No. 526 of 1965.

4. That writ petition was partly allowed by this Court on 21-2-1966. It was held that Sri Om Prakash was not eligible for appointment to U. P. Higher Judicial Service. In other respects, the petition was dismissed. Sri Chandra Mohan took up the matter in appeal before the Supreme Court. The appeal was allowed by the Supreme Court on 8-8-1966. It was held that Judicial Magistrates were not eligible for appointment as Civil & Sessions Judges. It was further held that the U. P. Higher Judicial Service Rules are constitutionally void, as they contravened Article 233 of the Constitution. The operative part of the judgment of the Supreme Court ran thus:—

"In the result, we hold that the U. P. Higher Judicial Service Rules providing for the recruitment of District Judges are constitutionally void and, therefore, the appointments made thereunder were ille-

gal We set aside the order of the High Court and issue a writ of mandamus to the 1st respondent not to make any appointment by direct recruitment to the U P Higher Judicial Service in pursuance of the selections made under the said rules. The 1st respondent will pay the costs of the appellant. The other respondents will bear their own costs."

The case is reported in AIR 1966 SC 1987

5 This decision of the Supreme Court created a serious situation. According to the judgment, appointment of several persons as District Judges during the course of some ten years became illegal. Parliament intervened in order to meet the serious situation and enacted the Constitution (Twentieth Amendment) Act 1966. By this amendment, Article 233A was inserted in the Constitution. Article 233A of the Constitution ran thus —

"Notwithstanding any judgment, decree or order of any court,—

(a) (i) no appointment of any person already in the judicial service of a State or of any person who has been for not less than seven years an advocate or a pleader to be a district judge in that State and

(ii) no posting, promotion or transfer of any such person as a district judge, made at any time before the commencement of the Constitution (Twentieth Amendment) Act, 1966 otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions,

(b) no jurisdiction exercised, no judgment, decree, sentence or order passed or made, and no other act or proceeding done or taken, before the commencement of the Constitution (Twentieth Amendment) Act, 1966 by, or before, any person appointed, posted, promoted or transferred as a district judge in any State otherwise than in accordance with the provisions of Article 233 or Article 235 shall be deemed to be illegal or invalid or ever to have become illegal or invalid by reason only of the fact that such appointment, posting, promotion or transfer was not made in accordance with the said provisions."

On 1-2-1967 Sri Chandra Mohan filed another writ petition again challenging the appointment of persons from advocates and Judicial Magistrates between 1953 and 1964. This is Writ No 397 of 1967, out of which the present special appeals have arisen. The petition challenged the appointments of opposite parties Nos 2 to 16 to U P Higher Judicial Service. Sri Rikheshwari Prasad Sri

R C Bajpai and Sri Beharji Das, who are opposite parties Nos 13, 14 and 15 to the second writ petition were parties to the appeal before the Supreme Court, that arose out of Sri Chandra Mohan's first writ petition. The main contention of the petitioner in the second writ petition is that the Constitution (Twentieth Amendment) Act is unconstitutional, because the Amendment Act was not passed in accordance with the special procedure laid down in the proviso to Article 368 of the Constitution.

6. This writ petition was disposed of on 24-11-1967 by a single Judge of this Court. The petition was partly allowed. It was held that opposite parties Nos 13, 14 and 15 are holding the posts of District Judges illegally and without the authority of the Constitution. A writ in the nature of quo warranto was directed to be issued ousting the three persons from their offices.

7. Three separate appeals have been filed against the decision of the learned single Judge dated 24-11-1967. Special Appeal No 1054 of 1967 has been filed by Sri Beharji Das, Sri R C Bajpai and Sri Rikheshwari Prasad, who were opposite parties Nos 15, 14 and 13 respectively in the writ petition. Special Appeal No 30 of 1968 has been filed by Sri Chandra Mohan, petitioner. The State of Uttar Pradesh has filed Special Appeal No 87 of 1968. The petitioner in his special appeal has prayed that the opposite parties Nos 2 to 11 should also be ousted from their offices. Sri Beharji Das and others and the State of Uttar Pradesh have prayed that the writ petition should be dismissed in its entirety.

8. It will be noticed that Sri Chandra Mohan filed two writ petitions in succession in 1965 and 1967. It will be convenient to refer to the former writ petition of Sri Chandra Mohan as the previous case.

9. In grounds Nos 12 and 13 of the present writ petition the petitioner raised the question of violation of Article 16 of the Constitution. This contention has been rejected by the learned single Judge. Mr Jagdish Swarup appearing for the petitioner did not raise the question of infringement of Article 14 or Article 16 of the Constitution before us.

10. It will be convenient to take up the case of Sri Prayag Narayan first. He was opposite party No 12 in this writ petition. At the time of his appointment to U P Higher Judicial Service he was serving as a Judicial Magistrate. In the previous case (AIR 1966 SC 1987) it has been held that Judicial Magistrates are not eligible for appointment to U P Higher Judicial Service.

11. However, Sri Prayag Narayan raised another ground in support of his

appointment. Clause (2) of Article 233 of the Constitution states:—

"A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

Sri Prayag Narain urged that he is qualified under clause (2) of Article 233, because he was a pleader for not less than seven years before his appointment as a Judicial Magistrate. He filed a counter-affidavit. In paragraph 15 of the counter-affidavit he deposed that he had already completed more than seven years as a pleader before his appointment to the Higher Judicial Service. The petitioner did not file a rejoinder challenging this allegation of Sri Prayag Narayan. I, therefore, accept Sri Prayag Narayan's counter-affidavit to the effect that he had completed more than seven years as a pleader before his appointment to the Higher Judicial Service.

12. This position was not seriously disputed by Mr. Jagdish Swarup. He urged that, in spite of Sri Prayag Narayan's practice as a pleader for seven years, his case is not covered by Article 233 (2), because he was in the service of the State as a Judicial Magistrate.

13. It is true that Sri Prayag Narayan was in service at the material time. But in the previous case (AIR 1966 SC 1987) it has been held by the Supreme Court that the expression "the service" in Article 233(2) can only mean 'Judicial service' as defined in Clause (b) of Article 236. Admittedly, Sri Prayag Narayan was not in "judicial service" as defined in Clause (b) of Article 236. It follows that he was not in "the service" within the meaning of Clause (2) of Article 233.

14. Some emphasis was placed upon the expression "has been" appearing in Clause (2) of Article 233. The contention was that the expression "has been" made it necessary that the person concerned must have been in active practice as an advocate or a pleader at the time of his selection as a District Judge.

15. In *State of Assam v. Horizon Union*, AIR 1967 SC 442 the question arose whether one Sri Dutta was eligible to be appointed as the presiding officer of an Industrial Tribunal in Assam under the Industrial Disputes Act, 1947. For over three years Sri Dutta held the post of an Additional District Judge. He worked as Registrar of Assam High Court. He retired from that office in 1959. In 1965 the State Government appointed Sri Dutta the presiding officer of an Industrial Tribunal in Assam. Section 7A of the Industrial Disputes Act, 1947 provided for

constitution of Industrial Tribunals. Sub-section (3) of Section 7A ran thus:—

"A person shall not be qualified for appointment as the presiding officer of a Tribunal unless—

(a)

(aa) he has worked as a District Judge or as an Additional District Judge or as both for a total period of not less than three years or is qualified for appointment as a Judge of a High Court"

It was held that Sri Dutta was qualified for appointment as the presiding officer of the Industrial Tribunal under Clause (aa) of Sub-section (3) of Section 7A. It will be noticed that Sri Dutta's appointment in the year 1965 was upheld, although he had retired from service long before 1965.

16. Clause (2) of Article 217 prescribes qualifications for appointment of a High Court Judge. Clause (2) of Article 217 states:—

"A person shall not be qualified for appointment as a Judge of a High Court unless he is a citizen of India and —

(a) has for at least ten years held a judicial office in the territory of India"

17. It is well known that in several cases persons have been appointed as High Court Judges some time after their retirement as District Judges. Such appointments have never been challenged. The position under Article 233 (2) is similar to that under Article 217 (2) (a) of the Constitution.

18. Sri Prayag Narayan was not already in the service of the State within the meaning of clause (2) of Article 233. He has been a pleader for not less than seven years before his appointment to the Higher Judicial Service. He was, therefore, eligible for the appointment under clause (2) of Article 233. The learned single Judge was right in upholding Sri Prayag Narayan's appointment.

19. Next we have to consider the question of validity of appointment of opposite parties Nos. 2 to 11 and Nos. 13 to 15. The Constitution (Twentieth Amendment) Act, 1966 validates the appointment of these officers. But according to the petitioner, the Amendment Act is itself unconstitutional. This contention has been partly accepted by the learned Single Judge. He has held that the Constitution (Twentieth Amendment) Act affects Article 142 also. Opposite parties Nos. 13, 14 and 15 were parties to the previous case. Consequently, the Constitution (Twentieth Amendment) Act, 1966 is unconstitutional and void in so far as it validates the appointment of these three persons. I am unable to agree.

20. The first contention of Mr. Jagdish Swarup is that Article 233A does not

amount to amendment of the Constitution at all. I found some difficulty in following the argument. It is true that a Written Constitution is the fundamental law of the country. But there are no fixed rules as to the subjects that can properly be included in a Written Constitution. The Constitution of India is a lengthy document. Our Constitution deals with such diverse subjects as language and prohibition. Article 233A is in the nature of a proviso to Article 233. There was no suggestion that Article 233 is not a part of the Constitution. If Article 233 is a part of the Constitution, there is no difficulty in holding that Article 233A is also a part of the Constitution. The process of inserting Article 233A involved amendment of the Constitution. The amendment had to be made by Parliament as laid down in Article 368. Amendment was made according to the procedure laid down in the main provision of Article 368. The question has been raised whether the special procedure laid down in the proviso to Article 368 was necessary on the ground that certain Articles covered by the proviso are affected by this amendment.

21 The object underlying Article 233A was to validate certain appointments, which were invalid on the ground that the appointments contravened Article 233. The question has been raised whether it is permissible to make a provision in the Constitution so as to get over the constitutional difficulty previously experienced. It has also been argued for the petitioner that constitutional amendment for getting over Supreme Court decisions is not permissible.

22. The learned single Judge has referred to the American doctrine of separation of powers. It is true that our Constitution also has devoted separate parts for the executive, legislature and judiciary. But division of powers in our Constitution is not so rigid as that under the Constitution of the United States of America. It is the settled legislative practice in India that whenever a decision of a Court creates practical difficulty, such difficulty may be overcome by appropriate legislation. This has been the practice in India both before and after the commencement of the Constitution.

23 In *United Provinces v Atiqa Begum*, AIR 1941 SC 16 it was held by the Federal Court that legislation for the purpose of validation of executive orders must necessarily be regarded as subsidiary or ancillary to the power of legislating on the particular subject in respect of which the executive orders may have been issued.

24. Schedule VII to Government of India Act, 1935 contained a list of sub-

jects within the jurisdiction of the Federation and Provinces. In *Piare Dusadh v Emperor*, AIR 1944 FC 1 it was held by the Federal Court that the power of validation must be taken to be ancillary or subsidiary to the power to deal with the subjects specified in the Lists in Schedule VII of the Act.

25. In *State of Orissa v Bhopendra Kumar*, AIR 1962 SC 945 it was held that the Governor was competent to issue an Ordinance with a view to override the judgment delivered by the High Court in its jurisdiction under Article 226 of the Constitution.

26 Mr Jagdish Swarup conceded that validity of Acts may be given retrospective effect. He also conceded that Legislature may intervene in order to cure defects in executive action. But he urged that such power of validation cannot be pressed into service in the case of legislative defect or constitutional infirmity.

27 Articles 31A and 31B were inserted in the Constitution in order to get over difficulties created by decisions of Courts. In *Shankari Prasad v Union of India*, AIR 1951 SC 458 it was held that the Constitution (First Amendment) Act, 1951 by which the two Articles were inserted was valid.

28. In *Mt Jadao v Municipal Committee, Khandwa*, AIR 1961 SC 1486 it was held that retrospective laws could validate an Act, which contained some defect in its enactment. The power of validating defective laws was ancillary and subsidiary to the powers conferred by the Entries and was included in those powers.

29 In *M/s West Ramnad Electric Distribution Co Ltd v State of Madras*, AIR 1962 SC 1753 it was held that a notification issued under a prior invalid Act can be validated by a subsequent valid Act.

30 In *Sajan Singh v State of Rajasthan*, AIR 1965 SC 845 it was held that it cannot be urged that inasmuch as the impugned Act purported in substance to set aside the decisions of Courts of competent jurisdiction by which some of the Acts added to the Ninth Schedule had been declared to be invalid, it is unconstitutional. Legislative power to make laws in respect of areas entrusted to the legislative jurisdiction of different legislative bodies can be exercised both prospectively and retrospectively. On several occasions Legislatures think it necessary to validate laws which have been declared to be invalid by Courts of competent jurisdiction, and in so doing, they have necessarily to provide for the intended validation to take effect notwithstanding any judgment, decree or order passed by a Court of competent jurisdiction to the contrary.

31. In *Golak Nath v. State of Punjab* AIR 1967 SC 1643 it has been held that there are no limitations on the power to amend under Article 368 except that such amendment must not infringe fundamental rights. By inserting Article 233A in the Constitution, Article 233 has been modified. Neither Article 233 nor Article 233A involves fundamental rights. So, amendment of the Constitution by inserting Article 233A was within the competence of Parliament.

32. Next we have to consider the petitioner's contention that the impugned amendment affects Articles 142 and 144 of the Constitution. Article 141 lays down that the law declared by the Supreme Court shall be binding on all Courts within the territory of India. Article 141 does not prevent the appropriate Legislature from amending the law. Nor does Article 141 take away Parliament's power to amend the Constitution according to the prescribed procedure.

33. Clause (1) of Article 142 states:—
"The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or order so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe."

It was urged for the petitioner that the impugned amendment affects the Supreme Court's power under Clause (1) of Article 142. This contention has to be repelled for a variety of reasons. Clause (1) of Article 142 has been divided into two parts. According to the first part of Clause (1), the Supreme Court may pass decrees and orders in cases coming before it. Article 233A does not prevent the Supreme Court from passing decrees or orders in cases coming before it. The second part of Clause (1) lays down that decrees of the Supreme Court are enforceable throughout the territory of India according to the procedure to be prescribed by Parliament. Now, the Supreme Court's decree dated 8-8-1966 in the previous case consists of two parts. The first part is declaratory. That part is not executable. Under the second part of the decree, the State Government was prohibited from making appointments under the invalid Rules. Opposite parties Nos. 2 to 15 had been appointed to U. P. Higher Judicial Service before 8-8-1966. There was, therefore, no question of executing the decree dated 8-8-1966 against these officers. If Parliament can lay down the procedure for execution of Supreme Court decrees, it is open to Parliament to create a situation where there would

be no occasion for execution of such a decree.

34. Article 144 states:—
"All authorities, civil and judicial, in the territory of India shall act in aid of the Supreme Court."

This Article also does not prevent Legislatures from altering law by appropriate legislation.

35. In *Udai Ram v. Union of India*, AIR 1968 SC 1138 it was held that the provisions of an Act cannot be challenged as invalid on the ground that they encroached upon the domain of the judiciary by seeking to nullify judicial decisions. The American doctrine of well-defined separation of legislative and judicial powers has no application in India. It cannot be said that an Indian Statute which seeks to validate invalid actions is bad if the invalidity has already been pronounced upon by a Court of law.

36. I find no conflict between Articles 142 and 144 on one hand and Article 233A on the other hand. Inserting Article 233A in the Constitution had not the effect of amending Article 142 or Article 144 directly or indirectly. Articles 233 and 233A fall under Chapter VI of Part VI of the Constitution. This Chapter is not covered by the proviso to Article 368. So, it was not necessary in the instant case to follow the special procedure laid down in the proviso to Article 368. The ordinary procedure laid down in the main part of Article 368 was followed. That was sufficient. In my opinion, the Constitution (Twentieth Amendment) Act, 1966 is valid.

37. The learned single Judge has expressed the view that, in spite of the decision of the Supreme Court in the previous case, certain rules in the U. P. Higher Judicial Service Rules, 1953 are valid. It is not necessary to deal with that question in the present appeals. The opposite parties do not rely upon any particular part of U. P. Higher Judicial Service Rules, 1953. The opposite parties take their stand on the Constitution (Twentieth Amendment) Act, 1966. I, therefore, express no opinion on the question whether certain rules in the U. P. Higher Judicial Service Rules, 1953 are valid, in spite of the decision of the Supreme Court in AIR 1966 SC 1987. That question is left open.

38. Appointments of opposite parties Nos. 2 to 15 have been validated by Constitution (Twentieth Amendment) Act, 1966. The fact that opposite parties Nos. 13, 14 and 15 were parties to the previous case makes no difference. Appointments of all these 14 officers are valid. Sri Om Prakash Sharma, opposite party No. 16 was not actually appointed to the U. P. Higher Judicial Service. There is, therefore, no question of ousting him from any

office. In my opinion Special Appeals Nos 1054 of 1967 and 87 of 1968 should be allowed, and Special Appeal No 30 of 1968 should be dismissed. The writ petition should be dismissed against all the opposite parties.

39 G C MATHUR, J — I agree with the judgment of my Lord the Chief Justice and with the order which he proposes to pass. I, however, wish to say a few words on the question whether the Constitution (Twentieth Amendment) Act makes any change in Article 142 (1) so as to attract the proviso to Article 368. Clause (1) of Article 142 is in two parts. The first part empowers the Supreme Court to pass such decree or order as is necessary to do complete justice in the matter before it. There is no complaint that this part is affected by the Amendment Act. The second part empowers Parliament, by law, and the President by order to prescribe the procedure for the enforcement of the decree and order of the Supreme Court throughout the territories of India. Under this power the President has made the Supreme Court (Decrees and Orders) Enforcement Order, 1954. The Amendment Act does not touch this power of Parliament or of the President. In this view, the Amendment Act does not make any changes in Article 142(1).

40 Even if the second part of Clause (1) of Article 142 be construed as declaring that the decrees and orders of the Supreme Court shall be enforceable throughout the territories of India and further as empowering Parliament and the President to prescribe the procedure for the enforcement of the decrees and orders, the Amendment Act makes no change in it. The Amendment Act does not make any change in the language of Clause (1) of Article 142, nor does it add any proviso or exception to it. What is said is that the Amending Act renders the order passed by the Supreme Court in the previous case unenforceable and thereby affects the operation of Article 142 (1). The operative order of the Supreme Court is in two parts. The first part declares the Rules to be void and consequently the appointments made thereunder to be illegal. This part is merely declaratory and no question of enforcing or executing it can arise. So far as this part of the order is concerned there is no difficulty as it is now well settled that an order of a Court can be legally superseded by legislative or constitutional amendment and Clause (1) of Article 142 does not prohibit such supersession. Therefore, the Amending Act in so far as it supersedes the declaration made by the Supreme Court, does not affect the operation of Article 142(1).

41. The second part of the order of the Supreme Court directs the State Gov-

ernment not to make any appointments to the U P Higher Judicial Service in pursuance of the selections made under the Rules. This injunction could only operate in the future. The Supreme Court did not order the removal of any persons from service who had already been appointed. Respondents Nos 2 to 12 to the present writ petition were appointed to the Higher Judicial Service before the first writ petition was filed and respondents Nos 13 to 15 were appointed in May-June, 1966, after the dismissal of the first writ petition and after the vacation of the stay order by the Supreme Court but before it passed final orders in that case. The injunction was not directed against the appointments of respondents Nos 2 to 15 but only against future appointments. The Amendment Act does not permit the State Government to make any appointments in future on the basis of selections made under the Rules and, therefore, it cannot be said to render unenforceable an injunction issued by the Supreme Court. Since the Amending Act does not at all touch the enforceable part of the order of the Supreme Court, it does not affect the operation of Clause (1) of Article 142.

42. The matter may be viewed from another angle. Clause (1) of Article 142 guarantees the enforceability of a subsisting decree or order of the Supreme Court, but it does not guarantee the subsistence of the decree or order itself. If the decree or order does not subsist then there is nothing on which Article 142(1) can operate. It is not disputed that the decree or order of a Court can be superseded by a legislative or constitutional amendment, there is no prohibition in the Constitution — and certainly not in Article 142(1) — against such supersession of a decree or order of the Supreme Court. Once the decree or order of the Supreme Court is properly and legally superseded no question of its enforceability under Article 142 (1) can arise. The order of the Supreme Court in the previous case has been properly and legally superseded by the Amending Act. There is no subsisting order the enforceability of which can be said to have been affected. One simple example will illustrate the point. Suppose the Supreme Court passes a decree or order and later, upon an application for review reverses it. Can it be urged that the subsequent order affects the applicability of Article 142(1) as it renders unenforceable the earlier order? Surely not. The Supreme Court has the power to review its decree or order and, it having exercised that power the original decree or order is superseded by the subsequent order. No question of enforcing the original decree or order under Article 142(1) can arise.

Likewise, Parliament has, in the exercise of its constitutional power to supersede judgments, decrees and orders of courts, superseded the order of the Supreme Court in the previous case by the Amendment Act.

43. The Amendment Act does not affect the application of Article 142 (1) and, therefore, cannot be said to make any change therein. The proviso to Article 368 is not attracted and the Amendment was not required to be ratified by the Legislatures of the States.

44. **MUKERJEE, J.:**— I agree with the judgment of my Lord, the Chief Justice.

45. **BY THE COURT:** Special Appeals Nos. 1054 of 1967 and 87 of 1968 are allowed with costs against respondent No. 1. Special Appeal No. 30 of 1968 is dismissed with costs to contesting respondents. The writ petition is dismissed with costs to contesting opposite parties. LGC/D.V.C. Order accordingly.

AIR 1969 ALLAHABAD 601 (V 56 C 113)
JAGDISH SAHAI AND GANGESHVAR PRASAD, JJ.

Smt. Sarla Devi, Applicant v. Shri Balwan Singh, Respondent.

Civil Revn. No. 910 of 1965, D/- 2-3-1968 against judgment of Second Addl. Dist. J. Meerut in Misc. Appeal No. 214 of 1964.

Hindu Marriage Act (1955), Ss. 28, 21, 24 — Scope of — Order under S. 24 — Appeal lies under S. 28 — F. A. F. O. No. 244 of 1959, D/- 19-5-1960 (All), Overruled; AIR 1960 Bom 315 & AIR 1962 Cal 455 Dissented from.

A right of appeal is a substantive right and is not a mere matter of procedure. The words "shall be regulated, as far as may be, by the Code of Civil Procedure, 1908" in Section 21 clearly indicate that it is the procedure only which is to be regulated by the Code of Civil Procedure. (Para 3)

The words used "and may be appealed from" in Section 28 of the Act clearly give a person aggrieved the right to file an appeal. The section makes every decree or order passed under the provisions of the Act appealable as of right, but the appeal would be regulated and governed by that particular local civil Act which rules in the State in which the appeal arises. (Para 4)

An order passed under Section 24 is not a mere interlocutory order. It is an order passed in favour of a party requiring the other party to make certain payments. That being the legal position, an appeal lies against the order on an appli-

cation under Section 24. AIR 1967 Andh Pra 323 (FB) & AIR 1961 All 395 (FB) & AIR 1961 Punj 508 & AIR 1962 Punj 127 & AIR 1959 Cal 455 Rel. on; F. A. F. O. No. 244 of 1959, D/- 19-5-1960 (All) Overruled; AIR 1960 Bom 315 and AIR 1962 Cal 455 Dissented from. (Paras 9, 10)

Cases Referred: Chronological Paras.

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| (1967) AIR 1967 Andh Pra 323 (V 54)=(1967) 2 Andh WR 296 (FB), K. Kutumba Rao v. K. Sesharatnamamba | 8, 10 |
| (1962) AIR 1962 Cal 455 (V 49)= 66 Cal WN 388, Gopendra Nath Basu Malik v. Smt. Prativa Rani | 7 |
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| (1959) AIR 1959 Cal 455 (V 46)= Smt. Sobhana Sen v. Amar Kanta | 10 |
| (1959) AIR 1959 Madh Pra 187 (V 46)= 1958 MPLJ 246, Rukhmanibai v. Kishanlal Ramlal | 10 |

JAGDISH SAHAI, J.:— This civil revision is directed against an order passed by Sri Abu Saad, II Additional District Judge, Meerut, on 14-4-1965, in exercise of the appellate jurisdiction conferred by Section 28 of the Hindu Marriage Act (hereinafter referred to as the Act), setting aside the order passed by the learned Civil Judge, Varanasi, granting to Smt. Sarla Devi, applicant before us, the expenses of the proceedings and maintenance pendente lite. The learned single Judge before whom the revision application came up for hearing has referred the following question of law to us for decision:—

"Does an appeal lie against an order passed on an application under Section 24 of the Hindu Marriage Act?"

The question, therefore, is whether the appeal before Sri Abu Saad was competent under the provisions of Section 28 of the Act

2. Section 24 of the Act reads —

"Where in any proceeding under this Act it appears to the Court that either the wife or the husband, as the case may be, has no independent income sufficient for her or his support and the necessary expenses of the proceeding, it may on the application of the wife or the husband, 'order' the respondent to pay to the petitioner the expenses of the proceeding, and monthly during the proceeding such sum as, having regard to the petitioner's own income and the income of the respondent, it may seem to the Court to be reasonable"

Section 28 of the Act reads —

"All decrees and orders made by the Court in any proceeding under this Act shall be enforced in like manner as the decrees and orders of the Court made in the exercise of its original civil jurisdiction are enforced, and may be appealed from under any law for the time being in force

Provided that there shall be no appeal on the subject of costs only"

Section 28 of the Act provides for two things, firstly that all orders made by the court in any proceeding shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction and secondly all these orders may be appealed from. It is not disputed that the order passed under Section 24 of the Act if not complied with shall be enforced as an order of the Court. The words "may be appealed from" clearly make all orders appealable. There is nothing in the Act to show that an order passed under Section 24 of the Act is excepted from the scope of the words mentioned above (underlined (here in ' ') by us)

3. It has been contended that under Section 21 of the Act the provisions of the Code of Civil Procedure have been made applicable to all proceedings and, therefore, whether or not an appeal would lie must be culled out from the provisions of the Code of Civil Procedure. Section 21 of the Act reads —

"Subject to the other provisions contained in this Act and to such rules as the High Court may make in this behalf, all proceedings under this Act shall be regulated as far as may be, by the Code of Civil Procedure, 1908"

All that Section 21 of the Act provides for is that the proceedings under the Act shall be regulated by the Code of Civil Procedure. In other words the provision requires that the procedure to be followed in proceedings under the Act would be the one contained in the Civil Procedure Code. A right of appeal is a

substantive right and is not a mere matter of procedure. The use of the words "shall be regulated, as far as may be, by the Code of Civil Procedure, 1908" in Section 21 of the Act clearly indicate that it is the procedure only which is to be regulated by the Code of Civil Procedure. Section 28 of the Act confers an unqualified right of appeal. The words used "and may be appealed from" in Section 28 of the Act clearly give a person aggrieved the right to file an appeal. In our opinion, therefore, an order passed under Section 24 of the Act is appealable at the instance of a party aggrieved.

4. The words "under any law for the time being in force" occurring in Section 28 of the Act, in our opinion, only mean that the appeal shall be governed by the provisions contained in the Act which deals with forums of Civil appeals in that area. The necessity for using this expression arose because of the circumstance that in different States there are different statutes in respect of Civil appeals. The Code of Civil Procedure does not provide the forum to which appeals would lie from decrees or orders. All that it does is to confer a right of appeal under certain circumstances. The forum to which an appeal would lie would be determined by the particular Act which applies to the State in which the appeal arises. For instance, for the purposes of Uttar Pradesh, Bihar, Orissa, Assam and Bengal it would be the provisions of the Bengal, Agra and Assam Civil Courts Act which would determine the forum to which the appeal would lie. Similarly in Mysore State it is the Mysore Civil Courts Act, in Madras State, it is the Madras Civil Courts Act and in Bombay State, it is the Bombay Civil Courts Act which would be the "law for the time being in force". The Legislature has used the words aforesaid because different States have different Acts dealing with forum for civil appeals. In our opinion, therefore, the second part of Section 28 of the Act makes every decree or order passed under the provisions of the Act appealable as of right, but the appeal would be regulated and governed by that particular local civil Act which rules in the State in which the appeal arises.

5. Our attention has been invited to a single Judge decision of this Court in F A F O No 244 of 1959 Smt Kusum Lata v Jagdish Prasad, decided on 19-5-1960 by N U Beg J wherein the learned single Judge held that no appeal lies against an order passed under Section 24 of the Act. With great respect to N U Beg J we are of the opinion that the right of appeal would not be governed by the provisions of the Code of Civil Procedure. In fact the C P C does not deal with forums to which appeals would lie.

6. Learned Counsel has next placed reliance upon a single Judge decision of Bombay High Court in Prithviraj Singji Mansinghji v. Bai Shivpravakumari, AIR 1960 Bom 315. In that case Gokhale, J. took the view that Section 28 of the Act does not provide for an appeal and the right of appeal must be culled out from the Code of Civil Procedure. We have already held above that Section 28 of the Act does provide for an appeal against every decree or order passed under the Act. Therefore, with great respect to Gokhale J. we are unable to agree with him.

7. Learned Counsel has next placed reliance upon a single Judge decision of the Calcutta High Court in Gopendra Nath Basu Malik v. Smt. Prativa Rani AIR 1962 Cal 455. The learned Judge has held that all that Section 28 of the Act provides in that the decrees or orders passed under the Act may be appealed from under any law for the time being in force and inasmuch as there is no law under which an appeal would lie against an order passed under Section 24 of the Act, no appeal lay against such an order. With great respect to the learned Judge we are unable to hold that the correct meaning of Section 28 of the Act is that the appeal must lie under the provisions of some other Act. We have already said that the language of Section 28 of the Act leads to the conclusion that it is that section which makes every decree or order appealable and all that the words "under any law for the time being in force" mean is that the forum to which the appeal would lie would be determined by the civil law applicable to the particular area in which the order sought to be appealed is passed. Again with great respect to the learned Judge we can treat the words "and may be appealed from" occurring in Section 28 of the Act as mere surplusages which would be the result if the Calcutta view is accepted.

8. Learned Counsel has also placed reliance upon Jalsutram Annapurnamma v. Jalsutram Ramkrishna Sastry, AIR 1959 Andh Pra 49 and B. Saraswathi v. B. Krishna Murthy AIR 1960 Andh Pra 30. We need not notice these decisions because a Full Bench of the same Court in K. Kutumba Rao v. K. Sesharatnamamba AIR 1967 Andh Pra 323 (FB) has overruled these cases and taken the same view which we are taking in this case.

9. In our opinion the meanings of the words used are unambiguous and plain. The words "and may be appealed from" occurring in Section 28 of the Act clearly mean that all the decrees and orders mentioned in Section 28 of the Act are appealable by virtue of that provision. The word "and" clearly relates to the words

"all decrees and orders" with which Section 28 of the Act opens and the words "may be appealed from" clearly indicate that "all decrees and orders" mentioned in the opening part of Section 28 are appealable as of right. If the section is read after deleting words unnecessary, for our purposes, it would run as follows:

"All decrees and orders made by the court in any proceeding under this Act ... may be appealed from under any law for the time being in force".

No decree or order is excepted from this rule. An order passed under Section 24 is not a mere interlocutory order. It is an order passed in favour of a party requiring the other party to make certain payments. The only exception made by Section 28 of the Act is in respect of an appeal relating to costs only. That being the legal position, we are satisfied that in the present case the appeal before Sri Abu Saad was competent.

10. We would answer the question referred to us in the affirmative and say that an appeal lies against an order passed under Section 24 of the Act. The view that we are taking finds support from AIR 1967 Andh Pra 323 (FB) (supra), Paras Ram v. Janki Bai AIR 1961 All 395 (FB), Rukhmanibai v. Kishanlal Ramlal, AIR 1959 Madh Pra 187, Dr. Tarlochan Singh v. Smt. Mohinder Kuar, AIR 1961 Punj 508, Sunder Singh v. Smt. Manna Sunder Singh, AIR 1962 Punj 127 and Smt. Sobhana Sen v. Amar Kanta Sen, AIR 1959 Cal 455.

11. Let the papers be returned to the learned single Judge with the answer given above.

D.R.R.

Reference answered accordingly.

AIR 1969 ALLAHABAD 603 (V 56 C 114)
JAGDISH SAHAI AND GANGESHWAR PRASAD, JJ.

Maharaj Singh, Appellant v. Smt. Uma Singh, Respondent.

F. A. F. O. No. 41 of 1963, D/- 2-3-1968 against judgment and decree of Dist. J. Varanasi, D/- 26-11-1962.

Special Marriage Act (1954), Ss. 39 and 36 — Order under S. 36, appealability of, under S. 39 — Held that appeal lies: AIR 1969 All 601 Rel. on. (Para 3)

Cases Referred: Chronological Paras
(1969) AIR 1969 All 601 (V 56) =
Civil Revn. No. 910 of 1965,
Sarla Devi v. Balwan Singh 2

LL/EM/G131/68

B. R. Tripathi, for Appellant, A Banerji, for Respondent

JAGDISH SAHAI, J.:— In this case the question referred to us by a learned single Judge of this Court is—

"Does an appeal lie against an order passed on an application under Section 36 of the Special Marriage Act, 1954?"

Section 36 of the Special Marriage Act, 1954 (hereinafter referred to as the Act) reads—

"Where in any proceeding under Chapter V of Chapter VI it appears to the district court that the wife has no independent income sufficient for her support and the necessary expenses of the proceeding, it may, on the application of the wife, order the husband to pay to her the expenses of the proceeding, and weekly or monthly during the proceeding such sum as, having regard to the husband's income it may seem to the court to be reasonable."

Section 39 of the Act reads—

"All decrees and orders made by the court in any proceeding under Chapter V or Chapter VI shall be enforced in like manner as the decrees and orders of the court made in the exercise of its original civil jurisdiction are enforced and may be appealed from under the law for the time being in force"

Provided that every such appeal shall be instituted within a period of ninety days from the date of the decree or order"

2 This provision is pari materia with Section 28 of the Hindu Marriage Act. The words used therein are "may be appealed from under any law for the time being in force". The difference between the two provisions is that under Section 28 of the Hindu Marriage Act the word used is 'any' instead of 'the'. There is no substantial difference in the language of the two provisions. We have already held in Civil Revn No 910 of 1965 Smt Sarla Devi v Sri Balwan Singh AIR 1969 All 601 that an appeal lies under Section 28 of the Hindu Marriage Act against an order passed under Sec 24 of the same Act

3 For the reasons given in that judgment we hold that an appeal lies under Section 39 of the Act against an order passed under Section 36 of the Act. We are of the opinion that in the present case the appeal was competent. Let the papers be returned to the learned single Judge with the answer aforesaid

VGW/DVC

Order accordingly

AIR 1969 ALLAHABAD 604 (V 56 C 115)
(LUCKNOW BENCH)

G D SAHGAL, J

Raja Ram Kumar Bhargava, Petitioner v State of Uttar Pradesh and another, Respondents

Writ Petn No 380 of 1967, D/- 5-9-1968

(A) Land Acquisition Act (1894), S. 3(a) — Lease-hold interests in land come within definition of expression 'land'. (1908) ILR 35 Cal 525 & AIR 1916 Pat 330 (1) Held no longer good law in view of AIR 1968 SC 1045 & AIR 1955 SC 298.

Clause (a) of Section 3 of Land Acquisition Act provides that the expression "land" includes benefits to arise out of land etc. The definition is of the expression "land" and not of "land". If it had been the definition of the "land" itself, then it could be said that land includes in it benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth as forming part of it. But when it is said that the expression "land" includes benefits etc., it means that, that expression connotes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth also which may be independent of the land. The lease-hold interests in land, therefore, can come within definition of expression 'land'. AIR 1955 SC 298 & AIR 1968 SC 1045 Foll. (1908) ILR 35 Cal 525 & AIR 1916 Pat 330 (1) held no longer good law in view of AIR 1968 SC 1045 & AIR 1955 SC 298

(Paras 7 and 9)

(B) Land Acquisition Act (1894), Ss 4, 8 and 9 — Marking of land on spot and its being measured on spot are very important stages and have to be taken before notice under S 9 is issued.

The marking of the land on the spot and its being measured on the spot are very important stages before notice under Section 9 is issued. The showing of the land in a plan may not exactly give an idea to the person interested after inspection at the office of the Collector as to which portion of the land is actually required for there may be different interpretations of the plan, but the marking out of land on the spot brings out the whole thing clear without any doubt as to which portion of the land is actually required to be acquired and its measurement also gives an idea as to how much of the land is required, and any one who claims that land or any interest in that land comes to know about it. This is a very important stage and under the law has to be taken prior to the notice being issued under Section 9 (Para 13)

Cases Referred: Chronological Paras
 (1968) AIR 1968 SC 1045 (V 55)=
 Civil Appeal No. 335 of 1966
 D/- 31-1-1968, Special Land
 Acquisition & Rehabilitation
 Officer, Sagar v. Seshagiri Rao 8
 (1955) AIR 1955 SC 298 (V 42)=
 1955-1 SCR 1311, Collector of
 Bombay v. Nusserwanji
 Rattanji Mistri 8
 (1916) AIR 1916 Pat 330 (1) (V 3),
 Dashrath Sahu v. Secy. of State 10
 (1910) ILR 34 Bom 618=
 12 Bom LR 34, Govt of Bombay
 v. Usufali Salebhai 8
 (1908) ILR 35 Cal 525= 7 Cal LJ 445,
 Shyam Chunder Mardraj v.
 Secy. of State 10

S. D. Misra and N. M. Shukla, for Petitioner; Standing Counsel B. C. Mathur, for Respondents.

ORDER: This is a petition under Article 226 of the Constitution praying for a writ of mandamus commanding the respondents, namely, the State of Uttar Pradesh and the Collector of Lucknow not to take acquisition proceedings regarding the land mentioned in the notifications (copies contained in annexures 1 and 2) and not to disturb the possession of the petitioner over that land.

2. A notification was issued on the 21st of November, 1966 by respondent No. 2, the Collector of Lucknow under Sub-section (1) of Section 4 of the Land Acquisition Act, 1894 (Act 1 of 1894) under which the respondents proposed to acquire an approximate area of 22 acres, viz. 9500 square feet from plot No. 163, situate in Hazratganj, Lucknow the plan as to which could be inspected at the office of the Collector of Lucknow. A notification was thereafter issued on the 8th of May, 1967 under Section 6 of the Act along with a notification under Sub-section (1-A) of Section 17 of the Act as amended in its application to Uttar Pradesh directing the Collector of Lucknow, though no award under Section 11 had been made, on the expiration of 15 days from the publication of the notification under Sub-section (1) of Section 9 to take possession of the land. The land belongs to the State of Uttar Pradesh, opposite party No. 1, the interest of the petitioner being of a lessee, the lease having been granted to him on the 1st of June, 1939 of an area of 10 Bighas 19 biswas 16 biswas 5 kachwans out of the plot No. 163 for a term of 90 years from the 1st of June, 1939. The area which is sought to be acquired by the notifications, above referred to, is said to be part of that land of which lease has been granted to the petitioner. This fact is not disputed.

According to the petitioner, the notifications under Sections 4 and 6 of the Land

Acquisition Act gave only an approximate area of 9500 square feet to be acquired and the plan which could be inspected in the office of the Collector shows the land as 100' x 100'. The land, however, has not been measured so far when it should have been measured under Section 8 of the Land Acquisition Act. The case of the petitioner is that in spite of the mandatory provisions of law that the land should be measured, the Collector has issued notice under Section 9 of the Act without its being measured. The land, it is said, has also not been marked out on the spot as should have been done under Section 8 of the Land Acquisition Act. As such it is said that any proceeding for the acquisition of the land without the land being measured and marked out on the spot was without jurisdiction, illegal and ultra vires. The notice under Section 9, also, therefore, was invalid on account of the omission to measure and mark the area proposed to be acquired. It is in these circumstances that the writ petition has been filed with the prayer, referred to above.

3. The allegation that the land has not been measured and that it has not been marked out on the spot is contained in paragraphs 5 and 5A of the petition. In the counter-affidavit with respect to paragraph 5 it is not stated that the land has been got measured, but what has been stated is that the land proposed to be acquired has been marked in the plan as measuring 100' x 100' and that it is in the shape of a rhombus and the area so calculated comes approximately to 9500 square feet. The way in which the area has been calculated is to be found in Appendix A where it is shown to be 9503.57 square feet, say 9500 square feet. As to the allegation in paragraph 5A that the land has not been marked out on the spot, the counter affidavit claims that it was measured, planned and marked out under Section 4 of the Land Acquisition Act for purposes of acquisition and as it was not necessary again to mark it out under Section 8 when it had already been marked out under Section 4, the re-measuring has not been done. This is contained in paragraph 2 of the counter affidavit dated the 20th/22nd of June, 1968 filed by one Shiva Narain. This paragraph has been sworn from information based on the record maintained in the office.

There is a copy of a letter attached to Annexure A filed on behalf of the respondents issued from the Executive Engineer to the Special Land Acquisition Officer, Nagar Mahapalika indicating that the land was measured out in the presence of Shiva Narain Amin of the Nagar Mahapalika on the 27th of June, 1967. The notice under Section 9, copy of which is contained in Annexure B, how-

ever, which purports to be signed by the same Shiva Narain Amin, shows that it is of a date prior to the 27th of June, 1967, when according to the letter above referred to it was measured by Shiv Narain Amin. The affidavit of Shiva Narain to the effect that the land had been measured, planned and marked out under Section 4 of the Land Acquisition Act for purposes of acquisition is dated the 20th of June, 1968 and is sworn from information based on record. In view of the affidavit of the petitioner stating categorically to the effect that no measurement was done of the land nor was it marked out on the spot this affidavit of Shiva Narain, based as it is only on information derived from records which have not been produced, is not sufficient to rebut it. Moreover, the letter accompanying Annexure A supports the petitioner's case that the measurement, if any, was done after the notice under Section 9 had already been issued.

4. The relief is claimed on behalf of the petitioner on two grounds. Firstly, it is pointed out that there could be no acquisition of land which belonged to the Government and that the interest of the petitioner which was only that of a lessee could not be acquired because the Land Acquisition Act contemplates acquisition of the land itself and not of any interest therein. The second ground is, as already mentioned, that there has been no marking out of the land or measuring of the same at the Section 8 stage and as such no notice could be issued under Section 9 and any further proceeding would be against the provisions of the Act.

5. Let us examine the two contentions one by one.

6. Sub-section (1) of Section 4 of the Act provides that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality. The term "land" has been defined in Clause (a) of Section 3 as follows:

"the expression 'land' includes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth"

The contention is that as "land" includes benefits to arise out of land and things attached to the earth or permanently fastened to anything attached to the earth, the latter form part of the land and are not separate from the land. So what can be acquired is only land and not benefits to arise out of land, and things

attached to the earth or permanently fastened to anything attached to the earth and as they form part of the land and are not separate from it, they do not come within the definition of the term "land"

7. A careful perusal of Clause (a) of Section 3, however, will indicate that the argument is not tenable. This clause provides that the expression "land" includes benefits to arise out of land etc. (The underlining (in single quotation marks here, Ed) is mine). The definition is of the expression "land" and not of "land". If it had been the definition of the "land" itself, then it could be said that land includes in it benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth, as forming part of it. But when it is said that the expression "land" includes benefits etc., it means that, that expression connotes benefits to arise out of land, and things attached to the earth or permanently fastened to anything attached to the earth, also which may be independent of the land.

8. We, have, however, high authority also for the proposition that what can be acquired is not only land but interest in land also apart from land. In *Collector of Bombay v Nusserwanji Rattani*, *Mistri*, 1955-1 SCR 1311 at p 1321 = (AIR 1955 SC 298 at p 304) it is pointed out by the Supreme Court:

"... .. when the Government acquires lands under the provisions of the Land Acquisition Act it must be for a public purpose, and with a view to put them to that purpose, the Government acquires the sum total of all private interests subsisting in them. If the Government has itself an interest in the land, it has only to acquire the other interests outstanding therein, so that it might be in a position to pass it on absolutely for public use."

Further on, the following observations of Batchelor, J in *In the matter of the Land Acquisition Act Govt of Bombay v Usufali Salebhai*, (1910) 11LR 34 Bom 618 at p 636 were quoted with approval.

"In other words Government, as it seems to me, are not debarred from acquiring and paying for the only outstanding interests merely because the Act, which primarily contemplates all interests as held outside Government, directs that the entire compensation based upon the market value of the whole land must be distributed among the claimants".

This position has recently been reiterated in *Special Land Acquisition and Rehabilitation Officer, Sagar v Seshagiri Rao*, Civil Appeal No 335 of 1966 D/- 31-1-68

(AIR 1968 SC 1045) where, apart from quoting from Batchelor, J. more exhaustively, the following remarks find place:

".....The Act is, it is true, silent as to the acquisition of partial interests in the land, but it cannot be inferred therefrom that interest in land restricted because of the existence of rights of the State in the land cannot be acquired. When land is notified for acquisition for a public purpose and the State has no interest therein, market value of the land must be determined and apportioned among the persons entitled to the land. Where the interest of the owner is clogged by the right of the State, the compensation payable is only the market value of that interest, subject to the clog."

The words, namely, "interests as clog the right of Government" are also to be found in the Bombay case, above referred to. In the judgment of Chandavarkar, J. with whom Batchelor, J. sat in that appeal, we find:

"..... To acquire a land is not necessarily the same thing as to purchase the right of fee-simple to it, but means the purchase of such interests as clog the right of Government to use it for any purpose they like."

Again the same learned Judge further states:

"..... The use of the inclusive verb "includes" shows that the legislature intended to lump together in one single expression—viz., "land"—several things or particulars, such as the soil, the buildings on it, any charges on it, and other interests in it, all which have separate existence and are capable of being dealt with either in a mass or separately as the exigencies of each case arising under the Act may require."

9. It would thus appear that even though the land itself belonged to the Government, the petitioner having only lease-holder's rights therein, the leasehold-interests could be acquired as they come within the definition of the expression "land".

10. In view of the above strong authority of the Supreme Court, the two cases cited on behalf of the petitioner, namely, *Shyam Chunder Mardraj v. Secretary of State* (1908) ILR 35 Cal 525 and *Dashrath Sahu v. Secretary of State* AIR 1916 Pat 330 (1) are no longer good law.

11. On the first point, therefore, the petition fails.

12. Let us examine the second point.

13. Under Sub-section (2) of Section 4 after the notification under Sub-section (1) of Section 4 has been made, it shall be lawful for any officer, either generally

or specially authorized by such Government in this behalf, and for his servants and workmen to enter upon and survey and take levels of any land in such locality and to set out the boundaries of the land proposed to be taken and to mark such levels, boundaries and line by placing marks and cutting trenches etc. It means that after notification under Sub-section (1) of Section 4 the land sought to be acquired can be surveyed and the boundaries marked on the spot. In this case though the case of the petitioner is that no marking out on the spot had been done before the notice under Section 9 was issued, the case of the respondent is that this was done at Section 4 stage. But as I have already pointed out from the affidavits, counter-affidavits and the evidence contained in annexure A, what appears to have been done is that the land was marked out in the plan kept at the Collector's office as an equilateral rhombus having each side as 100'. Even the plan is on the record, being part of annexure A, but there does not seem to have been made any measurement on the spot for marking out the boundaries there which cannot take the place of what is contemplated under sub-section (2) of Section 4.

Then after the notification under Section 6 which is a notification of declaration that the land is required for a public purpose, under Section 7 the Government or some officer authorised by the Government shall direct the Collector to take order for the acquisition of the land, and after this has been done, the Collector shall cause the land, unless it has already been marked out under Section 4, to be marked out. He shall also cause it to be measured, and if no plan has been made thereof, a plan to be made of the same. What is required at this stage, therefore, is that the land has to be marked out unless it has already been marked out under Section 4 and the marking out, as I have already pointed out, is the marking out of the land on the spot. It further provides for the measurement of the land and for the preparation of a plan, if one has not been made. The plan had no doubt been made in this case which was available for inspection at the office of the Collector after the notification under Sub-section (1) of Section 4, but there does not appear to have been any marking out of the land under Section 4 or under Section 8 nor any measurement thereof. It is only when this has been done that the Collector can cause notice to be given under Sub-section (1) of Section 9 or under Sub-section (2) can issue notice to any occupier of the land, or person believed to be interested in the land.

The notice in question has been issued before the marking of the land on the

spot and its being measured on the spot. This is a very important stage before notice is issued. The showing of the land in a plan may not exactly give an idea to the person interested after inspection at the office of the Collector as to which portion of the land is actually required, for there may be different interpretations of the plan, but the marking out of land on the spot brings out the whole thing clear without any doubt as to which portion of the land is actually required to be acquired and its measurement also gives an idea as to how much of the land is required, and any one who claims that land or any interest in that land comes to know about it. This is a very important

stage and under the law has to be taken prior to the notice being issued under Section 9. As this procedure has not been followed, the issue of the notice under Section 9 was not proper. The notice has, therefore, to be quashed.

14. The petition is accordingly allowed and the notice contained in annexure 3 quashed. The respondents are directed not to proceed with the land acquisition proceedings in pursuance of the said notice.

AKJ/DVC

Petition allowed.

E N D

not be prejudiced in his defence. It may be noted that these words were not used either in S. 476 or S. 479, Cr. P. C., and when they are used in S. 479-A, Cr. P. C. it only means that the Legislature has introduced those words with a purpose.

3. The next contention of the learned counsel for the petitioner is that his statement recorded under S. 164, Cr. P. C., is not evidence recorded in a judicial proceeding. Section 164, Cr. P. C. falls under Chapter XIV of the Code of Criminal Procedure which relates to the powers of the Police to investigate the cases reported to them but in AIR 1959 Andh Pra 250 to which a reference has been made earlier, it was observed by the learned Judge that an investigation under Chapter XIV of the Code of Criminal Procedure is a stage of a judicial proceeding and a person who makes on oath statements which he knew to be false before a Magistrate conducting the investigation, gives false evidence and commits an offence under S. 193, I.P.C. This observation was made in the light of the decision in *Tevan v. Emperor*, (1906) ILR 29 Mad 89 : (3 Cri LJ 370). Any way, this is a question which does not require any further consideration because I am inclined to allow these petitions on the former point that the Magistrate had failed to give a finding as to which of the two contradictory statements is false.

4. In the result, these revision cases are allowed and the proceedings initiated against the petitioners will be dropped. BDB/D.V.C. Revision allowed.

the Registration Act., there is no actual admission of the document. At best, it can be said that the document is only tentatively brought on record. Such tentative or provisional reception of the document does not amount to an admission of the document within the meaning of Section 36. If a document received into record on the basis of an interlocutory order is to be treated as finally admitted, it will lead to untenable positions, when the final decision in the case is to the contrary. In all such cases, only tentative directions are given and there is no finality about the reception of the document. Such reception cannot, therefore, be an admission of the document. AIR 1949 Mad 300 and AIR 1962 Andh Pra 398 and AIR 1929 Mad 522 and AIR 1961 SC 1655 (1957), Foll. (Para 7)

It is thus only when the admissibility of a document is judicially determined and the document is admitted as evidence, that Section 36 of the Stamp Act comes into operation. If, on the other hand, it is admitted by inadvertence without the Court applying its mind or admitted subject to the final decision of the case, there is no admission of the document within the meaning of S. 36. (Para 10)

(B) Municipalities — Madras District Municipalities Act (5 of 1920), Ss. 78-A, 116-A, 116-B and 116-C — Madras Local Authorities (Duty on Transfer of Property) Rules (1948), Rr. 3, 4, 5 — Scope and applicability — Mention of Ss. 27 and 24, but not of S. 35 of Stamp Act in Section 116-B and R. 4 — Effect of — Penal provision like S. 35 of Stamp Act cannot be applied by inference — Civil Court has no power to levy or exact duty on transfer and penalty thereof — (Stamp Act (1899), Ss. 35, 27, 64) — (Civil P. C. (1908), Pre. — Interpretation of Statutes — Penal Provision).

By importing Sections 27 and 64 of the Stamp Act into the Madras District Municipalities Act, for the purpose of levy and collection of the transfer duty, Section 116-B only insists upon the disclosure of all material particulars and facts in the document under which a transfer is made so that the proper duty may be levied and collected. Section 116-B does not make other provisions of the Stamp Act applicable to the levy and collection of transfer duty under the Madras District Municipalities Act, while it makes Sections 27 and 64 alone, applicable. None of the provisions of the Madras District Municipalities Act confer any power on any Civil Court to levy and exact transfer duty or any penalty in respect thereof. The very fact that Sections 27 and 64 are specifically made applicable and not other provisions would lead to the inference that the legislature did not contemplate the application of Section 35 to the levy and collection of

AIR 1969 ANDHRA PRADESH 417
(V 56 C 106)

BASI REDDY AND SAMBASIVA
RAO JJ.

K. Manavala Naicker Defendant, Petitioner v. K. R. Gopala Krishnaiah Chetti, Plaintiff, Respondent.

Civil Revn. Petn. No. 1182 of 1966, D/-17-7-1968 from order of Obul Reddy, J., D/-17-2-1967.

(A) Stamp Act (1899), S. 36 — "Where an instrument has been admitted in evidence" — Document provisionally admitted, subject to final orders — Such tentative reception of document does not amount to admission of document within Section 36 — (Words and Phrases).

The principle behind Section 36 is that there should be an 'admission' within the meaning of the Stamp Act. If a document is provisionally admitted, subject to final orders that may be passed in a revision case or subject to objections that may be raised under any other enactment like

the transfer duty under the Madras District Municipalities Act

(Paras 13 and 14)

None of the provisions of the Madras District Municipalities Act or the relevant rules made thereunder, refers to Section 35 of the Stamp Act and makes it applicable to the duty on transfers of property. If the legislature had intended to make such a penal provision as Section 35 of the Stamp Act applicable to such duty it would not have omitted it from Section 116-B while referring to Sections 27 and 64 of that Act. A penal provision like Section 35 of Stamp Act cannot be made applicable by inferences. There should be a specific provision to that effect before such penal provision is applied. In the absence of any such provision, the Civil Court has no power to levy or exact the duty on transfer and penalty in respect of such duty (Para 18)

Cases Referred	Chronological	Paras
(1962) AIR 1962 Andh Pra 398 (V 49) = (1962) 1962-1 Andh LT, 247 Simhadri v Varalakshmi		9
(1961) AIR 1961 SC 1655 (V 48) = (1962) 2 SCR 333, Javer Chand v Pukhba Surana	4, 6 10, 14	
(1957) AIR 1957 Andh Pra 1022 (V 44) = 1956 Andh WR 490, N Basavaiah Naidu v T Venkateswarlu	4, 5	
(1949) AIR 1949 Mad 300 (V 36) = 1948-2 Mad LJ 254, S Yerru Swami v Vannurappa	8	
(1929) AIR 1929 Mad 522 (V 16) = ILR 53 Mad 137 Venkanna v. Parasuram Byas	9	

C. Padmanabha Reddy, for Petitioner;
R. Venugopal Reddy and M. Krishnamachari, for Respondent

SAMBASIVA RAO, J.:—Obul Reddi, J., has referred this revision petition to a Division Bench. It is preferred against the order of the Subordinate Judge's Court, Chittoor passed in O. S. No. 64 of 1962, holding that surcharge and penalty are payable on an unstamped conveyance under Section 116-A of the Madras District Municipalities Act.

2. The respondent as plaintiff filed O. S. No. 64 of 1962 for declaration of his title to the plaint schedule property, which is a house situated within the municipal limits of Chittoor and for possession of the same after ejecting the petitioner therefrom. He based his claim on a sale deed dated 24-8-1964 from one Ramachandra Naicker, who was the owner of the property. The defence of the petitioner, who is the defendant in the suit is that he purchased the house orally from the owner Ramachandra Naicker for a sum of Rs. 9,900 and that in pursuance of the aforesaid oral sale, he paid a sum of Rs. 5,400 towards a mortgage decree passed against the owner and also dis-

charged several other debts of the owner to an extent of Rs. 3,700. It is also stated by him that the owner Ramachandra Naicker followed up his oral sale by executing a letter dated 6-2-1950 confirming the sale. It is this letter that was sought to be let in evidence by the defendant. On behalf of the respondent, an objection was taken that the letter is inadmissible in evidence as it is not stamped and registered. The Court upheld that objection holding that the document is a conveyance within the meaning of Section 2 (1) of the Stamp Act and, therefore, is liable for stamp duty and penalty under Art. 20 of Schedule 1-A of the Stamp Act.

The petitioner paid the stamp duty and penalty that were so levied against him. Still another objection was taken on behalf of the respondent that the document is inadmissible for the reason that a duty on transfer of property in the form of surcharge liable under Section 116-A of the Madras District Municipalities Act, had not been paid. The trial Court upheld this objection and held that both surcharge and also penalty are payable in respect of the document under S. 116-A of the Act. It is this order that the petitioner seeks to be revised in this revision petition. Pending the revision petition, the petitioner has applied for stay of the operation of the trial Court's order. On 20th of September, 1966, this Court granted stay of the payment of surcharge and penalty, but directed that the trial of the suit should go on and the document should be tentatively received in evidence, subject to final orders and also to any objections that may be raised under the Registration Act.

3. The first contention of Sri Padmanabha Reddi, the learned counsel for the petitioner, is that by virtue of the order of this Court dated 20th of September, 1966, the document has been admitted in evidence and some evidence also has been let in on that basis. Once a document is admitted, neither the trial Court at a later stage, nor the appellate Court in appeal, can call such admission in question. He relies upon Section 36 of the Indian Stamp Act in support of this contention which lays down that "where an instrument has been admitted in evidence such admission shall not except as provided in Section 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped."

4. The learned counsel, therefore, argues that now that the document has been admitted, for whatever reason it might be, it is not open for the trial Court or for that matter, any other Court to object to receiving that document in evidence, on the ground that surcharge

has not been paid on it. He invites our attention to the decision of the Supreme Court in *Javer Chand v. Pukhraj Surana*, AIR 1961 SC 1655 and that of the High Court of Andhra in *N. Basavaiah Naidu v. T. Venkateswarlu*, 1956 Andh WR 490 = (AIR 1957 Andh Pra 1022).

5. In 1956 Andh WR 490 = (AIR 1957 Andh Pra 1022) Viswanatha Sastri, J. was considering a case where a document had, in fact, been admitted in evidence, though in disregard of the provisions of S. 35 of the Stamp Act. The learned Judge took the view that Section 36 of the Stamp Act prohibited the rejection of a document, which had been already admitted and that objections could not be taken when there had been such admission of the document.

6. In AIR 1961 SC 1655 the Supreme Court held that—

"Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 of the Stamp Act comes into operation. Once a document has been admitted in evidence, as aforesaid, it is not open either to the Trial Court itself or to a Court of Appeal or Revision to go behind that order. Such an order is not one of those judicial orders which are liable to be reviewed or revised by the same Court or a Court of superior jurisdiction."

This was a case which arose under the Stamp Act directly. An examination of the facts would show that the two documents, about the admissibility of which the point in consideration arose before the Supreme Court, were exhibited and numbered under the signature of the presiding officer of the Court and in pursuance thereof, they were introduced in evidence and were also referred to and read in evidence by the counsel. It is thus clear that the documents in question were unconditionally received in evidence by the Court and it was in the light of those circumstances, the Supreme Court held that it was not open to the Court to go behind the order admitting the documents.

7. The contention of the learned counsel, based on Section 36 of the Stamp Act and the two above referred decisions cannot be upheld. It is not possible to accept that Section 36 of the Stamp Act would apply to a case, that arises under Section 116-A of the Madras District Municipalities Act. We will presently consider this aspect of the matter in detail. Even supposing it does, the principle behind Section 36 and the two decisions is that there should be an 'admission' within the meaning of the Stamp

Act. If a document is provisionally admitted, subject to final orders that may be passed in a revision case or subject to objections that may be raised under any other enactment like the Registration Act, there is no actual admission of the document. At best, it can be said that the document is only tentatively brought on record. Such tentative or provisional reception of the document does not tantamount, in our view, to an admission of the document within the meaning of Section 36. Otherwise, any amount of difficulty and inconvenience may be caused to the parties and to the Courts. For instance, in this case, the document has been directed by this Court, at the time of passing an order on an interlocutory application for stay, to be received by the trial Court, pending final disposal of the revision petition. The lower Court is bound to obey the directions issued by the higher Court and, therefore, the trial Court in this case has, in obedience to the directions contained in the order of this Court dated 20th of September, 1966, received the document on record and marked it.

That interlocutory order which was passed on 20th of September, 1966, is subject to the final order that will be passed in the main revision petition itself. If ultimately, the revision is dismissed or some other order is passed which goes against the admission of the document the trial Court will once again be bound to exclude the document from admission. It is important to note that the order passed on 20th of September, 1966 is only an order that would be in force during the pendency of the revision petition and is, in any case, subject, to the final orders that are going to be passed in the main case. The interim order was evidently passed to avoid delay in the disposal of the matter. If the document received into record on the basis of such an interlocutory order is to be treated as finally admitted, it would lead to untenable positions, when the final decision in the case is to the contrary. In all such cases, only tentative directions are given and there is no finality about the reception of the document. Such reception cannot, therefore, be an admission of the document.

8. We find support to this view in the following decisions:

The decision in *S. Yerri Swami v. Vannurappa*, AIR 1949 Mad 300 is one of such cases. In that case, a plea was taken in the written statement that the suit promissory notes were inadmissible in evidence, because they were insufficiently stamped. A specific issue on the question of inadmissibility was also raised. The promissory notes were, however, marked without disposing of the issue. *Satyanarayana Rao, J.*, dealing with the contention that the defendant was precluded

under Section 36 of the Stamp Act from raising the objection as to the admissibility of the promissory notes in the appellate Court, held that—

"The more serious objection to his remarks is that the learned District Munsif seems to have overlooked the plea in the written statement and the issue in the case which definitely raised the question of the insufficiency of the stamp. In the face of these objections it is difficult to see what necessity there was for the counsel for the defence to go in repeating his objections at each time. The very finding of the learned District Munsif discloses that when the promissory notes were marked at the preliminary trial, as Exs P and P 1 he did not at all consider the admissibility of the documents and must have marked them tentatively for the purpose of the disposal of that issue.

The learned appellate Judge in my opinion came to the correct conclusion in holding that in view of the circumstances set forth above there was no admission of the documents in evidence within the meaning of Section 36, Stamp Act. As in the present case there was a specific issue on the point and as the documents were marked at the preliminary trial without disposing of that issue, it cannot be said that the documents were admitted in evidence within the meaning of Section 36 so as to preclude the defendants from raising question that the documents were not properly stamped. Even if the learned District Munsif had decided issue 3 in favour of the plaintiff and came to the conclusion that they were admissible, it would have been perfectly open to the appellate Court to reverse that finding and reject the documents as it must be deemed that an admission under Section 36 must be only subject to his finding on issue 3."

9. Deciding a similar question and referring to the aforesaid decision of Satyanarayana Rao, J., Satyanarayana Raju J., made the following observations in *Sumhadri v Varalakshmi*, AIR 1962 Andh Pra 393 in paragraph 6:

"The question as to whether a document has been admitted or not depends upon the facts of each case. Where, as was the case in *Venkanna v. Parasuram Byas*, ILR 53 Mad 137 = AIR 1929 Mad 522 the clerk of the Court made the endorsement or where, as in the decision rendered by Mr Justice Satyanarayana Rao, the admission was tentative, there can be no difficulty and it is open to the Court to consider the question of the admissibility of the document at a subsequent stage."

10. The following observation of the Supreme Court in AIR 1961 SC 1653 at p. 1657, itself also lends support to our view.

"Section 35 is in the nature of a penal provision and has far-reaching effects. Parties to a litigation, where

such a controversy is raised, have to be circumspect and the party challenging the admissibility of the document has to be alert to see that the document is not admitted in evidence by the Court. The Court has to judicially determine the matter as soon as the document is tendered in evidence and before it is marked as an exhibit in the case. The record in this case discloses the fact that the hundis were marked as Exs. P. 1 and P. 2 and bore the endorsement 'admitted in evidence' under the signature of the Court. It is not, therefore, one of those cases where a document has been inadvertently admitted, without the Court applying its mind to the question of its admissibility. Once a document has been marked as an exhibit in the case and the trial has proceeded all along on the footing that the document was an exhibit in the case and has been used by the parties in examination and cross-examination of their witnesses, Section 36 of the Stamp Act comes into operation."

It is thus clear that only when the admissibility of a document is judicially determined and then the document is admitted as evidence, that Section 36 of the Stamp Act comes into operation. If, on the other hand, it is admitted by inadvertence without the Court applying its mind or admitted subject to the final decision of the case, there is no admission of the document within the meaning of Section 36.

11. For these reasons we cannot accept the first contention of the learned counsel for the petitioner that the admission of the letter dated 6-2-1950 cannot be called in question at any stage of the suit or in appeal.

12. The next and more substantial point made by the learned counsel for the petitioner is that the Madras District Municipalities Act does not confer any power on the Civil Court to levy and to exact surcharge or penalty and the Civil Court has no jurisdiction to do so. He argues that, in any event, the Act does not contemplate the levy of a penalty. Sections 78-A, 116-A, 116-B and 116-C are the provisions of the Act which are material for the consideration of this question. Section 78-A provides for the levy of a duty on transfers of property in every municipality. Sections 116-A to 116-C come under the caption "duty on transfers of property." As the marginal note indicates, Section 116-A relates to the method of assessment of duty on transfers of property. It states that the transfer duty is levied in the form of a surcharge on the stamp duty, at such rates as may be prescribed by the State Government. It, however, prescribes that such duty shall not exceed 5 per cent on the amount specified in the table

therein. Both parties are agreed that this section provides only the method of assessment and does not throw any light on the question on hand.

13. Section 116-B makes Sections 27 and 64 of the Indian Stamp Act applicable to the levy of the transfer duty. It would be useful to notice in this context, the scope of Section 27 and Section 64 of the Indian Stamp Act. The said Sec. 27 lays down that—

“The consideration (if any) and all other facts and circumstances affecting the chargeability of any instrument with duty, or the amount of the duty with which it is chargeable, shall be fully and truly set forth therein.”

Section 64 provides for penalty for omission to comply with the provisions of Section 27. Thus, by importing Sections 27 and 64 of the Indian Stamp Act into the Madras District Municipalities Act, for the purpose of levy and collection of the transfer duty Section 116-B only insists upon the disclosure of all material particulars and facts in the document under which a transfer is made so that the proper duty (may be—sic) levied and collected. It is also very significant to note that Section 116-B does not make other provisions of the Indian Stamp Act applicable to the levy and collection of transfer duty under the Madras District Municipalities Act, while it makes Sections 27 and 64 alone, applicable. The last provision in the context of transfer duty is Section 116-C. It empowers the State Government to—

“make rules not inconsistent with this Act for regulating the collection of the duty, the payment thereof to the municipal councils concerned and the deduction of any expenses incurred by the Government in the collection thereof.”

It requires that the rules to be made, should not be inconsistent with the Act and that such rules should regulate the collection of the duty, its payment to the Municipal Council, and the deduction of any expenses incurred by the Government in its collection. It is thus to be seen, that none of the provisions of the Madras District Municipalities Act confer any power on any Civil Court to levy and exact transfer duty or any penalty in respect thereof.

14. The lower Court evidently sought to apply Section 35 of the Indian Stamp Act to this case and to exact the transfer duty and penalty from the petitioner on that basis. Section 35 of that Act is, as the Supreme Court observed in AIR 1961 SC 1655 at p. 1657, in the nature of a penal provision and has far-reaching effects. It is well established that a penal provision should not be read into any enactment, unless it is so specifically provided for. As we have stated, there is

nothing in the Madras District Municipalities Act to show that Section 35 of the Indian Stamp Act should be read into its provisions. On the other hand, the reasonable inference is that it is not made applicable, because Section 116-B specifically makes, only Sections 27 and 64 of that Act applicable to the levy of transfer duty. Nothing prevented the legislature to include Section 35 of the Stamp Act that applies to the levy of transfer duty. It is inconceivable to infer that the legislature has omitted the inclusion of Section 35 of the Indian Stamp Act, by inadvertence. The very fact that Ss. 27 and 64 are specifically made applicable and not other provisions would lead to the inference that the legislature did not contemplate the application of Section 35 to the levy and collection of the transfer duty under the Madras District Municipalities Act.

15. The learned counsel for the respondent, however, invites our attention to Rule 3 of the “Madras Local Authorities (Duty on Transfer of Property) Rules, 1948.” It is as follows:

“Provisions of the Stamp Act to apply to transfer duty:— (1) All the provisions of the Stamp Act and the rules made thereunder shall, so far as may be, apply in relation to the transfer duty as they apply in relation to the duty chargeable under that Act.

(2) Where the transfer duty or any portion thereof is less than two annas, such duty or portion shall not be collected.”

Relying on this rule, it is contended that all the provisions of the Stamp Act, including Section 35, would apply to the transfer duty. But, this argument overlooks the very material words in sub-rule (1) namely, “so far as may be.” It is always a cardinal rule of construction, that, unless the contrary is firmly established, the different provisions of an enactment are consistent and reconcilable with each other and also that the rules framed thereunder are consistent and in accordance with the provisions of the main enactment and the powers conferred on the rule making authority under the Statute. Construing Rule 3 in the light of the aforesaid maxim, it would be seen that the provisions of the Stamp Act would apply to levy and collection of transfer duty, only in so far as they are permitted by the Act. As we have already stated, we do not find any warrant in the provisions of the Madras District Municipalities Act, for the supposition that Section 35 of the Indian Stamp Act is made applicable to the transfer duty. Rule 3 is obviously referring to Sections 27 and 64 of the Indian Stamp Act and the Rules made thereunder. Moreover, it is difficult to hold that the Rule making authority intended to make all the provisions of the Stamp Act applicable to the

transfer duty, though the main enactment makes only two sections applicable.

16 A reading of Rule 4 makes the position clear. It refers to the duties of registering officers and requires those officers to see, whenever any instrument is presented for registration to them, whether the particulars referred to in S 27 of the Stamp Act are set forth in the instrument. It is obviously for the purpose of ensuring that the proper transfer duty is levied and collected, that Sec. 27 of the Stamp Act is made applicable. Its application would enable the registering officer, to notice all the relevant particulars regarding levy of the duty. If such particulars are not stated, the parties to the transaction would become liable to the penalty, that would be imposed under Section 64 of the Stamp Act.

17. Sub-rule (2) of Rule 4 enjoins upon the registering officer to impound the document and forward it to the Collector, if the particulars as required under Section 27 of the Stamp Act, are not set forth in the document, so that the penalty under Section 64 of the Stamp Act could be levied. Rule 5 relates to 'maintenance and consolidation of accounts in respect of transfer duty'. It requires that an account of the transfer duty should be maintained, showing separately the duty imposed under the Stamp Act and the transfer duty. It is also pertinent to note that even R 5 does not make any reference to Section 35 of the Stamp Act.

18. It is thus seen that none of the provisions of the Madras District Municipalities Act or the relevant rules made thereunder, refers to Section 35 of the Indian Stamp Act and makes it applicable to the duty on transfer of property. If the legislature had intended to make such a penal provision as Section 35 of the Indian Stamp Act applicable to such duty, it would not have omitted it from Section 116-B, while referring to Sections 27 and 64 of that Act. As we have already said, a penal provision like (Section 35 of (sic)) the Indian Stamp Act cannot be made applicable by inferences. There should be a specific provision to that effect before such penal provision is applied. In the absence of any such provision, we cannot uphold the contention that the Civil Court has power to levy or exact the duty on transfer and penalty in respect of such duty.

19. The learned counsel places reliance upon the definition of the word 'chargeable' contained in Section 2 Cl. (6) of the Indian Stamp Act, which is in the following terms:

"Chargeable" means, as applied to an instrument executed or first executed after the commencement of this Act, chargeable under this Act, and, as appli-

ed to any other instrument, chargeable under the law in force in India when such instrument was executed or, where several persons executed the instrument at different times, first executed."

20. On the basis of this definition, it is argued that, 'chargeable' means under any law in force in India and, therefore, an instrument which is chargeable under the Madras District Municipalities Act also comes within the purview of the Indian Stamp Act. No authority is placed before us in support of this contention. Besides, it is difficult to understand this definition as bringing, within its purview, instruments which are chargeable to any duty under any law in force in India other than the laws relating to Stamp Duty. It appears to us that the words 'chargeable under the law in force in India' mean, only under any other Stamp Law in the country. The definition itself makes the distinction clear. In its first part it deals with instruments chargeable under the Indian Stamp Act itself. In its second part, it refers to 'any other instrument chargeable 'under the law in force in India' which must logically mean the instruments other than the instruments chargeable under the Indian Stamp Act, but which are chargeable under any other Stamp Act, but which are chargeable under any other stamp law in force in the country. It is common knowledge that there are other Stamp laws than the Indian Stamp Act, which are in force in the Country. For instance, there are separate Stamp Laws with varying schedules of Stamp duties now in force in several States. We have, therefore, no hesitation to reject this contention of the learned counsel for the respondent.

21. The learned counsel for the petitioner advances another argument in support of his main contention that S 35 of the Indian Stamp Act does not apply to the transfer duty leviable under the Madras District Municipalities Act. Section 35 rules that instruments not duly stamped are inadmissible in evidence. The learned counsel, therefore, contends that Section 35 obviously refers to only those documents which are required to be stamped, but not duly stamped. He states that in the matter of payment of duty on transfers, cash is usually collected and it is not paid in the form of affixing stamps on the instruments. He cites the practice that is obtaining in the City of Hyderabad, as an instance, that such transfer duty is collected by way of cash and not in the form of stamps. If such is the fact, there is considerable force in his argument. However, we do not propose to express any view on this aspect of the matter, because sufficient data is not made available to us in this regard.

22. The learned counsel on both sides state that there is no decided case on this point. We are, therefore, obliged to decide the case on the provisions of the Madras District Municipalities Act and the Rules made thereunder.

23. For these reasons, we uphold the contention of the learned counsel for the petitioner and hold that the Court has no power to levy and exact the duty on transfers leviable under the Madras District Municipalities Act and to exclude an instrument from evidence, for non-payment of that duty and penalty.

24. We, therefore, allow the Civil Revision Petition and set aside the order of the lower Court. The lower Court will now proceed with the trial of the suit in accordance with law, after receiving the letter dated 6-2-1950 in evidence. Since there has been no guidance by way of a decided case one way or the other so far and the lower Court had to decide it entirely on the provisions of the Statute, we think that this is a fit case where we should direct that each party should bear its own costs in this revision petition.

SSG/D.V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 423
(V 56 C 107)

P. JAGANMOHAN REDDY C. J AND
KONDAIAH J.

Ahmadunnisa Begum. Petitioner v. Union of India represented by Secretary, Ministry of Home Affairs, Government of India, New Delhi, Respondents.

Writ Petn. No. 863 of 1967, D/-29-1-1968.

(A) Constitution of India, Arts. 363, 226 — "Dispute arising out of any provision of treaty or other similar instrument" — Agreement between Ruler and Government of India — Whether succession to personal or private property was made subject-matter of the guarantee or assurance — Ascertainment — Court can look into terms of the agreement — Words "personal rights" in Art. IV of agreement do not include private properties of Rulers — (Words and Phrases — "Personal right" and "Private properties" — (Civil P. C. (1908), S. 9).

Where the claims are made under the agreement between the Ruler and the Government of India, the jurisdiction of the Courts is barred; but where the claim falls outside the agreement, there can be no question of jurisdiction of the Courts being ousted. In petition under Article 226, the Courts have necessarily to look into the terms of the agreement to ascertain whether succession to personal or private property was also made the

subject matter of the guarantee or assurance. Case law referred. (Para 19)

The use of the words "personal rights" qua the Ruler has nothing to do with rights over private properties. The words "personal rights" must be construed ejusdem generis with privileges, dignities and titles which a Ruler qua a Ruler has, namely, immunity from jurisdiction of the Courts except with the permission of the Government of India, exemption from customs duties, the privilege to carry firearms without licence, and various other rights and privileges which a ruler had prior to the inauguration of the Constitution of India and which under Art. IV of the agreement, the Government of India had recognised as being enjoyed by the successor. The words "personal rights" in Art. IV of the agreement do not include private properties of the Rulers. Case law disc. (Paras 21, 25)

(B) Constitution of India, Art. 362, 366 (22), 363 — Certificate recognising person as sole successor to all private properties held by late Nawab — Government of India has no power or jurisdiction to issue such certificate — Recognition of successor — What is — Rights in respect of private property will be governed by ordinary law of land including law of inheritance — Jurisdiction of Courts not barred under Art. 363 to agitate that matter, subject to Section 87-B, Civil P. C. — (Civil P. C. (1908), Ss. 87-B, 9).

The Government of India has no power or jurisdiction whether under Art. 362 or otherwise to issue the certificate recognising the H. E. H. Nawab Mir Barkat Ali Khan Bahadur as the sole successor to all the private properties, moveable and immovable, held by the late Nizam or to authorise transfer of the private properties to the former. Case law Disc. (Para 36)

The scheme of the agreement between Ruler and Government of India was to separate the State property and the private property, the State property being merged in the territory of India in lieu of which a privy purse was granted to the Ruler who was to enjoy it during his lifetime and which he may use for the maintenance of himself and the members of his family for performance of marriages and maintenance of palaces etc. This amount was under no circumstances to be increased or decreased. This was paid to the Ruler in recognition of the merger of the territory over which he ruled. Recognition of succession to the gaddi is only a recognition as a Ruler for the purpose of getting the Privy purse which may be fixed and to personal rights, privileges etc. which he would have enjoyed as a Ruler. Recognition referred to in Article IV has nothing to do with private property which must devolve in accor-

dance with the personal law governing the ruler. (Para 29)

The Government of India was not concerned with the rights in any private property particularly the rights of third party therein. Even tenancy rights of ryots, were preserved and the Nizam's rights were made subject to the tenancy law. Thus the rights in respect of private property would, therefore, be governed by the ordinary law of the land including the law of inheritance. Hence it cannot be said that a dispute arose out of the covenant or in respect of any term thereof so as to oust the jurisdiction of Court by virtue of Art. 363 (Para 32)

Recognition of the Successor has nothing to do with the custom of the family. It was an act of State and a political decision, depending much upon the paramount power in the past and now by the President under the covenant and the Constitution. After the Constitution, recognition of the successor by the Government of India would be nothing more than a recognition of the successor to the gaddi. If, recognition of succession to the gaddi is only a political act and has nothing to do with private property, then whether private property follows the succession to the gaddi is a matter dehors the covenant and does not prevent either party to set up a claim thereto. Nor is the jurisdiction of the Courts barred under Art 363 to agitate that matter, subject no doubt to Section 87-B of the Civil Procedure Code

(Paras 33, 34)

Cases Referred: Chronological Paras

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(1966) W P. No. 416 of 1958, D/-15-12-1966 (AP), Raja Gajasimha Rao v Board of Revenue	33
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M C Chagla for M/s Sardar Ali Khan, Syed Azeenuddin and S. Krishna, for Petitioner; K Ramachandra Rao, Standing Counsel for Central Government 1st Respondent and M/s D. Narasaraaju and Anwarallah Pasha, for 2nd Respondent.

P. JAGAN MOHAN REDDY, C. J.:—The petitioner, daughter of the late General His Exalted Highness Nawab Sir Mir Osman Ali Khan, the erstwhile Ruler of the Hyderabad State (hereinafter referred to as "the late Nizam") filed this petition challenging the certificate issued by the Government of India on 27th February 1967 under Art 366 (22) of the Constitution of India to the 2nd respondent, His Exalted Highness Nawab Mir Barkat Ali Khan Bahadur (hereinafter referred to as "the Nizam") the grandson of the late Nizam, as being issued without the authority of law, is arbitrary, discriminatory and violative of the fundamental rights of the petitioner under Articles 14, 19 (1) (f) and 31 (1) of the Constitution. The impugned certificate is given below—

"Certificate

This is to certify that His Exalted Highness Nawab Mir Barkat Ali Khan Bahadur has been recognised by the President of India under Art 366 (22) of the Constitution as the Ruler of Hyderabad in succession to his grandfather, General His Exalted Highness Nawab Sir Mir Osman Ali Khan Bahadur, with effect from the 24th February, 1967 and accordingly the said His Exalted Highness Nawab Mir Barkat Ali Khan Bahadur, as such Ruler, is the sole successor to all private properties, movables and immoveable, held by the said General His Exalted Highness Nawab Sir Mir Osman Ali Khan Bahadur in the capacity of the Ruler of Hyderabad and that the Government of India have no objection to such properties being transferred to the said His Exalted Highness Nawab Mir Barkat Ali Khan Bahadur"

2. The petitioner stated that the late Nizam as the Ruler of the Hyderabad State, who having recognised on 23-11-1949 that the Constitution of India adopted by the Constituent Assembly of India shall be the Constitution for the State of Hyderabad as for the other parts of India and shall be enforced as such in accordance with the tenor of its provisions, entered into an agreement with the

Government of India on the 25th January 1950, determining and guaranteeing the amount of the privy purse and the personal rights, privileges and dignities, including the dynastic succession. After the conclusion of that agreement, as and from 26th January, 1950, except for the fact that he was appointed as the Raj Pramukh of Hyderabad as from that date, the late Nizam became a private citizen like any other person except for certain rights and privileges guaranteed to him under the aforesaid agreement with the Government of India. The agreement, according to the petitioner, guaranteed full ownership to his private properties.

The late Nizam was therefore, till the date of his death on the 24th February, 1967, was the owner and was in possession of the said private properties, which included several immovable and extensive moveable properties, cash, Government securities, gold and silver bullion, ornaments and utensils, jewellery, antiques and pieces of art and loans and debentures etc. In view of this, it was averred that inasmuch as the late Nizam was a Muslim of Sunni sect, succession to his private properties, namely, the said moveable and immovable properties, should be governed by the Hanafi school of Muslim law; that as the late Nizam died intestate on 24-2-1967, leaving as his heirs two widows, two sons and the petitioner, they would, according to the said Muslim law, be entitled to certain shares, namely the widows 1/16th each, the two sons 2/5ths each in the remainder of 14/16th and the petitioner to 1/5th of that remainder, and that the Nizam (the 2nd respondent) not being an heir under that law, was not entitled to succeed to any part of the said estate.

According to the petitioner, the impugned certificate purports to vary the normal rules of succession to the properties of a Muslim and deprives the petitioner and the other heirs of the late Nizam of their right to succeed to his estate. The petitioner further stated that the Government of India was not competent in law to issue the impugned certificate, interfering with, or depriving the petitioner and the other heirs of, their rights to succeed to the late Nizam under the personal law applicable to them. While this action of the Government of India, according to the petitioner, as has already been stated, is contrary to law, arbitrary, discriminatory and violative of the fundamental rights under Arts. 14, 19 (1) (f) and 31 (1) of the Constitution of India, she further alleges that it also infringed the principles of natural justice, because before depriving her of her rights as an heir to succeed to the private properties of her late father, it was incumbent upon the Government of India to have given notice

to her and afforded an opportunity of being heard before issuing the certificate.

3. The 1st respondent, Union of India, contended that under Art. II of the agreement entered into between the late Nizam and the Government of India on 25th January, 1950, full ownership, use and enjoyment of all the private properties, both immovable and moveable, including jewellery, securities etc., were guaranteed and in accordance with the terms of that article, an inventory of the properties which the late Nizam claimed to be his private properties was submitted by him, and after the same was considered by the 1st respondent and the Government of Hyderabad, they were declared to be his (late Nizam's) private properties. The settlement of private properties of the Ruler, it is contended, was an act of State, and as such is not justiciable. After the death of the late Nizam on 24-2-1967, pursuant to Art. IV of the said agreement, the Nizam (the 2nd respondent) was declared to be his successor under Art. 366 (22) of the Constitution.

It is further contended that consequent upon his succession to the Rulership of Hyderabad, the Nizam became the sole successor to all the personal rights and properties and assets of the late Nizam, which were recognised as the private properties of the Ruler of Hyderabad, and under the terms of the agreement aforesaid, he was entitled to full ownership, use and enjoyment of all such properties. Consequently, the certificate setting out the factual position was issued to the Nizam on the 27th of February, 1967. The full ownership, use and enjoyment of private properties by a Ruler having been guaranteed by the Government of India in pursuance of the said agreement, neither the agreement, nor any dispute or obligation arising therefrom is justiciable by virtue of Art. 363 (1) of the Constitution. The allegations in respect of the heirs or the shares of each of them, or the parties being governed by the Hanafi school of Muslim law were denied for want of knowledge, and in any event were said to be irrelevant.

4. The Nizam, the 2nd respondent, challenged the jurisdiction of this Court to entertain the writ petition, as it was barred under Art. 363 (1) of the Constitution, inasmuch as the guarantee given by the Government of India under Articles II (1) and IV of the agreement related not only to the succession to the gaddi but also to the personal rights, privileges, dignities and titles of the late Nizam in which term "personal rights" is included the personal or private properties of the late Nizam, and hence what the petitioner is raising in her petition is a dispute in respect of that agreement, which cannot be entertained either by the Supreme Court or by any other Court. It is con-

tended that the Central Government has plenary power to determine and in effect declare the successor's rights to the properties owned and possessed by the deceased Ruler at the time of his demise, and it is not open to any one to challenge the decision and declaration of the Government of India in that regard

Even assuming that it is open to the petitioner or any one else to challenge the correctness and validity of the declaration by the Government of India, the petition raises a dispute as to the interpretation of the respective rights and obligations of the late Nizam and the Government of India under the articles of agreement dated the 25th January 1950 which itself is a dispute. He submits that the contention of the petitioner that the private properties of the late Nizam should devolve in accordance with the Muslim law applicable to him, ignores the provisions of the agreement and the power of the Central Government thereunder, and challenges the competence of the Government of India in respect of the interpretation placed by it on the articles of the said agreement, which itself will amount to a dispute not justiciable under Article 363 of the Constitution. Alternatively it is contended that the private properties of the late Nizam did not belong to him as a mere citizen but belonged to him as the Ruler, and the rule of succession to the properties belonging to the late Nizam is entirely different to that applicable to an ordinary Muslim citizen, because private properties of the Ruler as distinguished from State properties always devolved by custom on the successor Nizam and the properties were never divided between the heirs under the ordinary law applicable to a Muslim citizen.

The petitioner, it is contended has to establish and prove that from the time when the dynasty of Nizam began, both moveable and immoveable properties of each Nizam on his demise were actually divided between the heirs then existing on the date of the demise, according to the ordinary law of inheritance applicable to a Muslim citizen. In the absence of any such allegation or proof, it is not open to the petitioner to assume that the properties moveable and immoveable, belonging to the late Nizam at the time of his demise and constituting his private properties, would not pass to the successor Nizam but would devolve upon the heirs under the ordinary law

The counter then referred to a letter dated 22-7-1954 written by the late Nizam to the Government of India, adverting therein to the custom of the family of the late Nizam under which private properties remaining undisposed of at the time of demise would go to the successor Nizam, and that it was for this reason that

the late Nizam created several trusts by deeds providing inter alia for those who would under the ordinary Muslim law of inheritance would have been heirs to his estate. The question that there is no law or custom applicable for succession to the private properties of the late Nizam is a question of fact which this Court cannot go into. The averments relating to infringement of Arts. 14, 19 (1) (f) and 31 (1) were traversed. It was again denied that the late Nizam like any other citizen is subject to the ordinary Muslim law of succession and since the Government of India was competent to determine this matter, there is no question of affording an opportunity to the petitioner or infringement of natural justice

5. In the reply of the petitioner the averments in the counter were traversed and it was contended that Art. IV of the agreement does not deal with private properties and the attempt to make it applicable to private properties is only for the purpose of submission that a dispute arises out of the agreement, as such, the jurisdiction of this Court is barred under Art. 363 of the Constitution.

6. Shri Chapla, learned advocate appearing for the petitioner, at the very outset stated that he is not challenging the agreement of 25-1-1950, nor is he raising a dispute thereunder, inasmuch as his whole case is that private properties of the late Nizam were not covered by the term "personal rights privileges and dignities" specified in Art. IV of the agreement which dealt with the recognition by the President of India of the successor to the gaddi of the deceased Ruler. It is his case that the President was fully competent to recognise a successor to the Ruler under Cl (22) of Art. 366, and the recognition of the Nizam the second respondent is not being challenged by him. So there can be no question of any dispute under the agreement.

If, as he contends personal rights which are referred to in Art. IV of the covenant do not and were never intended to cover private properties as distinguished from State properties a term which both the parties to the agreement were aware when they dealt with it in Art. II and which they could very well have used in Art. IV if succession to private properties were also intended to be declared by the President of India, then the question of applicability of custom as affecting devolution of property of the late Nizam who was a Muslim could not arise. In any case, it is contended, custom, unlike under the Hindu law, as abrogating, modifying or in any manner affecting the Quranic injunctions governing the personal rights of a Muslim under the Muslim law, cannot be allowed to be pleaded, proved or established, after the

application of the Shariat Act, 1937 to Hyderabad in 1959.

7. Mr. Narasaraaju, on the other hand submits that if on the 26th January 1950 there existed a custom relating to devolution of private property, under which the property devolves along with the gaddi, that custom would be rendered ineffective and inoperative only by a specific legislation to the contrary affecting the family of the Ruler. A mere general extension of the Shariat Act to Muslims, it is argued, does not by itself have the effect of making that custom inapplicable to the family of the late Nizam relating to the succession of the private property of the Ruler qua Ruler.

8. The main argument of Sri Narasaraaju as also of Sri Ramachandra Rao, however, was based on the applicability of Art. 363 of the Constitution in ousting the jurisdiction of the Court to entertain this Writ Petition. Mr. Narasaraaju contended, as was averred in the counter of the Nizam, that private properties are included in the term "personal rights" under Art. IV of the agreement and, at any rate, whether it is so or not, is a question relating to the interpretation of the covenant, and therefore, Art. 363 bars the jurisdiction of the Court. In other words, he contends that this Court has no jurisdiction even to interpret the meaning of the expression "personal rights." It is further contended that the Nizam cannot be described as a mere citizen. The learned advocate says that the late Nizam was a privileged citizen, and one of the privileges he had was to have the right of succession both in respect of the gaddi as well as his private properties governed by the agreement which is political in nature, entered into between the two independent States. There is, therefore, no question of any application of Articles 14, 19 (1) (f) or 31 (1) of the Constitution.

9. Mr. Ramachandra Rao for the Central Government, 1st respondent, similarly elaborated the point taken up by Shri Narasaraaju, by pointing out that both the petitioner as well as the 2nd respondent having relied upon and referred to the agreement for their respective contentions, it must be deemed that there is a dispute arising out of the agreement. Merely by framing the relief for quashing the certificate, it does not mean that it is not a dispute arising out of the agreement. The whole writ, according to him, is directed against the grant of the certificate, which was issued under the terms of the agreement, and the denial of the right to grant the certificate would be to raise a dispute under the agreement, and consequently the writ petition is barred under Art. 363.

10. We may, keeping in mind the several contentions, formulate the real

controversy in the writ petition under the following main heads, namely,

1. Whether the parties under Art. IV intended to and the covenant in fact did, provide for succession to the private property of the Ruler;
2. Has the Government of India executive power to issue the impugned certificate, declaring the Nizam, the 2nd respondent, as the successor to the private property of the late Nizam, and whether this Court cannot call in question such a certificate having regard to the provisions of Art. 363;
3. Does the custom of the family of the late Nizam, even assuming that it is established, apply in governing the succession to his private properties.

11. A great deal has been stated before us as to the nature of the agreement of merger, that it is a political agreement entered into between two independent States, namely, the Ruler on the one side and the Central Government on the other, that those covenants acquire the status of treaties and engagements entered into between two international persons, and that the framers of the Constitution, in order to give effect to the principles of international law, viz., that the municipal Courts can have no jurisdiction to entertain disputes relating to such covenants, have incorporated certain provisions in the Constitution relating to those covenants. While we do not think that ultimately anything will turn on the political aspect of the matter or the justifiability or otherwise of these covenants, because Mr. Chagla at the very outset, has quite frankly and, in our view, quite properly, did not even attempt to contest the proposition that if any dispute does arise out of the covenant of merger or of privy purse, entered into between the Ruler and the Government of India, the jurisdiction of the Courts would be barred, nonetheless, it might assist to some extent if we are to briefly sketch the historical background in which these agreements came to be executed.

12. On the eve of the attainment of independence by India, as is well known, there were over 500 States comprising nearly 2/5ths of the area of the country. These States, or as they were called Native States, had treaties, sanads and engagements with the then ruling power in India, namely, the British Crown, which apart from the obligations arising out of these treaties, engagements and sanads, asserted what is known as paramountcy or suzerainty, over the Rulers. By virtue of Section 7 of the Indian Independence Act, 1947 the relationship between the British Crown and the States came to an end, and the rights surrendered by the Native States to the paramount power

reverted to the Native States, with the result, that the political arrangement between the States on the one side and the British Crown on the other, were brought to an end. vide Sec. 7 (1) (b) In State of Gujarat v. Vora Fiddali, AIR 1964 SC 1043 a Bench of 7 Judges of the Supreme Court held that with the declaration of independence on the 15th August, 1947, the former Indian States attained independence and sovereignty.

Rajagopala Ayyangar J. speaking for himself and Sinha, C J said at p 1053:

"The native Indian rulers were undoubtedly sovereign in the territories under their jurisdiction and they parted with their sovereignty in States, firstly on accession, then on integration and finally by what has been felicitously termed in the White Paper on Indian States as 'unionization,' i.e., by State territory becoming part and parcel of the territory of the Union of India which meant the complete extinction of their separate existence and individual sovereignty and of their States as separate Political units." Subba Rao, J (as he then was) said at p 1066: "Under Section 7 of the Indian Independence Act, 1947, the suzerainty of the British Crown over the Indian States lapsed, with the result that Sant State became a full sovereign State." Similarly, Hidayatullah, J, at page 1072 said: "Santampur was an Indian State and the Ruler attained independence and sovereignty on August 15, 1947 on the ceasing of the paramountcy of the British Crown". Shah, J, said at p. 1082, pursuant to the agreement dated March 19, 1948 as from June, 1, 1948, the State of Sant merged with the Dominion of India. The sovereignty of the Ruler was thereby extinguished and the subjects of the Sant State became citizens of the Dominion of India". Mudholkar J, likewise observed at page 1091: "This State (Sant State) along with other ruling States in India, became an independent sovereign State in the year 1947, when the Dominions of India and Pakistan were constituted".

13. The nature of the independent status after the lapse of paramountcy on 15-8-1947 appears to have been dealt with and limited subsequently in another Judgment of a Bench of 3 Judges of the Supreme Court consisting of Subba Rao, J, (as he then was), Shah and Sikri, JJ, in Commissioner of Income-tax Andh Pra. v. Mir Osman Ali, AIR 1966 SC 1260. It may be observed that no reference has been made to the Judgment of the seven Judges, viz., AIR 1964 SC 1043 even though two of the learned Judges, Subba Rao, J, and Shah, J, were parties to it. In AIR 1966 SC 1260 it was contended by the learned advocate for the late Nizam that prior to January 26, 1950 the Nizam was a sovereign independent

Ruler and under international law as a foreign sovereign, he was exempt from taxation. This contention was negated on the ground that after 1858 when the British Crown took over from the East India Company the administration of the entire territory of India, the Indian States remained under the personal rule of their Chiefs under the Suzerainty of the Crown, and though after the Indian Independence Act, the paramountcy of the Crown lapsed in regard to Hyderabad and other States, the pre-existing agreements with those States continued in respect of specified matters, and the lapse of suzerainty or the breaking of ties with the British Crown did not ipso facto raise their status to that of international personality.

At page 1265, it was observed "It created a void and the position of the States was in a fluid state." Particularly in respect of the Nizam it was further observed. "..... After protracted negotiations, the Nizam issued a proclamation on November 23, 1949, accepting the Constitution of India, shortly to be adopted, subject to ratification by the Constituent Assembly of the Hyderabad State. The said constituent assembly ratified it and thereafter the Hyderabad State was included in Part B of the First Schedule to the Constitution." After referring to the White Paper on Indian States, at page 369 the learned Judge went on to say: "It will be seen from the said history that Hyderabad was under the suzerainty of the British Crown till the Indian Independence Act of 1947 was passed and that thereafter, after negotiations with the Indian Dominion, it finally acceded to it. It was never recognised as an international personality by the family of nations. It was all through a vassal of the British Crown..... It is, therefore, clear that Hyderabad State did not acquire international personality under the international law and so its ruler could not rely upon international law for claiming immunity from taxation of his personal properties."

14. The above history would show that whether the Native States were treated as independent sovereign States, recognised by international law, or not, the Government of India entered into agreement with the Rulers as independent sovereigns in lieu of their having surrendered the territories over which they ruled, providing for certain matters like privy purses, determination of what constituted his private property and which is the property belonging to the State, and the guarantee of their personal rights, privileges and dignities and succession to the gaddi. These merger agreements entered into by the Rulers were more or less similar, and in view of the solemn obligations entered into by the

Government of India, the Constituent Assembly incorporated certain provisions in the Constitution to ensure that guarantees given by it in respect of privy purses and other obligations were fully implemented. The 5 articles of the Constitution which deal with these agreements are the proviso to Art. 131, Arts. 291, 362, and 363 and Cl. (22) read with Cl. (16) of Art. 366.

15. Before examining these provisions, it is necessary to note the terms of the agreement entered into between the late Nizam and the Government of India on the 25th of January, 1950. It reads:

"....."

Whereas it has been decided that the Constitution of India adopted by the Constituent Assembly of India shall be the Constitution for the State of Hyderabad as for the other parts of India and shall be enforced as such in accordance with the tenor of its provisions;

And whereas it is expedient that the rights, privileges and dignities, including the dynastic succession and the privy purse, of His Exalted Highness the Nizam of Hyderabad shall be determined by agreement between him and the Government of India;

It is hereby agreed as follows:

Article I

(1) His Exalted Highness the Nizam of Hyderabad shall, with effect from the first day of April, 1950 be entitled to receive annually for his privy purse the sum of Rs. 50,00,000 (Rupees fifty lakhs) free of all taxes;

Provided that the sum specified above shall be payable only to present Nizam of Hyderabad for his life-time, and not to his successors, for whom provision will be made subsequently by the Government of India.

(2) The said amount is intended to cover all the expenses of His Exalted Highness the Nizam of Hyderabad and his family including expenses on account of his personal staff, maintenance of his residences, marriages and other ceremonies etc., and will neither be increased nor reduced for any reason whatsoever.

(3)

(4) The payment of the said amount as herein provided is guaranteed by the Government of India.

Article II

(1) His Exalted Highness the Nizam of Hyderabad shall be entitled to the full ownership, use and enjoyment of all the jewels, jewellery, ornaments, shares, securities and other private properties, moveable as well as immoveable (as distinct from State properties) belonging to him on the date of this Agreement.

(2) His Exalted Highness the Nizam of Hyderabad has furnished to the Government of India lists of all the moveable and immoveable properties held by him as such private properties.

(3) If any question arises as to whether any item of property is the private property of His Exalted Highness the Nizam of Hyderabad or State property, it shall be referred to such independent person as the Government may nominate and the decision of that person shall be final and binding on all concerned.

Article III

His Exalted Highness the Nizam of Hyderabad and the members of his family shall be entitled to all the personal privileges, dignities and titles enjoyed by them whether within or outside the territories of the State immediately before the fifteenth day of August, 1947.

Article IV

The Government of India guarantees the succession according to law and custom to the gaddi of the State and to the personal rights, privileges and dignities and titles of His Exalted Highness the Nizam of Hyderabad.

In confirmation whereof

A reading of the above terms would show that in consideration of the late Nizam agreeing to make the Constitution of India applicable to the State of Hyderabad as for the other parts of India in accordance with the tenor thereof, the Government of India guaranteed to the late Nizam (a) payment of an amount of privy purse fixed, free of all taxes, which privy purse shall not be increased or decreased on any account whatsoever; (b) full ownership, use and enjoyment of private property, moveable and immoveable, jewellery, securities etc. and (c) succession according to law and custom to the gaddi of the state and to the personal rights, privileges, dignities and titles of the late Nizam. Apart from this, it declared that the late Nizam and the members of his family shall be entitled to all the personal privileges, dignities and titles enjoyed by them, whether within or outside the territories of the State immediately before 15-8-1947.

16. It may be stated that prior to the integration in most of the States, there was no distinction between expenditure on the administration and the Ruler's privy purse. Even where the Ruler's privy purse had been fixed no effective steps had been taken to ensure that the expenditure expected to cover by the privy purse was not directly or indirectly charged on the revenues of the State, which amounts, therefore, were spent on the Rulers and on the members of the ruling families. Accordingly at the time of negotiations between the Rulers and the Government of India, the revenues of each State was taken as a criterion for fixing the privy purse. Only in the case of some of the viable States like Hyderabad, Mysore etc. a sum above Rs. 10, 00,000 was fixed. Apart from this, the Nizam of Hydera-

bad had a jagir, known as Sarf-e-khas, whose revenues furnished the privy purse. This Sarf-e-khas was surrendered by him to the State in lieu of which the privy purse of Rs. 50,00,000 was fixed. In order to keep distinct the property which the late Nizam had given up and merged in the Hyderabad State, and his private properties including jewels, jewellery, ornaments, securities etc., Art II of the agreement declared the full ownership of such properties belonging to him, lists of which properties were furnished to the Government of India.

17. We may now consider how far the guarantees and assurances given in this and other similar agreements entered into with the Rulers have been incorporated in the Constitution. Some of these provisions are contained in Arts 291, 362 and Cls. (15) and (22) of Art. 366, which are as under—

"Art 291: Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India, and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income"

Art 362 In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in Art 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State."

Art. 366 In this Constitution, unless the context otherwise requires the following expressions have the meanings hereby respectively assigned to them, that is to say—

(15) 'Indian State' means any territory which the Government of the Dominion of India recognised as such a State;

(22) 'Ruler' in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in Cl. (1) of Art 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler."

These articles, as has already been stated, gave effect to the guarantees contained in the agreement entered into between the Government of India and the Ruler, of the obligations existing prior to the date

of the Constitution, firstly in respect of the privy purse and secondly, by requiring that in the exercise of the power of the Parliament or the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard must be had to the guarantee or assurance given under any covenant, agreement etc, which is mentioned in Art 291, with respect to personal rights, privileges and dignities of the Rulers of the Indian States. Arts. 291, 361 and Cl. (22) of Art. 366 deal specifically with what is contained in Arts I and IV of the covenant. In so far as Art. II is concerned, it merely declares that the Ruler will be entitled to full ownership, use and enjoyment of private properties which have been settled in accordance with the list furnished by him and that any dispute in respect of it, which can only be whether any particular item of property is a State property or the Ruler's private property, will be decided by arbitration.

No constitutional guarantee is necessary, nor was any guarantee necessary in respect of the declaration that the Ruler and his family would be entitled to the personal rights, privileges and dignities and titles enjoyed by them, whether within or outside the territories of the State, immediately before 15-8-1947. These however, would be governed by the covenant. In so far as private property is concerned, once it is declared to be private property of the Ruler, it will only be dealt with and is subject to the law of the land. In any case, any dispute in respect of these matters dealt with by the agreement is not justiciable. Under the proviso to Art 131, the original jurisdiction of the Supreme Court shall not extend to a dispute arising out of any treaty, agreement, covenant, engagement, sanad or other similar instrument which, having been entered into or executed before the commencement of the Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute. Article 363 bars the jurisdiction of Courts in respect of these agreements. Since great reliance has been placed on this Article by the respondents, we give below the terms of that Article.

Art. 363 (1) Notwithstanding anything in this Constitution but subject to the provisions of Art. 143, neither the Supreme Court nor any other Court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments

was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.

(2) In this article.

(a) 'Indian State' means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) 'Ruler includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State.'

The first limb of this article bars interference by Courts in disputes arising out of a treaty, agreement, covenant etc, entered into before the commencement of the Constitution by any Ruler of an Indian State to which the Government of the Dominion of India or any of its predecessor Governments was a party, and which has or has been continued in operation after such commencement. The second limb bars the jurisdiction of Courts in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of the Constitution relating to any such treaty, agreement, covenant, etc.

18. Whether the jurisdiction of Courts is barred even apart from these provisions, by virtue of the political nature of the agreements themselves, is a matter with which we need not concern ourselves in the present case, inasmuch as the provisions of the Constitution provide fully and amply in respect of matters arising out of treaties, engagements, sanads, agreements, etc., entered into by the Rulers of the erstwhile States with the Government of India prior to the coming into force of the Constitution and which have or have continued in operation after such commencement.

19. The question therefore, is whether inheritance to the private property of a Ruler is governed by the agreement or covenant entered into between the Ruler and the Government of the Dominion of India. This would require a consideration of the terms of the agreement or covenant. But the contention of Sri Narasaraaju that this Court has no jurisdiction to interpret what is the meaning of the term "personal rights" as that would itself amount to a dispute arising out of the agreement appears to be far-fetched, because after all, in order to know whether any dispute arises out of the agreement or not, the Court has first to ascertain *prima facie* whether the subject-

matter of the dispute falls within the scope and ambit of the agreement. If this is not so, it will be difficult to say whether in fact any dispute arises out of such an agreement.

In every one of the cases cited by Sri Narasaraaju, viz. State of Bihar v. Kameshwar Singh, AIR 1952 SC 252; Bhagwat Singh v. State of Rajasthan, AIR 1964 SC 444; Umeg Singh v. State of Bombay, AIR 1955 SC 540 and Usmanali Khan v. Sagar Mal, AIR 1965 SC 1798 and the other cases to which we will refer presently, the Supreme Court looked into the covenant and examined its terms. Apart from these cases, in AIR 1966 SC 1260 the agreement, particularly Art. IV itself was construed. In all the above cases, it may be observed, where the jurisdiction of the Courts is sought to be barred, the claims were made under the agreement; but where the claim falls outside the agreement, there can be no question of jurisdiction of the Courts being ousted. In this view, we have necessarily to look into the terms of the agreement to ascertain whether succession to personal or private property was also made the subject-matter of the guarantee or assurance.

20. It is recognised by both the parties that this is not a dispute arising out of Art. II, inasmuch as there is no question involved in this petition as to which of the properties of the late Nizam are his private properties. The parties proceed on the footing that the late Nizam died possessed of and was the full owner of his private properties and had dealt with them as such during his life time. Of course if there was any dispute as to which item of the property is the private property of the Ruler, machinery has been provided in Art. II of the agreement for determining that dispute. But the question is whether the agreement, and more particularly Art. IV purports to deal with succession to the private property of the late Nizam.

As we have already seen, neither Articles I, II or III deal with this aspect of the matter. Art. III merely declares that the late Nizam and the members of his family would be entitled to certain personal privileges, dignities and titles. In so far as Art. IV is concerned, which deals with succession, there is no specific reference to succession to private properties as such. The only reference is of a recognition of succession according to law and custom to the gaddi of the State and to the personal rights, privileges and dignities and titles of the late Nizam. The successor, therefore, would be entitled not only to succeed to the gaddi but also to the personal rights, privileges and dignities of the late Nizam. The matter for consideration is whether "personal rights" referred to in this article are intended to

include, and in fact included, rights in private property and whether the Government of India has the power to recognise a successor thereto

21. "Personal rights" referred to in Article IV undoubtedly are personal rights qua the Ruler. But rights to private property have nothing to do with succession to the gaddi. One person may as heir succeed to the private property and another person may be recognised as an heir to the gaddi. With the former the Government of India has no concern, while it has the power to recognise the latter. It cannot be denied that by the very nature of the rights which the late Nizam had, to the full ownership, use, enjoyment and possession of his private property, to deal with it as he liked, to gift it, to create a trust or charity, to bequeath it by will to the extent he could under his personal law, are such that the Government of India could not have been invited to exercise any power or control over them. Nor could the members of his family have any right to prevent him from exercising his full ownership thereon. In these circumstances, the parties could not in our view have intended to deal with succession to property with which the Government of India was not concerned. Nor could the Nizam voluntarily or willingly confer a right on the Government of India over such property, even if it be after his lifetime.

A conferment of a right on the Government of India to recognise any person it chooses as the successor to the gaddi also as a successor to his private property might tantamount to a derogation of the recognition and declaration of the right of the late Nizam to the full ownership, enjoyment and possession of that property mentioned in Art. II or to bequeath the same by will. Apart from the fact that such a power was never intended to be conferred on the Government of India, the use of the words "personal rights" qua the Ruler as we have said earlier, has nothing to do with rights over private properties. In our view "personal rights" must be construed ejusdem generis with privileges, dignities and titles which a Ruler qua Ruler has, namely, immunity from jurisdiction of the Courts except with the permission of the Govt. of India, exemption from customs duties, the privilege to carry fire-arms without licence, and various other rights and privileges which a Ruler had prior to the inauguration of the Constitution of India and which under Art. IV of the agreement, the Government of India has recognised as being enjoyed by the successor

22. The white paper on Indian States in Paragraph 240 at pages 125, 126 sets

out the nature of the guarantees regarding these rights and privileges. It says, "Guarantees have been given to the Rulers under the various agreements and Covenants for the continuance of their rights, dignities and privileges. The rights enjoyed by the rulers vary from State to State and are exercisable both within and without the States. They cover a variety of matters ranging from the use of red plates on cars to immunity from Civil and Criminal jurisdiction and exemption from customs duties etc. Even in the past it was neither considered desirable nor practicable to draw up an exhaustive list of all these rights. During the negotiations following the introduction of the scheme embodied in the Government of India Act, 1935, the Department had taken the position that no more could be done in respect of the rights and privileges enjoyed by the Rulers than a general assurance of the intention of the Government of India to continue them. Obviously, it would have been a source of perpetual regret if all these matters had been treated as justiciable. Article 363 has, therefore, been embodied in the Constitution which excludes specifically the Agreements of Merger and the Covenants from the jurisdiction of Courts except in cases which may be referred to the Supreme Court by the President. At the same time, the Government of India considered it necessary that constitutional recognition should be given to the guarantees and assurances which the Government of India have given in respect of the rights and privileges of Rulers. This is contained in Art. 362, which provides that in the exercise of their legislative and executive authority, the legislative and executive organs of the Union and States will have due regard to the guarantees given to the Rulers with respect to their personal rights, privileges and dignities."

23. What is set out in this passage clearly accords with our view and is in consonance with the terms and tenor of Art. IV of the agreement.

24. It may be observed in this connection that under Section 86 of the Code of Civil Procedure, prior to the Constitution, immunity from civil jurisdiction and arrest of the Rulers of the Native States was the same as that granted to foreign Rulers, Ambassadors, Envoys, High Commissioners etc. But after the Constitution, inasmuch as the Rulers of the Native States became ordinary citizens, immunity was given to them in terms of Section 87-B of the Code of Civil Procedure by reason of the Covenants and the Constitutional provisions guaranteeing the personal rights.

25. There is authority for the proposition that "personal rights" in Art. IV

of the agreement do not include private properties of the Rulers. The Supreme Court had an occasion to consider the question whether an interference with the rights of possession and enjoyment of the private property of a Ruler was not an interference with guarantee given in Article II of the Merger Agreement. The consistent view of the Supreme Court was that it did not interfere with the rights in the said property, and that any law which dealt with the private properties of a Ruler dealt with them only in recognition of that right. In AIR 1952 SC 252, S. R. Das, J. observed at p. 306:

"The guarantee or assurance to which due regard is to be had is limited to personal rights, privileges and dignities of the Ruler qua a Ruler it does not extend to personal property which is different from personal rights. Further, this Article does not import any legal obligation but is an assurance only. All that the covenant does is to recognise the title of the Ruler as owner of certain properties. To say that the Ruler is the owner of certain properties is not to say that those properties shall in no circumstances be acquired by the State. The fact that his personal properties are sought to be acquired on payment of compensation clearly recognises his title just as the titles of other proprietors are recognised. Finally, the jurisdiction of the Court to decide any dispute arising out of the covenant is barred by Art. 363."

26. In *Sudhansusekhar v. State of Orissa*, AIR 1961 SC 196 a similar view was expressed. In that case, by Art. IV of the Merger Agreement executed by the Ruler of Sonapur on 15-12-1947, the Ruler after the merger was entitled to all personal privileges enjoyed by him, whether within or outside the territories of the State, immediately before the 15th day of August 1947. By Art. V the Dominion Government guaranteed the succession according to law and custom, to the gaddi of the State and to the personal rights, privileges, dignities and titles of the Ruler. By Art. III, he remained entitled to full ownership, use and enjoyment of all private properties (but not of the State properties) belonging to him on the date of the merger. On December 30, 1949, the Governor of Orissa promulgated Ordinance No. 4 of 1949 providing inter alia that the Orissa Agricultural Income-tax Act 1947, be applied to the merged Orissa States.

The Agricultural Income-tax Officer assessed the ex-Ruler to pay tax for the years 1950-51 to 1953 to 54. He disputed his liability to pay the tax by virtue of the merger agreement. Various contentions were raised. It will be seen that the several terms of the Merger Agreement were similar to those contained in

Arts. II, III and IV of the Merger Agreement in this case. Shah J. who delivered the Judgment of the Bench consisting of S. K. Das, Hidayathullah, Das Gupta and Rajagopala Ayyangar, JJ., relying upon the observations of S. R. Das, J. in *Visweshwar Rao v. State of M. P.* (Same as *State of Bihar v. Kameshwar Singh*), AIR 1952 SC 252 already cited by us, said at page 198:

"In our view, there is no force in the contentions raised by the appellant. The privileges guaranteed by Arts. 4 and 5 are personal privileges of the Appellant as an ex-Ruler and those privileges do not extend to his personal properties." This case was again referred to and relied upon by Subba Rao, J. in AIR 1966 SC 1260.

27. In *Vir Rajindra Singh v. Union of India*, AIR 1963 Punj 461 D. K. Mahajan, J., sitting singly had to consider an attack against an order of the President recognising His Highness Maharaj Rana Shri Hemant Singh as the Ruler of Dholpur State. After setting out the history of the dispute, he referred to the contention advanced by Mr. Daphtary that the power of recognition enjoyed by the President under Art. 366 (22) of the Constitution is purely an executive and political power and that it has nothing to do with the right in or to property which the petitioner may have as the successor to the deceased Ruler. It was stated that Mr. Daphtary referred to the Covenant and pointed out that the property was divided into two categories in the Covenant—(1) the private property of the Ruler, of which, under the Covenant, he has been made the full owner, and (2) the public property of the Ruler. In so far as the succession to the Ruler's private property is concerned, it is stated that it was not governed by any provisions in the Constitution of India, and that recognition of a Ruler under Art. 366 (22) is merely for the purposes of the Constitution.

It was further stated that there is no provision in the Constitution as to how the President is to exercise the power of recognition under Art. 366 (22), that it is the recognition that makes the Ruler and that the words "for the time being" in Art. 366 (2) clearly show that the recognition may be withdrawn or varied. At page 464, D. K. Mahajan, J., said. "Recognition, the counsel contends, in this context is really the power of selection. Therefore, the act of the President recognising a Ruler does not affect any property to which the petitioner has a right to succeed as the next heir of the Ruler." In the end of page 468 the learned Judge concluded:

"The sum total of the aforesaid discussion is that the private property of a Ruler after his death is not governed

by any of the provisions in the Constitution. This has been fairly and frankly conceded by Mr Daphtary. The recognition of his successor as Ruler only confers on him the privileges guaranteed by the Covenant and will not necessarily make him the heir to the deceased Ruler's private property."

28. Mr Narasaraaju tried to distinguish the observations of Das J and Mahajan, J, in AIR 1952 SC 252 and the observations in the other cases referred to above on the ground that the decisions were really based on the non-justiciability of the claim. No doubt in AIR 1952 SC 252 Mahajan J and Das J, did refer in the end to the claim being also barred by Art. 363. It may be observed that in that case several grounds were raised which were being dealt with. It is apparent from the observations of Mahajan, J, at page 302 that non-justiciability of the issue under Art. 363 was one of the grounds for dismissing the petition. He stated "the guarantee contained in the article (Art. 362) is of a limited extent only. It assures that the Rulers' properties declared as their private properties will not be claimed as State Properties. The guarantee has no greater scope than this. That guarantee has been fully respected by the impugned statute, as it treats those properties as their private properties and seeks to acquire them on that assumption. Moreover, it seems to me that in view of the comprehensive language of Article 363 this issue is not justiciable." Das, J, at page 306, prefaced his observations "there occur to me several answers to this contention" and then proceeded to make the observation which have been referred to above after which he stated "Finally the jurisdiction of the Court to decide any dispute arising out of the covenant is barred by Article 363." Where several grounds have been given, it does not mean that the ground of non-justiciability alone should be considered as the ratio of the decision.

29. Sri Narasaraaju again contends that the agreement being a political agreement and considered in international law as an act of State, the general principles applicable to interpretation of Statutes ought not to be applied but recourse should be had to rules of international law in interpreting treaties. In support of this contention, he refers to certain passages in Oppenheim's International Law, (8th Edn) pages 953 and 957 namely "the whole of the treaty must be taken into consideration, if the meaning of any one of its provisions is doubtful, and not only the wording of the treaty but also its purpose, the motive which led to its conclusion, and the conditions prevailing at the time." The conduct of the parties subsequent to the conclusion of the treaty may in some cases

be resorted to as a means of interpretation, especially with regard to the obligations of the party as acknowledged by its conduct." Accordingly, Mr. Narsaraju refers us to the correspondence that ensued between the late Nizam and the late Prime Minister and Mr Kailash Nath Katju, the then Home Minister, from which it is stated that it can be clearly ascertained as to how the parties understood the terms. The contention is that when the Govt of India guaranteed the succession according to law and custom to the gaddi of the State, it guaranteed the succession not only to the gaddi but to the private property as well which according to the custom of the family of the late Nizam was part of the gaddi. There is in our view no force in this contention. No doubt as pointed out by us earlier, in many instances prior to the merger there was little or no distinction between State property and private property and in some cases even though the privy purses were fixed the Rulers were not making any great distinction between the two but were enjoying the State property also. It was for this reason that the State property and the private property was sought to be distinguished and Art. II guaranteed full rights to the ownership possession and enjoyment of the private property which the Government of India recognised as such private property of the Ruler.

This was not a special agreement entered into with the late Nizam alone but an agreement entered into with almost all the Rulers and contained similar and identical terms. The scheme of it as we have said was to separate the State property and the private the State property being merged in the territory of India in lieu of which a privy purse was granted to the Ruler who was to enjoy during his life time and which he may use for the maintenance of himself and the members of his family for performance of marriages and maintenance of Palaces etc. This amount was under no circumstances to be increased or decreased. This was paid to the Ruler in recognition of the merger of the territory over which he ruled. Recognition of succession to the gaddi is only a recognition as a Ruler for the purpose of getting the privy purse which may be fixed and to the personal rights privileges etc which he would have enjoyed as a Ruler. Where, therefore the Ruler by the covenant definitely agree to keep these two different properties, namely privy purse and the private property apart from one another, recognition referred to in Art. IV has nothing to do with private property which must devolve in accordance with the personal law governing the Ruler.

30. A letter of the late Nizam to the late Prime Minister dated 14-6-1954 throws a good deal of light on what was

in fact done. In paragraph 2 of the letter the late Nizam said: "When the Sarf-e-Khas Administration was handed over to Diwani early in February 1949, it was suggested by the Government of India that with a view to safeguard the interest of the members of my family, I should make suitable provision for them, during my lifetime. With that object in view I have created separate Trusts for all the members of my family which will enable "them to maintain themselves in accordance with and befitting the station of life in which Providence has placed them" and I am satisfied that I have thus fulfilled my duty "towards them as the head of the family." It was with respect to the success of the entire scheme and the way in which these trusts will work that the late Nizam was concerned with in that letter, and he thought that that would depend upon the care and interest which his successor as the head of the family and the president of almost all the Trusts would show for their comfort and happiness. Then he proceeded to inform the late prime Minister how he was disappointed in his two sons and how his grandson, the present Nizam, was the person who was most fitted to succeed him. There is nothing in this letter which will assist the 2nd respondent.

31. On 22-7-1954 along with a letter to Dr. Kailash Nath Katju, Minister for States, the late Nizam handed over a Note, in which he stated: "In the Asaf Jani family succession was not according to Mahomedan Law, but according to tradition and custom. There were no hard and fast rules, and much depended on the wish of the Ruler and the circumstances prevailing at the time of succession. The successor was not only proclaimed the Ruler, but he also inherited the Sarf-e-Khas and all other properties and assets of the former Ruler, and, was the Head of the Family, he was responsible for the maintenance of all other members of the family." It was in this note that the late Nizam made out a case for dis-inheriting both his sons. The letter of Kailash Nath Katju, though agreeing with the late Nizam's view in respect of the unsuitability of his sons to succeed to him, nonetheless did not commit the Government of India but assured the late Nizam that when occasion does arise, the Government of India will give the utmost weight to the wishes mentioned by him.

In this letter nothing is stated about private property. Nor was any mention made with regard to private property when the Secretary to Government in the Ministry of Home Affairs. Mr. Viswanathan communicated the decision of the Government of India that Prince Mukar-ram Jah is recognised as an heir to succeed the late Nizam as the ruler of

Hyderabad. This was communicated to late Nizam in strict confidence. In letter dated April 14, 1964, it was stated that the Government of India decided to publish the notification recognising the present Nizam as the Ruler of Hyderabad, that day itself. Except, as we have said in the Note, where the late Nizam had stated that the successor in his family would also inherit the Sarf-e-Khas property and all other properties and assets of the former Ruler, in none of the letters there was mention about the private properties, nor did the Government of India refer to this aspect of the matter.

32. On the other hand the letter of the Home Secretary dated 30-11-1953 makes the intention of what sought to be included in the agreement clear. When the private properties of the late Nizam were acknowledged as per the lists furnished by him, the Home Secretary stated:

"1. x x x x x x

2. The effect of the declaration of these properties as the private property of Your Exalted Highness is that the Hyderabad State will have no claim on them. The declaration will not, however, prejudice third party rights in such properties.

3. Your Exalted Highness' rights in regard to the pasture lands measuring approximately 23,000 acres will be subject to the operation of and governed by the Hyderabad State tenancy and revenue laws."

The above extract would indicate beyond doubt that the Govt. of India was not concerned with the rights in any private property particularly the rights of third party therein. It may be noticed further that even tenancy rights of royts, were preserved and the Nizam's rights were made subject to the tenancy law. If this was the stand taken at the very outset immediately after the inauguration of the Constitution, it cannot be said that the Government of India were intending to affect the private property or deal with it in any manner much less recognising the succession after the death of the late Nizam. Thus the rights in respect of private property would, therefore, be governed by the ordinary law of the land including the law of inheritance. We do not think that the reference to private properties in the Note of the late Nizam can in any way introduce into the covenant something which was not in the contemplation of the parties and which was not dealt with in the agreement. Nor by the terms and tenor thereof could it be included as part of the covenant, so that it can be said that a dispute arose out of the covenant or in respect of any term thereof, as to oust the jurisdiction of this Court by virtue of Art. 363.

33. Recognition of the successor has nothing to do with the custom of the

family. It was an act of State and a political decision, depending much upon the paramount power in the past and now by the President under the covenant and the Constitution. There is no question of any strict adherence to the Muslim law that the successor should only be the heir to the deceased Ruler. In the past, recognition of the successor meant that he became the Ruler of the State and by virtue of that position, his right to the properties of the erstwhile Ruler whom he succeeded was undoubted and could not be challenged by anyone. He or the members of his family could not be sued in his Courts and his will was the law. Even the disputes relating to grants made by him were not cognisable by ordinary Courts of that State, and here again succession to jagirs granted by him were at his sweet will and pleasure, in that every grant was considered to be a fresh grant. It was so held in *Ahmad-un-Nissa Begum v State of Hyderabad* ILR (1952) Hyd 595 = (AIR 1952 Hyd 163) (FB) and by this Court in *Raja Gajasingha Rao v. Board of Revenue*, W. P. No 416 of 1958, D/-15-12-1966 (AP). But that position would no longer prevail after the Constitution when the Ruler has no such powers, but was only a citizen, no doubt privileged citizen by virtue of the provisions in the Covenant and the articles of the Constitution.

In AIR 1964 SC 444 *Shah, J.* stated: "The appellant has also since the Constitution been a citizen of India, and his recognition as Ruler under Art. 366 (22) of the Constitution has not altered his status, but as a citizen he is undoubtedly assured a privileged position". Even in the case of the late Nizam in AIR 1966 SC 1260 *Subba Rao, J.*, repelling the contention that the late Nizam was immune from taxation, observed at p 1266: "It is not and it cannot be, disputed that on April 1, 1950 the assessee was not a ruling chief but an ordinary citizen of India, residing, within the meaning of Section 4 of the Act, in that part of India which was a part of Hyderabad State". Even after the Constitution, recognition of the successor by the Government of India would be nothing more than a recognition of the successor to the gaddi. But, as we have, said that power and authority, by and under which the Ruler enjoyed all other properties belonging to the erstwhile ruler can no longer be availed of to acquire and enjoy properties belonging to the erstwhile Ruler.

34. It is no doubt contended by Sri Narasaraaju that the custom of the gaddi was that private property was part of the gaddi and that that custom has been recognised in Art. IV. Sri Chagla, however, states that no custom could be recognised

after the application of the Shariat Act, 1937 to Andhra Pradesh. If, as we have said earlier, recognition of succession to the gaddi is only a political act and has nothing to do with private property, then whether private property follows the succession to the gaddi is a matter de hors the covenant and does not prevent either party to set up a claim thereto. Nor is the jurisdiction of the Courts barred under Art 363 to agitate that matter, subject no doubt to Section 87-B of the Civil Procedure Code. In the view we have taken, it is unnecessary for us to go into that question, though it was argued by Sri Chagla, that even in a case where there was a custom under which Khojas were, governed by some of the principles of Hindu Law, when they migrated to Hyderabad they were governed only by Muslim law, vide *Jahandarunnissa Begum v Mohd Moinuddin*, AIR 1953 Hyd 117, which was approved by their Lordships of the Supreme Court in *Noorbanu v. Deputy Custodian General of Evacuee Property*, AIR 1965 SC 1937. The learned counsel had further contended that in any case, after the Shariat Act, 1937 was applied to the State of Andhra Pradesh in 1959, any family custom at variance with Mahomedan Law cannot be pleaded, by virtue of Section 2 of that Act, which reads: "Notwithstanding any custom or usage to the contrary, in all questions (save questions relating to agricultural land) regarding intestate succession, special property of females, including personal property inherited or obtained under contract or gift or any other provision of personal Law, marriage, dissolution of marriage, including talaq, ila, zihar, lian, khula and Mubaraq, maintenance, dower, guardianship, gifts, trust and trust properties, and wakfs (other than charities and charitable institutions and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariat)".

Nor is it necessary for us to express any view on the proposition advanced by Sri Narasaraaju, though ex facie we find it difficult to appreciate, that if on the 25th January 1950 a custom relating to devolution of private property was that it should devolve along with the gaddi, that custom will be rendered ineffective and inoperative only by a specific legislation relating to that person, a mere general extension of the Shariat Act to a Muslim does not have the effect of applying the provisions to him. Nor is it necessary to consider whether the certificate offends Arts 14, 19 (1) (f) or 31 (1) of the Constitution, because this would presuppose that the Government of India has power to issue such a certificate and that the same is in violation of the fundamental rights guaranteed to a citizen.

35. It now remains to be considered under what provision the certificate was issued by the Government of India. The certificate itself does not specify under what provision it has been issued, except to say that as a consequence of Nawab Mir Barkat Ali Khan, the 2nd respondent, being recognised as the Ruler of Hyderabad in succession to the late Nizam under Cl. (22) of Art. 366, he is entitled to succeed to the private properties of the late Nizam. We, however, asked Sri Narasaraaju and Sri Ramachandra Rao to tell us the provision under which the certificate was issued. The only answer that was given was that the Government of India would have power to issue such a certificate in exercise of the executive power of the Union, under Art. 362. If the covenant specified in Art. 291 dealt with succession to personal rights, which as they contend, include private property, then the Government of India would have power to issue the certificate under that Article, notwithstanding the fact that the certificate did not specify that the Government of India purported to act under that Article. We have already given reasons why "personal rights" either in Art. IV of the agreement or as specified in Art. 362 of the Constitution do not include private property.

36. In the result, we hold that the Government of India has no power or jurisdiction whether under Art. 362 or otherwise to issue the certificate recognising the 2nd respondent as the sole successor to all the private properties, moveable and immovable, held by the late Nizam, or to authorise transfer of the private properties to the 2nd respondent. Accordingly, we allow the writ petition with costs and quash the certificate dated 27-2-1967 issued to the Nizam, the 2nd respondent, relating to the succession to private properties of the late Nizam. Advocate's fee Rs. 100.

SSG/D.V.C.

Petition allowed.

AIR 1969 ANDHRA PRADESH 437
(V 56 C 108)

KUMARAYYA, J.

Official Receiver, Anantapur, Appellant
v. Kondeti Suryanarayana and others,
Respondents.

A. A. A. O. No. 63 of 1964, D/-13-3-1968, against order of Dist. J. Anantapur, D/-29-1-1963.

Provincial Insolvency Act (1920), Sections 4, 53 and 54 — Scope — Joint Hindu family — Untainted debts of father — Suit for partition by sons before the declaration of insolvency — Question whether Son's share could be brought in to

meet the creditor's demand against father by virtue of doctrine of pious obligation under Hindu Law is within the direction of Insolvency Court — Remedy of official Receiver to have the properties of sons sold by private sale is lost, but his right to enforce debts against sons remains.

Under Section 4 of the Provincial Insolvency Act the Insolvency Court has full power to decide questions arising in any case of insolvency which is within the cognisance of the Court. The questions may be questions of fact or of law. They may relate to title or priority. They may be of any nature whatsoever. The Court has full plenary powers, subject of course to the provisions of the Act, to decide them, if it thinks it necessary or expedient in the interests of justice and for the purpose of making a complete distribution of the property. Such powers can, however, be exercised subject to provisions of the Act. Thus, where the sons belonging to a joint Hindu family have already filed a partition suit prior to the declaration of father as insolvent, the question whether the shares of the sons in the joint family may be made available for paying off pre-partition debts contracted by the father, is a matter that comes squarely within the ambit of Section 4 as that matter has arisen for decision by reason of the insolvency of the father and the decision thereof is expedient for purposes of making a complete distribution of property and doing complete justice in the case. If there be a liability in law on the sons to pay off the untainted pre-partition debts of the father from out of their shares in the joint family property in case of insolvency of the father, the insolvency Court has power to decide the liability of the sons for purposes of complete distribution of all the available assets amongst the creditors. The obligation of the sons to pay out of their shares in the joint family property, the pre-partition debts, if there has been no arrangement made at the time of partition with regard to the same, is recognised by Hindu law. That share therefore, may be brought within the reach of the creditors for paying off the debts contracted by the father.

(Para 5)

In such a case after declaration of the father as insolvent, on account of partition which was effected by reason of the institution of a suit, only the remedy of the Official Receiver to sell the property privately is lost; but the substantial right to enforce the debts due to the creditors against the sons remains and that he can work out by suitable proceedings, though not by private sale, the liabilities of the sons. AIR 1928 Mad 735 (FB) and AIR 1931 Mad 317, Rel. on; AIR 1957 Andh Pra 692, Expl.

(Para 5)

- Cases Referred:** Chronological Paras
- (1957) AIR 1957 Andh Pra 692 (V 44) = (1957) 1 Andh WR 216, C Sriramamoorthi v. Official Receiver 1, 2, 5, 7
- (1952) AIR 1952 Mad 776 (V 39) = (1952) 1 Mad LJ 681, Thirumaleswara v Govinda 1
- (1949) AIR 1949 Mad 216 (V 36) = (1948) 2 Mad LJ 415, Official Receiver v Devarayan Chettiar 1
- (1936) AIR 1936 PC 277 (V 23) = ILR 17 Lah 644, Sat Narain v. Srikishan 5
- (1931) AIR 1931 Mad 317 (V 18) = 61 Mad LJ 66, Ramchandra Aiyar v Official Assignee of Madras 1, 2, 5
- (1928) AIR 1928 Mad 735 (V 15) = 55 Mad LJ 175 (FB), Official Assignee v Ramchandra 4, 7
- (1927) AIR 1927 Mad 471 (V 14) = 52 Mad LJ 387 (FB), Venku Reddi v Venku Reddy 4
- (1924) AIR 1924 Mad 682 (V 11) = 46 Mad LJ 590, Ramchandra Jagannatha Rao v Viswesam 4

A. Bhujangarao for T Venkatappa, for Appellant, L. Balajah, for Respondents Nos 1 and 2.

JUDGMENT:— The Official Receiver is the appellant, Respondents 1 and 2 are the sons of the 3rd respondent. The 3rd respondent was adjudged insolvent on 7-12-1960 on a creditor's insolvency petition I P No 22 of 1960 which was presented on 14-10-1960. His sons had already instituted a suit, O S No 46/60 for partition and allotment of 2/3rd share before the Subordinate Judge's Court, Anantapur. On 13-9-60, an ex parte preliminary decree was passed therein, which is marked as Ex. A-3. On an application, I. A. No 223/61 filed on behalf of the plaintiffs in that suit, the Official Receiver was impleaded as a party to the final decree proceedings. As soon as he was brought on record the Official Receiver put forth his plea that there are debts due to the creditors and that all these debts are the pre-partition debts and that provision ought to be made in the decree for the payment of the same as they were not tainted debts.

The learned Subordinate Judge directed the Official Receiver to resort to appropriate remedy in that behalf and passed a final decree on 26-6-1961. As a result, the Official Receiver moved the Insolvency Court by filing an application, I. A. No 703/61 under Sections 4, 53 and 54 of the Provincial Insolvency Act for a declaration that the debts due from the father are binding on the sons to the extent of their shares in the joint family property and that the said shares are liable to be sold for discharge of the debts. This petition was resisted on the ground that

a final decree for partition has already been passed and the sons being third persons, they are not amenable to the jurisdiction of the Insolvency Court and that the petition should be dismissed in limine. They denied the truth and binding nature of the debts and urged that the debts are sham and fictitious. The 3rd respondent, the father disputed the genuineness of the debts and stated that the promissory notes were not supported by consideration. The ground taken by the sons that the Insolvency Court has no jurisdiction to decide under Section 4 the disputes between the creditors and the sons of the insolvent was negatived by the Court of first instance.

On appeal however, the learned District Judge allowed the claim set up by the sons as to the jurisdiction of the Insolvency Court to go into the matter on the basis that the principle laid down in Ramachandra Aiyer v. The Official Assignee of Madras 61 Mad LJ 66 = (AIR 1931 Mad 317), was not followed in the later decisions of the Madras High Court in Official Receiver v. Devarayan Chettiar, AIR 1949 Mad 216 and Thirumaleswara v Govinda, AIR 1952 Mad 776 and that on the other hand in C. Sriramamurthi v Official Receiver, AIR 1957 Andh Pra 692, the principle was clearly laid down that, if a division were effected between the insolvent and his sons before the Official Receiver exercised the power of the sale the latter could only sell the share of the insolvent leaving the creditors to pursue their remedies against the sons' shares by means of suits instituted against them invoking pious obligation of the sons to discharge their father's untainted debts.

In the opinion of the learned District Judge, these observations went against the decision in 61 Mad LJ 66 = (AIR 1931 Mad 317) and hence the decision of the Madras High Court is no longer binding on this Court. On this basis he held that the petition filed by the Official Receiver invoking the jurisdiction under Section 4 is not maintainable and that the remedy of the Official Receiver is to file a separate suit against the sons of the insolvent. Consequently, the order of the learned Subordinate Judge was set aside. Hence the Official Receiver has come up in appeal to this Court.

2. The learned Counsel, Mr. Bhujanga Rao appearing for the appellant contends firstly that the observations in AIR 1957 Andh Pra 692 were in no way inconsistent with the principle laid down in 61 Mad LJ 66 = (AIR 1931 Mad 317), secondly that the Court had power to entertain the application under Section 4, and that the judgment in appeal is, therefore, liable to be set aside. As provided under Section 28 of the Provincial Insolvency Act, on the making of an order of adjudication, the whole of the property

of the insolvent shall vest in the Court or in a receiver and shall become divisible among the creditors. Section 28-A, which was introduced by reason of the Amendment Act 25 of 1948, provides that the property of the insolvent shall comprise and shall always be deemed to have comprised also the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of property as might have been exercised by the insolvent for his own benefit at the commencement of his insolvency or before his discharge.

We are not concerned with the two provisions to this section. Of course, by reason of adjudication of the father of a joint Hindu family governed by the Mitakshara Law as insolvent, there vests in the Official Receiver, 61 Mad LJ 66 the separate property of the insolvent father; and (2) also the power which the father of a joint family has to alienate the joint family property, including his son's share in the joint family property for paying his antecedent debts not contracted for an immoral purpose. The father's power of disposition over ancestral property including his son's share for the discharge of his untainted debts vested in the Official Receiver, however, could be exercised by him only so long as there was no partition between the father and sons. The result is that on a division between them, the father's power and consequently the power of the Official Receiver, to sell the shares of the sons would come to an end. In this premises, the Official Receiver who was entitled in law to sell the shares of the sons as well for the untainted debts of his father in exercise of the father's power of disposition over ancestral property, had no such power in this case by reason of partition.

In other words, he had no power to sell himself the share of the sons of the insolvent in the hitherto undivided joint family property. That does not mean however that he cannot also take appropriate measures to make the shares of the sons available for the benefit of the creditors for pre-partition debts, the liability of which would continue as ever on the shares of the sons obtained under partition. What is lost to him by reason of partition is only power of himself selling the share and not his right to bring it to sale through the intervention of the Court. The Official Receiver represents the general body of creditors also and as such, he has to protect their interests as well. In the present proceeding, indeed, the sons had brought their action for partition of joint family property even before the insolvency proceedings were started and obtained a preliminary decree long before the father was adjudged insolvent on 7-12-1960. The Official Receiver was brought on re-

cord in the partition action later and that at the instance of the plaintiffs and he had in fact moved the Court to make provision for payment of pre-partition debts in the final decree to be passed. He was however directed to resort to appropriate remedy. It is in consequence thereof that he has filed this petition under Section 4.

3. The contention of the learned Counsel for the respondents, Mr. Balaiah is that, since the sons are third persons, their share cannot be brought up for consideration in the insolvency proceedings and that they themselves are not, amenable to the jurisdiction of the Insolvency Court. To appreciate the argument, it is necessary here to read the provisions of Section 4 to the extent relevant for our purpose:—

"4 (1) Subject to the provisions of this Act, the Court shall have full power to decide all questions whether of title or priority, or of any nature whatsoever and whether involving matters of law or of fact, which may arise in any case of insolvency coming within the cognizance of the Court, or which the Court may deem it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case."

4. The insolvency Court has thus full power to decide questions arising in any case of insolvency which is within the cognizance of the Court. The questions may be questions of fact or of law. They may relate to title or priority. They may be of any nature whatsoever. The Court has full plenary powers, subject of course to the provisions of the Act, to decide them, if it thinks it necessary or expedient in the interest of justice and for the purpose of making a complete distribution of the property. Wide indeed are the powers of the Insolvency Court in this behalf, but they are intended to be exercised at the discretion of the Court. It follows therefore, that should the Court be of the view that the matter involves detailed enquiry or is complicated, it will direct the parties to resort to a regular suit.

Thus, the question whether the shares of the sons in the joint family may be made available for paying of pre-partition debts contracted by the father, is a matter that comes squarely within the ambit of Sec. 4 as that matter has arisen for decision by reason of the insolvency of the father and the decision thereof is expedient for purposes of making a complete distribution of property and doing complete justice in the case. Thus, if there be a liability on the sons in law to pay off the untainted pre-partition debts of the father from out of their shares in the joint family property in case of insolvency of the father, the

Insolvency Court has power to decide the liability of the sons for purposes of complete distribution of all the available assets amongst the creditors. The obligation of the sons to pay, out of their shares in the joint family property, the pre-partition debts, if there has been no arrangement made at the time of partition with regard to the same, is recognised by Hindu law. That share therefore, may be brought within the reach of the creditors for paying off the debts contracted by the father. So then it cannot be said that this is a matter which is outside the powers of the Insolvency Court or does not arise in insolvency. In *Official Assignee v Ramachandra Aiyar*, 55 Mad LJ 175 = (AIR 1928 Mad 735) (FB) the Official Assignee took out a notice of motion praying (1) that it may be declared that the debts mentioned therein are binding upon the insolvent's sons and (2) that he (The Official Assignee) may be authorised to sell the family properties to the extent of the interest of the minor mentioned therein. It was observed by Ramesam, J,

"But all that is contended for the respondent is not that the substantial right of the Official Assignee to proceed against the sons for the father's debts is lost, but only one of the several remedies open has been extinguished. Now, the Official Assignee has got several remedies against the sons. first, as representing creditors, or associating himself with them, he can file suits against the sons, obtain decrees and sell the son's share also; and secondly, in the partition suit now pending at Madura, wherever it may be tried ultimately, at Madura or Madras, he can apply for the creditors to be made parties, so that the findings as to the nature of the debts may bind all and ask for a decree providing for the payment of such debts as are not illegal or immoral, see *Venku Reddy v Venku Reddy*, 52 Mad LJ 387 = (AIR 1927 Mad 471) (FB) There is possibly a third remedy open. We have held in the connected Full Bench decision that, in garnishee proceedings, a question can be decided by the Insolvency Judge if necessary. This power is subject only to his discretion, but he is not bound to go into all questions that arise before him. In the present case the Judge sitting in insolvency may, if he thinks proper, decide the questions raised by the Official Assignee as between himself and the sons, provided the sons fill the character of the garnishee. These are matters for him to determine. The Official Assignee can then obtain formal decrees. The only remedy lost to the Official Assignee is the right of selling the sons' share by private sale. This is merely a processual right. The substantial right of the Official Assignee to enforce the debts due to the creditors against the sons remains by reason of our decision in *Rama-*

chandra Jagannatha Rao v. Viswesam, 46 Mad LJ 590 = (AIR 1924 Mad 682). One mode of enforcing it, a right which is merely ancillary and auxiliary to the main right, out of several modes, is all that is lost".

5. It is clear that, on account of partition which was effected by reason of the institution of a suit, only the remedy of the Official Receiver to sell the property privately is lost; but the substantial right to enforce the debts due to the creditors against the sons remains and that he can work out by suitable proceedings though not by private sale, the liabilities of the sons. In 61 Mad LJ 66 = (AIR 1931 Mad 317) it was held that notwithstanding the suit for partition and the consequent division in status, the right of the father to have his just debts paid out of the entire family property subsists, and where the father has been adjudged insolvent, such right vests in the Official Assignee as "property of the insolvent divisible among his creditors". It was pointed out that although by reason of the division of status brought about by a suit for partition instituted by the sons after the father's insolvency the father and the official Receiver lose the right of private sale of the family property including the shares of the sons, it is open to the Official Assignee to obtain a declaration against the sons, and get the family property included in their shares therein sold by or through Court, and that Section 7 gave the widest power to the Insolvency Court to go into such question and to declare the liability of the sons' share in the family property for the proved and just debts of the father insolvent and make all necessary orders for their realisation. It is on the basis of this authority that the Court of the first instance had overruled the objections taken under Section 4. But the appellate Court differed from the conclusion reached in view of the pronouncement in AIR 1957 Andh Pra 692. That was a case where, though a suit for partition was filed, partition was not deemed to be in the interests of the minors and, therefore, was not ordered. *Viswanadha Sastri J* who spoke for the Court while summing up the law observed thus

"The law as then understood was that the father's power of disposition over ancestral property, including his sons' shares for the discharge of his untainted debts vested in the official Receiver and could be exercised by him so long as there was no partition between them and the father's power and consequently the power of the Official Receiver, to sell the shares of the sons would come to an end, *Sat Narain v. Srikishan Das*. ILR 17 Lah 644 = AIR 1936 PC 277

If a division were effected between the insolvent and his sons before the Offi-

cial Receiver exercised the power of sale, the latter could only sell the share of the insolvent leaving the creditors to pursue their remedies against the sons' shares by means of suits instituted against them invoking the pious obligation of the sons to discharge their father's untainted debts."

6. The contention of the learned Counsel for the Respondents, Mr. Balaiah, is that, when the partition has taken place, the only remedy open to the creditors is to file suits against the sons invoking the pious obligation of the sons to discharge their father's untainted debts and that the Official Receiver cannot move the Insolvency Court under Section 4 nor can the creditors do so. I do not think, by making the observations relied upon by the learned Counsel, the Division Bench had intended to lay down exhaustively all the remedies open to the creditors or the Official Receiver for invoking the pious obligation of the sons to discharge their father's untainted debt. The remedy referred to was one of the remedies as pointed by Ramesam J., to which reference has already been made. There can be other remedies as well.

7. The appellate Court was in error in construing the observations to mean that, under law, the remedy of suit was deemed to be the only remedy for the creditors or the Official Receiver. The learned Judges, who decided the case in AIR 1957 Andh Pra 692, in no manner whatsoever, had intended to differ from the view taken by Ramesam J., in 55 Mad LJ 175 = (AIR 1928 Mad 735 FB). In my opinion, as observed by Ramesam J., there can also be a remedy available for the Official Receiver or the creditors under Section 4 though it is left to the discretion of the Insolvency Court to decide the matter itself or direct the parties to resort to a suit. In this view of the matter, the finding of the appellate Court as to the application of Section 4 cannot be upheld. The view taken by the Court of first instance must be accepted.

8. But it would appear from the facts of this case that the sons had taken a plea that the debts are not true or genuine. Nevertheless, in spite of the absence of any evidence on behalf of the sons that the debts were contracted by their father for immoral purposes the Court of the first instance held against the sons. It was the duty of the Official Receiver to prove that the father had contracted the debts and that they were true. It is only on proof of the truth or genuineness of the debts that the onus of their being tainted will shift on to the sons. It was the duty of the Court of the first instance to go into the matter and decide on the evidence adduced. It was open to the Court, if it appeared that the matter in-

volved issues of a suit. But if it wanted to exercise its jurisdiction under Section 4, it was incumbent on it to enter into enquiry as to the truth of the debts as well. As no such enquiry was done, the matter has to be remanded to the Court of the first instance.

9. I, therefore, remand the case to the Court of first instance for enquiry into the questions as to the truth and genuineness of the debts and also to their being not tainted in case their truth is proved. It is made clear that, as the exercise of jurisdiction under Section 4 is discretionary the Court is at liberty to refuse to exercise jurisdiction and direct the parties to resort to a remedy of a suit if it comes to the conclusion during the enquiry that the matter requires a detailed enquiry and involves complicated questions of law, and fact.

10. The appeal is allowed accordingly. Costs shall abide the result of the proceedings in the Court of first instance. No leave.

GGM/D.V.C.

Appeal allowed.

AIR 1969 ANDHRA PRADESH 441 (V 56 C 109)

SAMBASIVA RAO, J.

Income-tax Officer, Masulipatnam and another, Petitioners v. K. Srinivasa Rao, Respondent.

Civil Misc. Petn. No. 5081 of 1968, D/-5-7-1968 from order of High Court to review the judgment in W. P. No. 1126/1962, D/-1-2-1968.

(A) Constitution of India, Art. 226 — Writ petition on civil side — Review — Provisions of Civil P. C. would apply — High Court is governed by provisions of Civil P. C. and has jurisdiction to review its order under Art. 226 — AIR 1953 Mad 39, Foll. — Civil P. C. (1908), O. 47, R. 1, S. 114. (Para 8)

(B) Constitution of India, Art. 226 — Civil P. C. (1908), O. 47, R. 1 — Review — Order under Art. 226 passed on 1-2-1968 following Supreme Court decision — Decision relied on reversed by Supreme Court on 25-10-1967 — Latter decision not fully reported by 1-2-1968 but was only short noted in I. T. R. — Latter decision not brought to notice of Court — Held there was error apparent on face of record in order D/-1-2-1968, justifying review of the order — Even if it was counsel's mistake in not placing latest decision before Court, that affords sufficient ground for reviewing the order. AIR 1940 Mad 17 and (1954) Andh LT (Civil) 214, Foll. (Para 7)

(C) Income-tax Act (1922), S. 35 (5) — Scope — Individual assessment of a partner in a firm made prior to 1-4-1953

wherein his share of income from firm was also included — Assessment of firm completed after 1-4-1952 — Income-tax officer has jurisdiction to reopen assessment of partner — Sub-section (5) becomes operative as soon as it is found on assessment or reassessment of firm that share of partner in profit or loss of firm was not included in assessment or if included was not correct — Completion of assessment of partner as individual need not happen after 1-4-1952 — Completed assessment is subject matter of rectification and this may have preceded 1-4-1952 — Such completion does not control operation of sub-section (5) AIR 1968 SC 623, Foll.; (1952) 46 ITR 609 (SC) held overruled by AIR 1968 SC 623, W. P. No. 1126 of 1962, D/-1-2-1968 (AP), Reconsidered and order therein set aside in the light of Supreme Court Judgment in AIR 1968 SC 623 which had not been fully reported and was not brought to the notice of the previous Bench. (Paras 6, 10)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 623 (V 55) =
1968-69 ITR 252, Income-tax Officer
v T S Devinatha Nadar 6, 7

(1962) 1962-46 ITR 609 (SC), Second
Additional Income-tax
Officer, Guntur v. Atmala
Nagaraj 5, 6, 7

(1954) 1954 Andh LT (Civil) 214 =
1955 Andh WR 71, P Gengamma
v P. Venkanna 7

(1953) AIR 1953 Mad 739 (V 40) =
ILR (1952) Mad 1000, Chenchanna
Naidu v Praja Seva Transports
Ltd Cuddapah 8

(1940) AIR 1940 Mad 17 (V 27) =
1939-2 Mad LJ 809, Govinda
Chettiar v Varadappa Chettiar 7
(1938) AIR 1938 Mad 722 (V 25) =
ILR (1938) Mad 816, Ryots of
Garabandha v. Zamindar of
Parlakimidi 8

T Anantha Babu, for Petitioners;
Standing Counsel for Income-tax Department
and K. Ranghanatha Chari, for Respondent.

ORDER:— I am constrained to allow this review petition, filed by the Revenue.

2. Seshachalapati J and I allowed the Writ Petition No 1126 of 1962 by our order dated 1-2-1968. The Revenue seeks this order to be reviewed. Seshachalapati J., having retired since rendering our decision, this petition has come up before me sitting singly

3 One Katari Nagabhushanam, the father of the petitioner in the Writ Petition was a partner in a firm. For the assessment year 1948-49 he filed a return showing his taxable income at Rs 6,000. Later, he filed a letter stating that his 1/3 share of the income from the firm for the said assessment year was Rs. 6,402-5-4.

The Income-tax Officer by his order dated 19-8-1949 provisionally accepted the share income of the assessee from the firm as stated by him. It thus happened that the individual assessment of the assessee for the year 1948-49 was made prior to 1st April, 1952. However, the assessment of the firm of which the assessee was a partner was completed ex parte on 25-8-1952 fixing the total taxable income of the firm at Rs 2,01,642. There were appeals preferred against this order but they are not material for the consideration of the present petition. The Income-tax Officer purporting to act under Section 35 of the Income-tax Act, 1922 issued a notice dated 27-1-1956, proposing to rectify the new assessment of Nagabhushanam by including an income of Rupees 67,214 representing his 1/3rd share of the firm's income for the assessment year 1948-49. Objections were raised by the assessee to the jurisdiction of the Income-tax Officer under Section 35 (5) of the Act to revise the assessment which had been completed before 1-4-1952. That objection was overruled by the Income-tax Officer by his order dated 29-12-1956 and the assessee's tax still payable was determined for that year at Rs 25,254-4-0 after giving credit to the tax already paid in pursuance of the original assessment. Subsequently the assessee, Nagabhushanam died and no action was taken by the Department for nearly 3 years. Thereafter a certificate under S 46 of the Act was issued and the certificate proceedings were set in motion by the attaching the properties of the deceased assessee. One of the sons filed another writ petition which was however, dismissed. Another son by name Srinivasa Rao filed the present writ petition No 1126 of 1962 questioning the very proceedings as being without jurisdiction. The amount that was found to be still payable out of the tax determined, is Rs 10,736 33 Ps. The Revenue sought to recover this amount from out of the sale proceeds of a house belonging to the assessee. Hence the Writ Petition.

4. The only contention raised on behalf of the writ petitioner was that the Income-tax Officer had no jurisdiction to reopen and reassess an individual assessment of a partner made before 1st April, 1952 wherein his share of the income from the firm was also included. It was contended that the fact that the assessment of the firm as such, was completed after 1-4-1952 could not make any difference and would not confer any jurisdiction on the Income-tax Officer to reopen the individual assessment of a partner, completed before 1-4-1952 and that Section 35 (5) of the Act did not confer any such power on the Officer.

5. In our Order, allowing the writ petition, we upheld this objection put

forward on behalf of the petitioners. In upholding that objection we relied upon a decision of the Supreme Court in the Second Additional Income-tax Officer, Guntur v. Atmala Nagaraj, (1962) 46 ITR 609 (SC), wherein it was held that—

"Sub-section (5) of Section 35 was not applicable to cases where the assessment of the partner was completed before April 1, 1952 even though the assessment of the firm was completed after 1st April, 1952." "Though S. 35 (1) empowers the Income-tax authorities to rectify mistakes apparent from the record within four years from the date of the assessment order sought to be rectified a mistake which becomes apparent only from the record of the firm is not a mistake apparent from the record so far as the assessment of the partner is concerned."

This is a decision rendered by a Bench of the Supreme Court consisting of three learned Judges.

6. However, the Supreme Court reversed this view by a decision of Bench, consisting of five learned Judges (Hegde, J., dissenting), in the Income-tax Officer v. T. S. Devinatha Nadar, 1968-68 ITR 252 = (AIR 1968 SC 623), Mitter, J., speaking the majority view observed—

"This group of appeals has been referred to a larger Bench than one of three Judges before whom the matter was opened on May 4, 1967 because of the earlier decision of this Court."

After referring to the earlier decision in 1962-46 ITR 609 (SC) the learned Judge stated that:—

"With very great respect, we find ourselves unable to concur. As we have already said, sub-section (5) of Section 35 of the 1922 Act becomes operative as soon as it is found on the assessment or re-assessment of the firm or on any reduction or enhancement made in the income of the firm that the share of the partner in the profit or loss of the firm had not been included in the assessment of the partner or if included was not correct. The completion of the assessment of the partner as an individual need not happen after April 1, 1952. The completed assessment of the partner is the subject-matter of rectification and this may have preceded the above mentioned date. Such completion does not control the operation of the sub-section. In the result, we find ourselves unable to concur in the decision or the reasoning in Atmala Nagaraj's case 1962-46 ITR 609 (SC)."

7. It has thus come to happen that the Supreme Court has reversed its own view, on which we relied on rendering our decision dated 1-2-1968, though this latter decision of the Supreme Court was given on October, 25th, 1967 and was, therefore, in existence by the time we rendered our decision on 1-2-1968. However,

the latter decision was not fully reported till April 1968 and its full report was published in the 68th volume, Part III of the Income-tax Reports of the dated 15th April 1968. It appears, it was short noted in November, 1967 itself and both the learned counsel have stated that they had not noticed this case in the short-noted report. The result was that this latter decision of the Supreme Court was not brought to our notice, when we heard this writ petition and rendered our decision on 1-2-68, relying upon (1962) 46 ITR 609 (SC), which was subsequently overruled by (1968) 68 ITR 252 = (AIR 1968 SC 623). There is thus an error apparent on the face of the record in our order dated 1-2-1968. Since the latter decision of the Supreme Court was not fully reported by the time we rendered our decision but was only short noted, it may also be possible to say that despite the exercise of due diligence, the latter decision was not within the knowledge of the learned counsel. I am, therefore, clear in my mind that the circumstances above narrated, are sufficient in law, to warrant a review of our order dated 1-2-1968. Even supposing that it was the counsel's mistake in not placing the latest decision before us, that affords sufficient ground for reviewing our order. In Govinda Chettyar v. Varadappa Chettyar, (1939) 2 Mad LJ 809 = (AIR 1940 Mad 17) the Madras High Court and in P. Gengamma v. P. Venkanna, 1954 Andh LT (Civil) 214, this Court took the view that counsel's mistake is a sufficient ground which justifies a review.

8. Then, the next question is whether the provisions of the Civil Procedure Code, including those relating to review, are applicable to proceedings under Article 226 of the Constitution. A Division Bench of the Madras High Court in Chenchanna Naidu v. Praja Seva Transports Ltd. Guddapah, AIR 1953 Mad 39, (which is binding on me) held that:—

"If the application for the issue of a writ under Art. 226 is made on the civil side in dealing with such an application the High Court is governed by the provisions of the Civil Procedure Code, and the High Court has jurisdiction to review its order under Art. 226."

In coming to this conclusion the learned Judges of the Division Bench examined the entire case law and relied upon an earlier decision of the Madras High Court in Ryots of Garabandha v. Zamindar of Parlakimidi, AIR 1938 Mad 722. Ultimately the learned Judges held that

"We have held in C. M. P. No. 625 of 1951 that the Government order should 'ex facie' show that it applied its mind to the question of the legality, irregularity or propriety of the order of the Appellate Tribunal and that in the absence thereof the Government's order was liable

to be quashed. No doubt our omission to consider that point was due to the Counsel not putting forward before us that aspect of the case, (that application have not (sic) been grounded on the arbitrary exercise by the Government of the power conferred on it under Section 64-A of the Act). But, whoever might be responsible for it, if the most important point arising in the petition was not considered by us we think such an omission would constitute "an error apparent on the face of the record", within the meaning of the expression occurring in Order 47, Rule 1, Civil Procedure Code so as to warrant a review of our order dated 9th January, 1951.

It follows that our order dismissing the application for the issue of writ of certiorari is discharged. A writ nisi will issue in this case

It is thus clear that the provisions of Order 47 of the Civil Procedure Code would apply to the proceedings under Article 226 of the Constitution.

9. The result of the above discussion is that it is a case where I could review our order dated 1-2-1968

10. The learned counsel for the respondent in the review petition (Petitioner in the writ petition No 1126 of 1962) has fairly stated that the latter decision of the Supreme Court has completely reversed the position and that in the light of that decision, our decision dated 1-2-1968 became erroneous. He has, however, contended that there is a remedy available to the Revenue, by way of appeal to the Supreme Court and that, therefore, our order dated 1-2-1968 need not be reviewed. But, in view of the circumstances stated above and also the fact that had the latter decision, which was already in force by that time, been brought to our notice, our decision would have been one of dismissal of the writ petition, I am of the opinion that the proper course is to review our order dated 1-2-1968 and set it right in accordance with the latter decision of the Supreme Court. Our order dated 1-2-1968 in W P. No 1126 of 1962 is accordingly set aside and the said Writ Petition is hereby dismissed. In the circumstances of the case I make no order as to costs either in the writ petition or in this review petition.

LGC/D.V.C Order accordingly

AIR 1959 ANDHRA PRADESH 444
(V 56 C 110)

CHINNAPPA REDDY, J.

In re, Devalah, Petitioner.

Criminal Misc. Petn. No 1098 of 1968,
D/-24-7-1968

Criminal P. C. (1898), S. 561-A — Inherent power of High Court under — Can-

JL/KL/E363/68

not be exercised in respect of executive or administrative orders — Hyderabad City Police Act (9 of 1348 Fasli), S. 26 (1).

Section 561-A of the Criminal P. C. preserves the inherent power of the High Court to make suitable orders (1) to give effect to any order under the Code and (2) to prevent abuse of the process of the Court. It does not empower the High Court to interfere with executive orders of executive authorities. The Order under the Section to secure the ends of justice must be in relation to a proceeding in the High Court or any subordinate Criminal Court and that proceeding too must have judicial character and not of an executive or administrative one.

Though the Commissioner of Police, Hyderabad, functions as first class Magistrate for limited purpose, his order under Section 26 (1), Hyderabad City Police Act is clearly an executive order. (Para 2)

A Lakshminarayana, for Petitioner

ORDER. — This application under Section 561-A Criminal Procedure Code is entirely misconceived. In this application the petitioner seeks to have quashed an order of the Commissioner of Police under Section 26 (1) of the Hyderabad City Police Act of 1348 Fasli directing the petitioner to remove himself from the area of Kachiguda and shift himself to the area within the limits of Trimulgherry Police Circle and not leave that area for a period of one year.

2. Section 561-A of the Criminal Procedure Code preserves the inherent power of the High Court to make suitable orders (1) to give effect to any order under the Code, (2) to prevent abuse of the process of the Court or (3) to secure the ends of justice. The power given to the High Court, to make appropriate orders to secure the ends of justice, does not empower the High Court to interfere with executive orders of executive authorities. It is not intended to vest the High Court with any omnipotent power. The order to be made by the High Court under Section 561-A to secure the ends of justice must be in relation to a proceeding in the High Court or in any Subordinate Criminal Court and that proceeding too must have judicial character and must not be a proceeding of an executive or administrative character. The Commissioner of Police acting under Section 26 of the Hyderabad City Police Act cannot be called subordinate Criminal Court, nor can he be said to exercise any judicial functions. Mr. Lakshminarayana points out that the Commissioner of Police is a First Class Magistrate for certain purposes mentioned in Section 47 of the Hyderabad City Police Act, namely Sections 86, 87, 90 and 91 of the Hyderabad Code of Criminal Procedure. The Commissioner functions as 1st Class Magistrate only for those limited purposes

and not when he makes an order under Section 26 of the Act. It is also further urged that there is a provision in Section 26 (7) for hearing the person against whom an order under Section 26 (1) is proposed to be made and therefore, the order must be considered to be of judicial character. It is difficult to agree with this contention. Merely because a statute contains a provision for hearing a person against whom orders are proposed to be made the order does not acquire a judicial character. Section 26 occurs in the Chapter relating to Police Regulations and Rules for preservation of order. An order under Section 26 (1) is clearly of an executive character. I therefore, hold that the application under Section 561-A is not maintainable. It is, therefore, dismissed.

DGB/D.V.C. Application dismissed.

AIR 1969 ANDHRA PRADESH 445
(V 56 C 111)

SHARFUDDIN AHMED, J.

Public Prosecutor, Appellant v. Kanumarlapudi Ramalingaiah, Respondent, (Accused).

Criminal Appeal No. 735 of 1966, D/-11-6-1968, against order of Addl. Munsiff Magistrate Tenali in C. C. No. 18 of 1966.

(A) Prevention of Food Adulteration Act (1954), S. 2 (i) (a), (b), (c) — Food article not of nature, substance or quality which it purports or is represented to be — Amounts to “adulterated food” within S. 2 (i) (a).

A food article falls within the mischief of “adulterated food” as defined in Section 2 (i) (a) if it is not of the nature, substance or quality which it purports or is represented to be and the food article need not be actually injurious to the health of the purchaser or prejudicial to him in any other way. 1964 (1) Cri LJ 448 (AP), Explained. (Paras 3, 4)

(B) Prevention of Food Adulteration Act (1954), S. 13 (5) — Report of Public Analyst — When not binding on Court.

Once the Public Analyst who is an expert, has found that the article is adulterated, his opinion has to be accepted unless it is shown that his opinion is based on a misreading of facts, or is superseded. (Para 4)

Cases Referred: Chronological Paras
(1963) 1963-1 Andh WR 265 = 1964

(1) Cri LJ 448, Public Prosecutor
v. N. Subba Rao 4

K. Somakonda Reddy for Addl. Public Prosecutor, for Appellant; E. Manohar, for Respondent (Accused).

JUDGMENT:— The sole respondent (accused) was prosecuted for selling edible oil which was found to be adulterated by the Public Analyst. The Additional Munsiff-Magistrate of Tenali who tried the case, acquitted the accused on the ground that there was no reliable evidence to show that the coconut oil which had been mixed with the groundnut oil was likely to affect injuriously the health or any other way prejudicially affect the purchaser. The appeal is directed against this order of acquittal.

2. The facts beyond controversy are that the accused was found storing some oils in tins for the purpose of sale in his oil retail shop. The shop is situated in Ravi Anjaiah Street, 8th Ward, Tenali. The Food Inspector of Tenali Municipality purchased a sample of oil from him in the presence of mediators after paying the necessary price. The sample so purchased was divided into three equal parts and sealed in bottles. One bottle was handed over to the accused. The other was sent to the Court and the third one was sent to the Public Analyst for analysis. The Public Analyst in his report opined that the sample consisted of a mixture of 82% of groundnut oil and 18% of coconut oil and was therefore, adulterated. On that basis a report was laid against the accused for contravention of the provisions of the Food Adulteration Act, namely, Sections 16 (1) and 7 read with Section 2 (1) (a) and 2 (1) (i). The accused pleaded that he had sold “groundnut refined oil” and that he had not committed any offence. The learned Additional Munsiff-Magistrate, Tenali, after examining one witness for the prosecution and one witness for the defence, acquitted the accused mainly on the ground that the adulteration was not injurious to the health of the purchaser nor was shown to be prejudicial to him in any other way.

3. The learned Public Prosecutor contends that the view taken by the lower Court is erroneous inasmuch as adulteration as defined in the Act takes in its ambit the mixing of two edible oils. His argument is that the sample sent to the Public Analyst conformed neither to the standard prescribed for the groundnut oil nor for the coconut oil. In case of coconut oil, the provisions of A.17.0.1 are attracted while in the case of groundnut oil A.17.0.3 are applicable. The Public Analyst who had taken these into consideration had opined that the sample was adulterated. The definition in the Act of “adulterated food” is as under:

“An article of food shall be deemed to be adulterated—

(a) if the article sold by a vendor is not of the nature, substance or quality demanded by the purchaser and is to his prejudice, or is not of the nature, substance

or quality which it purports or represents to be."

In the instant case, even according to the admission of the accused, he sold the groundnut oil and according to the Public Analyst, the sample did not conform to the prescribed standard and thus it was adulterated. The learned counsel for the respondent contends that what was sold to the Inspector was groundnut refined oil in respect of which no standard has been prescribed by the Act, and therefore, the opinion of the Public Analyst that the sample was adulterated is not acceptable. I am not prepared to accept this argument. There is no variety of edible oil as 'groundnut refined oil.' At least the Act does not recognise the existence of an edible oil of this nature. The sample could have been therefore sold either as groundnut oil or as coconut oil. It is an admitted fact that the standard prescribed for those edible oils has not been adhered to in the sample sold and stocked for sale. It therefore falls within the mischief of 'adulterated food' as it was not of the nature, substance or quality which it purported or was represented to be.

4 The learned counsel has relied on a decision of this Court reported in *Public Prosecutor v N Subba Rao*, (1963) 1 Andh WR 265 = (1964 (1) Cri LJ 448) and the lower Court also has made a reference to this decision. With great respect to the learned Judge I am not inclined to accept the restricted scope of adulteration as accepted by him that the criterion for contravention of the Act is only with reference to the injury or prejudice to the purchaser. Having regard to the facts of that case *Munikamah J.* seems to have taken into consideration the definition of adulteration as found in Section 2 (b) and (c) of the Act. Further, I am of opinion that once the Public Analyst who is an expert has found that the article is adulterated, his opinion has to be accepted unless it is shown that his opinion is based on a misreading of facts or is superseded. I therefore, hold the accused guilty under Section 7 (1) of the Act and sentence him to pay a fine of Rs 200 bearing in mind that the offence was committed sometime in 1964 and the appeal is being disposed of in 1968. Time for payment of fine is one month from the date of receipt of records in the lower Court. In case of default, the accused-respondent will undergo 3 months' imprisonment.

5 Appeal allowed.

DVI/D.V.C.

Appeal allowed.

AIR 1969 ANDHRA PRADESH 446 (V 56 C 112)

GOPAL RAO EKBOTE J

Paidumarri Balasubba Chetty and Sons,
Appellants v. Jutur Reddiya and others,
Respondents

A. A. O No 45 of 1965, D/-6-12-1967.

(A) Provincial Insolvency Act (1920), S. 36 — Petitions for insolvency presented concurrently in more than one Court — Section vests discretion in Court to annul adjudication or stay proceedings and if discretion is not exercised, proceedings in both the Courts can without any objection, be continued. (Para 7)

(B) Provincial Insolvency Act (1920), Ss. 28, 27 — Order of adjudication passed under S. 27 — Effects provided under Section 28 whether automatically ensue.

According to Section 28 (4) of the Provincial Insolvency Act, 1920, all property after the date of an order of adjudication and before the discharge of the insolvent shall forthwith vest in the Court or Receiver, and when once the property vests in the Receiver, it would be futile to file another application for adjudication because it will not serve any purpose unless of course there are material changes in the circumstances. Even if any order of adjudication of insolvents is made a second time and consequently any subsequent vesting order is made, it cannot affect the rights acquired under a previous vesting order made by a competent Court. All that an Official Assignee could obtain by virtue of a subsequent vesting order made in another Court would be a sort of contingent or reversionary interest in the assets in the event of the previous order being set aside.: AIR 1929 Oudh 149 Rel on (Para 8)

(C) Provincial Insolvency Act (1920), Ss. 28 (4), 11, 36 — Property vesting in Official Receiver — Any order of adjudication subsequently passed would not divest property already vested.

While in view of Section 11 read with Section 36 of the Provincial Insolvency Act, 1920 it may not perhaps be objectionable to file concurrently two petitions for adjudication of the same debtor on the same or different acts of insolvency, but when once property vests in an Official Receiver, any order of adjudication subsequently passed will not divest the property which already vested in the Official Receiver. Nor the 2nd Official Receiver can do anything except wait for an opportunity to administer the estate in case his adjudication is annulled or the order is set aside. That is a mere contingency which may or may not happen. (1897) ILR 21 Bom 297 (307), Rel. on.

(Para 10)

Cases Referred: Chronological Paras
(1929) AIR 1929 Oudh 149 (V 16) =
6 Oudh WN 100, Ram Das v.
Sultan Husain Khan 6, 9
(1897) ILR 21 Bom 297, In re,
Aranvayal Sabhapathy 10

N. Ramamohan Rao, for Appellant;
P. M. Gopal Rao and K. Venkata Ramaiah,
for Respondents (Nos. 1 and 2).

JUDGMENT:— This is an appeal against an order of the Additional District Judge, Cuddapah passed on 19-10-1964 whereby he adjudicated respondents 1 and 2 as insolvents and directed that the estate of the debtors will vest in the Official Receiver for purposes of administration, and fixed the time for discharge as one year.

2. The necessary facts are that the appellants before me filed O. S. No. 69 of 1961 in the Court of the District Munsif, Cuddapah to recover a sum of Rs. 1532-4-0 against respondents 1 and 2 herein. They attached certain property before judgment. The suit was decreed on 30-5-1961. The decree-holder filed E. P. 288 of 1961 on 12-6-1961. The attached house was brought to sale on 20-11-1961. The sale was confirmed on 2nd May, 1962. The sale proceeds were distributed rateably amongst the decree-holders in the above said suit as well as other decree-holders against the same respondents on 4-5-1962.

3. I. P. No. 9 of 1961 was filed by the respondents 1 and 2 on 29-6-1961 before the Subordinate Judge's Court, Nellore to adjudicate them insolvents. I. A. No. 698 of 1961 was filed therein seeking stay of the sale which was to be held on 20-11-1961 in the decree passed in O. S. 69 of 1961. That petition was dismissed. C. M. A. No. 23 of 1961 which was filed was also dismissed on 12-2-1962. The 1st and 2nd respondents were subsequently adjudged as insolvents on 18-12-1963.

4. While the matter stood thus, I. P. 5 of 1964 out of which this appeal arises was filed by two petitioning creditors and the third was subsequently joined for adjudicating respondents 1 and 2 as insolvents. That act of insolvency alleged in the petition was that the respondents had filed I. P. 9/61 which constitutes an act of insolvency. This petition was resisted by the other creditors, particularly the decree-holder in O. S. 69 of 1961. Their contention was that the present petitioners were parties to I. P. 9 of 1961 and once respondents 1 and 2 were adjudicated insolvents in that proceeding, it is not permissible for these petitioners to file an application to adjudicate the same respondents as insolvents as there is no property of the insolvents which could now vest in the Official Receiver, if appointed in these proceedings. They contended that respondents 1 and 2 had only one house and they have no other property. That house was sold and is now

in the possession of the purchaser and the sale proceeds distributed amongst different decree-holders who had applied for the same.

5. The petitioners examined one witness and the respondents one witness. They also marked certain documents. Upon this material, the learned Additional District Judge negating the contention that the second petition for adjudication does not lie adjudged respondents 1 and 2 as insolvents. It is this view that is now questioned in this appeal.

6. The principal contention of the learned Advocate for the appellants is that once the respondents 1 and 2 were adjudicated as insolvents, unless the adjudication is annulled, the respondents cannot be adjudged as insolvents in another proceeding. He further contended that since the only property of the insolvents was already auctioned and the sale proceeds distributed amongst the decree-holders, nothing remains which could be vested in the Receiver appointed in this Insolvency Petition after the respondents 1 and 2 are adjudicated as insolvents. In support of this contention, reliance was placed on Ram Das v. Sultan Husain Khan, AIR 1929 Oudh 149.

7. Now, under Section 11 of the Provincial Insolvency Act, an insolvency petition can be presented to the Court in whose jurisdictional limits the debtor ordinarily resides or carries on business, or personally works for gain, or is in custody under arrest or imprisonment. It is thus plain that the debtor may be adjudged insolvent by the Court having jurisdiction in each of the places where he ordinarily resides or where he carries on business. It is to provide for such an eventuality that Section 36 of the Act provides that in case petitions, more than one, for insolvency are presented, concurrently in more than one Court, one of the two Courts may annul adjudication or stay the proceedings in consideration of the fact that the property of the debtor can be more conveniently distributed by the other Court. It must, however, be understood that Section 36 vests discretion in the Court, and if such a discretion is not exercised, the proceedings in both the Courts can, without any objection, be continued.

8. What has to be, however, seen is whether when under Section 27 an order of adjudication is passed, the effects provided under Section 28 of the Act would automatically ensue, according to sub-section (4) of which all property after the date of an order of adjudication and before his discharge shall forthwith vest in the Court or Receiver, and when once the property vests in the Receiver, it would be futile to file another application for adjudication because it will not serve any purpose unless of course there are mate-

rial changes in the circumstances. Even if any order of adjudication of insolvents is made a second time and consequently any subsequent vesting order is made, it cannot affect the rights acquired under a previous vesting order made by a competent Court. All that an Official Assignee could obtain by virtue of a subsequent vesting order made in another Court would be a sort of contingent or reversionary interest in the assets in the event of the previous order being set aside.

9. In AIR 1929 Oudh 149, a Bench of the Oudh Chief Court held:

"Under the Provincial Insolvency Act once a person has been declared an insolvent, it is not open to him to apply for a second order of adjudication until he has obtained an order of discharge or until his previous adjudication has been annulled."

10. While in view of Section 11 read with Section 36, it may not perhaps be objectionable to file concurrently two petitions for adjudication of the same respondents on the same or different acts of insolvency, but when once property vests in an Official Receiver, any order of adjudication subsequently passed will not divest the property which already vested in the Official Receiver. Nor the 2nd Official Receiver can do anything except wait for an opportunity to administer the estate in case his adjudication is annulled or the order is set aside. That is a mere contingency which may or may not happen and it is for that reason that it is held in *Re Aranvayal Sabhapathi*, (1897) ILR 21 Bom 297 at p 307 that the Court has a discretion to refuse the adjudication order if, having regard to all circumstances of the case, it is considered that all adjudication would be a vain and useless proceeding. Holding therefore, that the second petition is not barred under the Act, but when once the adjudication order is made and the property is vested in the Receiver, what has to be seen in this case is whether there are any circumstances for adjudicating the respondents insolvents or the petition can be refused on the ground that an Official Receiver was already appointed and since the prop-

erty is also sold, there is no purpose in adjudicating the respondents again as insolvents and appointing another Official Receiver as it is not likely to benefit all the creditors. It is not disputed that the only property, which the respondents 1 and 2 had, has already been sold. It is not possible to make any inquiry in regard to the question as to whether the sale in the Court auction of the house of the insolvents after I. P. No 9 of 1961 was filed is valid and the transferee gets title in the house, or assuming that he gets good title, the sale proceeds which actually vested in the Official Receiver could have been distributed amongst few of the creditors and not all of them and without the intervention of the Insolvency Court. These are matters which could have been agitated in I. P. 9 of 1961. Instead of following that procedure which the law permits, the petitioners have chosen to file this petition. Adjudicating the respondents 1 and 2 as insolvents would not solve the problem as on the date when I. P. 5/64 was filed apparently the insolvents had no property to administer or which could vest in the Official Receiver. The appointment of Official Receiver therefore, would not serve any purpose. Following the abovesaid Bombay decision, therefore, I do not find that the adjudication of respondents 1 and 2 in I. P. 5/64 would in any way be useful to the body of the creditors in view of the difficulties mentioned above. The lower Court therefore, ought to have taken into consideration the fact that the previous insolvency proceedings were in a way still pending because neither the insolvents are discharged nor the insolvency is annulled. In these circumstances, the adjudication of respondents 1 and 2 again as insolvents and the appointment of a Receiver will serve no purpose.

11. For the reasons already stated, I would allow the appeal, set aside the judgment of the Court below and dismiss I. P. 5 of 1964. In the circumstances of the case, I make no order as to costs.

MBR/D V.C.

Appeal allowed.

that of a District Judge as could attract the Bar.

Held, (1) that the appointment of the person holding the post of Deputy Registrar (which was in the State Judicial Service equivalent to the post of a Subordinate Judge) to the post of an Additional District Judge was a promotion in the same service, viz., the State Judicial Service and under Art. 235 of the Constitution, this promotion could be given only by the High Court and not by the Government. (Paras 7, 8 and 13)

(2) As the power to promote a person holding a post in the State Judicial Service inferior to that of a District Judge vests in the High Court under Art. 235 of the Constitution, R. 5 of the Assam Judicial Service Rules must be held to be invalid so far as it gives that power to the Governor. (Para 10)

(3) that the amendment brought in to redesignate the post of a Subordinate Judge as Assistant District Judge was a subterfuge to get the power of promoting a Subordinate Judge to the post of an Addl. District Judge and was clearly a fraud on the Constitution. Though under Art. 236 of the Constitution, the expression "District Judge" includes Additional District Judge, Joint District Judge, Assistant District Judge etc., these expressions mean, as they existed, at the time the Constitution came into force. In Assam, there was no such Assistant District Judge at the time the Constitution came into force. Therefore, the power of the High Court to promote a Subordinate Judge continues even though the designation of a 'Subordinate Judge' has been altered to 'Assistant District Judge'. (Paras 12 and 13)

(4) that he was not entitled to hold the post of District Judge (to which post he was subsequently posted) as his initial promotion to the post of Additional District Judge was void ab initio. (Para 14)

and (5) that as for the appointment to the posts of Additional Sessions Judge initially and Sessions Judge later on are concerned, these were not in the Judicial Service. These are included in the expression 'District Judge' under Art. 236 of the Constitution. The Government being entitled to make these appointments in consultation with the High Court under Article 233 read with Article 236, the person must be held to have been appointed to these posts by the competent authority and he could hold them. He could not, however, hold the post of District Judge. He was entitled to hold the post of Sessions Judge. AIR 1962 SC 1704 Foll. (Para 14)

(B) Constitution of India, Arts. 233 and 236—Additional District Judge in Assam appointed as District Judge — Appointment by Governor without consulting the High Court, void — It is not a promotion, but an appointment pure and simple.

(Para 13)
(C) Constitution of India, Arts. 233, 234 and 236 — Interpretation, keeping in view the legislative intent.

While interpreting Arts. 233 to 236 of the Constitution, the policy adopted by the Constituent Assembly and displayed in those Articles must be kept in view. The word 'control' in Art. 235 must be construed as complete control of the High Court, over the subordinate judiciary. To hold otherwise would be to reverse the policy which has moved determinedly in the direction of separating the Judiciary from the Executive.

(Para 15)

Similarly an ingenious interpretation should not be adopted of the word "promotion" in that Article to deprive the High Court of its power. The intention of the Constituent Assembly was clear that at least the Judicial officers holding posts inferior to that of a District Judge, should entirely look to the High Court and not to the Executive authority for their future prospects. In interpreting the said word, the weight should be in favour of this intention of the Constitution-makers. AIR 1966 SC 447 and AIR 1967 SC 903, Foll.

(Para 15)

(D) Constitution of India, Arts. 165 (2) and (3) and 235 — Advocate General's duty to point out any flaws in legal enactments — Art. 235 and R. 5 (4) (b) of Assam Judicial Service Rules — Apparent conflict between provisions — Advocate General to bring the same to the notice of the Government — (Assam Judicial Service Rules, 1967, R. 5 (4) (b)). (Para 16)

(E) Constitution of India, Art. 226 — Quo Warranto — Writ petition challenging the right of a judge to hold the post — Court deciding it in favour of Petitioner — Order passed by the Judge could not, however, be set aside in Quo warranto proceedings. (Para 17)

Cases Referred: Chronological Paras

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| (1967) AIR 1967 SC 903 (V 54)= | |
| (1967) 1 SCR 454, State of Assam v. Ranga Muhammad | 16 |
| (1966) AIR 1966 SC 447 (V 53)= | |
| (1966) 1 SCR 771, State of West Bengal v. Nripendra Nath Bagchi | 15 |
| (1962) AIR 1962 SC 1704 (V 49)= | |
| (1963) 1 SCR 437, High Court of Calcutta v. Amal Kumar | 7, 13 |

S N Bhuyan, N N Saikia, D P Chahha, for Petitioners, B C Barua, Advocate - General, G K Talukdar, Sr. Govt. Advocate, for Opp Parties

DUTTA, C. J.: This is a petition in which a writ of Quo Warranto is prayed for. The petitioners have been convicted in a sessions case by Shri U N Rajkhowa, District & Sessions Judge, Darrang. Their case is that Shri Rajkhowa is not entitled to hold the post of District and Sessions Judge, Darrang. The following are the admitted facts. Both the posts of the Subordinate Judge and the Deputy Registrar of the High Court were borne in the Assam Judicial Service (Junior) Grade I. Shri Rajkhowa who was a Munsif in Grade II of the said Service was appointed to be the Deputy Registrar by the then Chief Justice under Article 229 of the Constitution.

After he served a few years as Deputy Registrar, the Governor of Assam appointed him to officiate as Additional District and Sessions Judge, Lower Assam Districts at Nowgong by the following notification

"Dt 19-6-67.

No LJJ 74/66/55 — The services of Sri U N Rajkhowa, Deputy Registrar High Court of Assam and Nagaland being replaced at the disposal of the Govt., the Governor of Assam in consultation with the High Court of Assam and Nagaland, and in exercise of powers conferred by Article 233 of the Constitution read with Rule 5 (ii) of the Assam Judicial Service (Senior) Rules 1952 is pleased to appoint Sri Upendra Nath Rajkhowa to officiate as Additional District and Sessions Judge, Lower Assam Districts with Headquarters at Nowgong with effect from the date he takes over as such vice Shri M. C. Mahajan.

Sd B Sarma,
Secy., to the Govt.,
Law Department."

2 Then after a month or so Sri Rajkhowa was appointed by the Governor of Assam to be the District and Sessions Judge of Darrang District by the following notification

"Dt 28th July, 1967.

No LJJ 94/67/14 — In exercise of the powers conferred by Article 233 of the Constitution read with Rule 5 (ii) of the Assam Judicial Service (Senior) Rules 1952, the Governor of Assam and Nagaland is pleased to appoint Sri Upendra Nath Rajkhowa, Additional District and Sessions Judge Nowgong to officiate as District and Sessions Judge of Darrang District with Headquarters at Tezpur

with effect from 14th August, 1967 or the date on which he takes over as such, whichever is later.

Sd B Sarma,
Secy., to the Govt.,
Law Department"

3. It is submitted by the petitioner that although the notifications say that Sri Rajkhowa was "appointed", in fact, he was "promoted" firstly from the post of Deputy Registrar to that of the Additional District and Sessions Judge and secondly from the post of Additional District and Sessions Judge to the post of District and Sessions Judge. It is further contended that this right to promote a person holding a post which is in the State Judicial Service and inferior to the post of a District Judge, vests in the High Court under Article 235 of the Constitution. Hence it was the High Court which should have promoted Sri Rajkhowa. The Government having no authority to promote him, his promotions are void ab initio.

4. The provisions relating to the appointment, promotion of and control over the Subordinate Judicial Officers are laid down in Chapter VI of Part 6 of the Constitution of India. They are as follows.

"233 (1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment

234 Appointments of persons other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State

235 The control over district Courts, and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district judge shall be vested in the High Court but nothing in this article shall be construed as taking away from any such person any right of appeal which he

may have under the law regulating the conditions of his service or as authorising the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law.

236. In this chapter—

(a) the expression "district judge" includes judge of a city civil court, additional district judge, joint district judge, assistant district judge, Chief Judge of a small cause court, chief presidency magistrate, additional chief presidency magistrate, sessions judge, additional sessions judge and assistant sessions judge;

(b) the expression "judicial service" means a service consisting exclusively of persons intended to fill the post of district judge and other civil judicial post inferior to the post of district judge.

237. The Governor may by public notification direct that the foregoing provisions of this Chapter and any rules made thereunder shall with effect from such date as may be fixed by him in that behalf apply in relation to any class or classes of Magistrates in the State as they apply in relation to persons appointed to the judicial service of the State subject to such exceptions and modifications as may be specified in the notification."

5. The Assam Judicial Service was constituted by the Government of Assam by a notification dated the 25th August, 1952 and designated as "State Judicial Service". Then by a notification No. JJD. 50/51/24 certain Rules were made called the Assam Judicial Service Rules 1952. These Rules were made applicable only to what was called the State Judicial Service (Senior) which was constituted as follows:

Senior Grade I.

- (1) Registrar.
- (2) Legal Remembrancer.
- (3) District Judges.

Senior Grade II.

Additional District Judges.

6. Thereafter on the 9th of April 1954 the State Judicial Service (Junior) was created. Rules in respect of this Service were made by the notification No. LJJ. 84/54/168. This Service was constituted as follows:

Junior Grade I.

- (1) Subordinate Judges.
- (2) Deputy Registrar.

Junior Grade II.

- (1) Munsiffs.
- (2) Assistant Registrar.

7. The appointment of District Judges as well as the appointment of persons other than District Judges to the Judicial Service of a State is made by the Governor vide Articles 233 and 234 of the Constitution. According to the learned Advocate General, the Assam Judicial Service (Senior) and Assam Judicial Service (Junior) are two distinct Services and the appointment of a Subordinate Judge to be the Additional District Judge is not a case of promotion but of appointment. It is difficult to accept this contention of the learned Advocate-General. If this was so, then the Government by including the post of a Subordinate Judge as a Grade III post in the Assam Judicial Service (Senior) could say that when a Munsiff was appointed as a Subordinate Judge, it was a case of appointment and not of promotion. In such a case the power of promotion given to the High Court under Article 235 would become meaningless.

The Bengal, Agra and Oudh Civil Courts Act (hereinafter called the Civil Courts Act) established four classes of Civil Courts in Assam, viz. Court of District Judge, Court of Additional District Judge, Court of Subordinate Judge and Court of Munsiff. Appeal lies from the Court of the Subordinate Judge to the Court of the District Judge if the value of the original suit does not exceed Rs. 7000/-. As pointed out by the Supreme Court in *High Court of Calcutta v. Amal Kumar* AIR 1962 SC 1704 —

"In the hierarchy of the Courts of a District, the Court of Subordinate Judge is higher in rank than the Court of a Munsiff which stands at the bottom." I may only add that in the said hierarchy, the Court of a Subordinate Judge is lower in rank than the Court of an Additional District Judge.

8. Sri Rajkhowa was holding the post of Deputy Registrar which was in the State Judicial Service and equivalent to the post of a Subordinate Judge. His appointment to the post of an Additional District Judge was a promotion in the same Service viz. the State Judicial Service and under Article 235 of the Constitution this promotion could be given only by the High Court and not by the Government.

9. It may further be noted that Rule 5 of the Assam Judicial Service Rules 1952 stated as follows:

"5. Recruitment. — (i) The Chief Justice of the High Court shall fill up the post of the Registrar by virtue of Article 229 (1) of the Constitution of India preferably from Grade I or Grade II of the service.

(ii) Other posts of the cadre shall be filled up by the Governor in consultation with the High Court. Provided that not more than one-third of the posts in each Grade of the Cadre may be filled up by direct recruitment. The rest of the posts in Grade I and Grade II of the Cadre shall be filled up by promotion from Grade II of the Cadre and from Grade I of the Assam Judicial Service (Junior) respectively."

10. It will be seen that the above Rule provided for filling up of one-third of the posts of Additional District Judges in Grade II of Assam Judicial Service (Senior) by direct recruitment and the rest by promotion from the posts of Subordinate Judges which were in Grade I of Assam Judicial Service (Junior). Therefore, the provision for promotion from the post of a Subordinate Judge to the post of an Additional District Judge was there in the above Rule. The learned Advocate-General points out that under the Rule except the post of Registrar, all other posts of the Judicial Service (Senior) are to be filled up by the Governor. But as the power to promote a person holding a post in the State Judicial Service, inferior to that of a District Judge vests in the High Court under Article 235 of the Constitution the above Rule must be held to be invalid so far as it gives that power to the Governor.

11. It appears that the Government realised the weakness of their claim that they had the power to promote a Subordinate Judge simply by treating the promotion as an appointment. Hence the Civil Courts Act was amended by the Assam Act XII of 1967 which was brought into force on the 16th of August 1967. By this amendment, the designation of "Subordinate Judge" was altered to "Assistant District Judge". On the 17th August, 1967, that is one day later, the new Assam Judicial Service Rules 1967 were brought into force. In it the Assam Judicial Service was constituted as follows:

Grade I

- (1) District & Sessions Judge.
- (2) Registrar.
- (3) Presiding Officer, Industrial Tribunal.
- (4) Presiding Officer, Labour Court.

Grade II

- (1) Additional District Magistrate.
- (2) Assistant District Judge.
- (3) Deputy Registrar.

Grade III

- (1) Munsiff.
- (2) Judicial Magistrate
- (3) Sub-Divisional Magistrate (Judicial)
- (4) Assistant Registrar.

12. The change in the designation was made not to enhance the prestige of the Subordinate Judges who had been always pressing for better conditions of service and not for better designation. Under Article 236 the expression "District Judge" includes an "Assistant District Judge". So obviously the alteration in the designation was made so that the promotion of a Subordinate Judge, redesignated as Assistant District Judge, might not be treated as the promotion of a person holding a post inferior to that of a District Judge. Such a subterfuge to get the power of promoting a Subordinate Judge to the post of an Additional District Judge is clearly a fraud on the Constitution. It is true that under Article 236 the expression "District Judge" includes Additional District Judge, Joint District Judge, Assistant District Judge etc.

When the Constitution came into force, such Additional District Judges, Joint District Judges and Assistant District Judges existed in certain provinces under their respective Acts. For example, under the Bombay Civil Courts Act 1869 there were Joint District Judges and Assistant District Judges in the Bombay Presidency. An Assistant District Judge could be invested with all the powers of a District Judge in respect of a particular area and if he was so invested the jurisdiction of the District Judge ceased in that area. In Assam there was no such Assistant District Judge. Assistant District Judge, Additional District Judge, Joint District Judge etc. mentioned in Article 236 of the Constitution must mean these posts as they existed at the time the Constitution came into force. For example, Article 236 includes within the definition of District Judge, a Judge of a City Civil Court. The Government can not by changing the designation of the Munsiff to a "Judge of the City Civil Court", take away the power of the High Court to promote a Munsiff to the post of a Subordinate Judge. In the result therefore I hold that the power to promote a Subordinate Judge to the post of Additional District Judge is of the High Court. This power continues even though the designation of a "Subordinate Judge" has been altered to "Assistant District Judge".

13. Next I may take the question of appointment of an Additional District Judge as District Judge. The question is whether such an appointment is a promotion. An Additional District Judge is included in the definition of a District Judge under Article 236. Additional District Judges were there in this State when the Constitution came into force. There cannot be a promotion from a post which is to be treated as the

post of a District Judge to a post of a District Judge. Hence the appointment of an Additional District Judge as a District Judge is an appointment pure and simple and not a promotion. Such an appointment has to be made by the Governor in consultation with the High Court under Article 233 of the Constitution. I may summarise by conclusions as follows:

(1) Appointment "to be" a District Judge is to be made by the Governor in consultation with the High Court, vide Article 233.

(2) Promotion "of" a District Judge and not promotion "to be a District Judge" is also to be made by the Governor in consultation with the High Court, vide Article 233. In many States there is Selection Grade for District Judges. Appointment of a District Judge to the Selection Grade will be promotion of a District Judge.

(3) Promotion of a person—

(a) belonging to the State Judicial Service,

(b) holding a post inferior to that of a District Judge is to be made by the High Court.

"Under Article 235 of the Constitution, the High Court is the authority which has the power of promotion in respect of persons belonging to the State Judicial Service and holding any post inferior to that of the District Judge." AIR 1962 SC 1704.

4. Appointment to a post in the Judicial Services other than that of a District Judge is to be made by the Governor in accordance with Rules framed under Article 234.

(5) The various posts included in the expression "District Judge" under Article 236 of the Constitution are the posts which existed under those designations at the time of coming into force of the Constitution. The Government cannot take away the power of the High Court to promote a Subordinate Judge to the post of Additional District Judge simply by changing the designation of the Subordinate Judge to "Assistant District Judge". Legislation making such a change is colourable and a fraud on the Constitution. It may, however, be noted that when Sri Rajkhowa was appointed as Additional District Judge from his post of Deputy Registrar, the designation of the Subordinate Judge was not yet altered to Assistant District Judge.

14. In the result Sri Rajkhowa is not entitled to hold the post of District Judge as his initial promotion to the post of Additional District Judge is void ab initio. It may, however, be noted that

Sri Rajkhowa was also appointed by the Government as Additional Sessions Judge and then as Sessions Judge. These posts were not in the Judicial Service. They are included in the expression "District Judge" under Article 236. The Government being entitled to make these appointments in consultation with High Court under Article 233 read with Article 236, Sri Rajkhowa was appointed to these posts by the competent authority and he could hold them. He could not hold the post of District Judge only. He was entitled to hold the post of Sessions Judge.

15. In giving my interpretations of Articles 233 to 236, I have borne in mind, the policy adopted by the Constituent Assembly and displayed in those Articles. The Supreme Court in the case of State of West Bengal v. Nripendra Nath Bagchi, AIR 1966 SC 447 traced the history of Articles 233 to 237 and pointed out that the trend had been to separate the Judiciary from the Executive. In the said case the Supreme Court interpreted the word "control" in Article 235 and held that the control of the High Court over the subordinate judiciary meant complete control. It observed that "to hold otherwise will be to reverse the policy which has moved determinedly in this direction."

Similarly an ingenious interpretation should not be adopted of the word "promotion" in that Article to deprive the High Court of its power. The intention of the Constituent Assembly was clear that at least the Judicial officers holding posts inferior to that of a District Judge, should entirely look to the High Court and not to the Executive authority for their future prospects. In interpreting the said word, the weight should be in favour of this intention of the Constitution-makers.

16. It appears to be rather surprising that whereas the declared policy of the Government of Assam is to achieve complete separation of the Judiciary from the Executive, it should bring a colourable legislation to deprive the High Court of powers given to it by the Constitution. It is unbelievable that the Government would take actions which go counter to their policy. It is obvious that the Secretary of the Law Department must have misled the Government. In this connection, I like to draw the pointed attention of the Government to what the Supreme Court said in the case of State of Assam v. Ranga Muhammad, AIR 1967 SC 903. In that case the Government refused to transfer a District Judge as recommended by the High Court and the question arose whether the Government or the High Court had the

power to transfer a District Judge This Court held that the High Court alone had that power and this decision was upheld by the Supreme Court. The Supreme Court observed "This is not the first time when cordiality was ruined because a Secretary's name was suggested by the Minister and was not acceptable to the High Court." In the said case this Court had occasion to remark that in the matter of the transfer of a District Judge, the Government "acted mala fide throughout".

In their appeal to the Supreme Court, the Government prayed that the above remark should be expunged. While refusing to do so the Supreme Court pointed out how a frustrated Secretary could spoil the cordial relationship between the High Court and the Government. The Supreme Court also gave a note of warning that a Secretary might withhold vital informations from a Minister when he was personally interested in the matter. The learned Advocate-General contends that the power to promote a judicial officer given by Article 235 of the Constitution to the High Court, means the power to promote a Munsiff. If the High Court cannot promote a Munsiff even, this power given by the said Article becomes nugatory. But there is R 5 (4) (b) of the Assam Judicial Service Rules 1967 giving this power also to the Government. If the learned Advocate-General finds this rule to be inconsistent with the stand taken by him before us it is his duty to point out the position to the Government. Rule xiv of the Rules framed under Clauses (2) and (3) of Article 165 of the Constitution of India, assigning duties to the Advocate-General says as follows —

"The Advocate-General shall report to Government any flaws in legal enactments and any facts arising therefrom or in connection with cases conducted by him which he thinks, or the High Court desires, should be brought to the notice of the Government."

17. Lastly, as regards the prayer for setting aside the judgment given by Sri Rajkhowa, it may be said that this question cannot be examined in a petition for Quo Warranto. Therefore we should give no decision on the question in this petition whether the judgments given by Sri Rajkhowa as a District Judge are void. I may, however point out that the impugned judgment was given by Sri Rajkhowa not in his capacity as a District Judge but in his capacity as a Sessions Judge. The petition is allowed partially and it is directed that Sri Rajkhowa is not entitled to hold the post of District Judge. But he was appointed by the competent authority to the post of Additional Sessions Judge and

then to that of Sessions Judge. He will continue to hold this post. There will be no order as to costs.

18. K. C. SEN, J.: I agree.

19. Leave to appeal to the Supreme Court is granted under Article 132 (1) of the Constitution of India, as prayed for, as the case involves a substantial question of law as to the interpretation of the Constitution.

20. The prayer for stay of operation of the order is rejected.

TVN/D V C.

Ordered accordingly.

AIR 1969 ASSAM & NAGALAND 134
(V 56 C 30)

P K GOSWAMI, J.

Kali Kumar Sen and another, Appellants v Haridas Roy, Respondent

Second Appeal No 32 of 1964, D/- 18-12-1968, against decision of Sub. J. No II, Silchar, D/- 26-8-1963

(A) Civil P. C. (1908), O 20, R. 5, O. 14, R 1, S. 100 — Plea taken in written statement — No separate issue framed — But question discussed and decided under another issue — Finding not disturbed on technical objection in second appeal.

In a case for recovery of possession from the lessee, the lessee (defendant) questioned the validity of the notice terminating the lease in the written statement filed by him. Though there was no specific issue in that respect, the matter was gone into while discussing the issue about the maintainability of the suit.

Held, that the plaintiff at the stage of second appeal would be precluded from raising a technical objection that the finding on that question was bad for want of pleading and issue.

(Para 6)

(B) T. P. Act (1882), Ss. 106 and 107 — Lease of place for making steel trunks — Notice of termination giving 15 days' time invalid — No conflict between Sections 106 and 107. AIR 1952 Cal 320, Diss.

The lease in question was taken for making trunks out of steel sheets and for sale of those trunks. The tenancy was sought to be terminated by a 15 days' notice. The rent payable was Rs. 12/- per month. The defence was that the lease being one for manufacturing purpose, the notice was invalid and insufficient under the law.

CM/FM/A991/69/D

Held, applying the test that there must be production of a new and different article or the process must be such as to convert one kind into another, that the lease in question was a manufacturing lease and the notice giving only 15 days' time was invalid in law.

An argument that the lease having been held to be one for manufacturing purpose, it would be a lease from year to year under S. 106 of T. P. Act and therefore the lease in the absence of registration as required under S. 107 T. P. Act was void, was overruled. (Para 10)

For the purpose of Section 106 of the T. P. Act, in the absence of a contract etc., there will be a presumption under the law, in view of the purpose of the lease, in favour of a lease from year to year, even though a written lease for manufacturing purpose from year to year or for any term exceeding one year, must be by a registered instrument. For the purpose of Section 106 in respect of the duration of the lease and for the purpose of the period of the notice for terminating such lease, the lease will be deemed to be a lease from year to year or from month to month according to the purpose for which it has been made. There is no conflict between Section 106 and Section 107 of the T. P. Act. The rubric of Section 106 clearly indicates that it refers to only duration of certain leases in absence of a written contract or local usage. If no contract is established in a particular case, the provision of section 106 of the T. P. Act will operate and section 107 will not stand as a bar to giving effect to section 106. AIR 1946 Cal 317 & AIR 1959 Cal 181 & AIR 1963 Cal 198, Foll.; Second Appeal No. 156 of 1962, D/- 11-2-1965 (Assam) and AIR 1952 SC 23, Dist.; AIR 1952 Cal 320, Diss. (Para 10)

Cases Referred: Chronological Paras

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| (1965) Second Appeal No. 156 of 1962, D/- 11-2-1965 (Assam) | 8 |
| (1963) AIR 1963 Cal 198 (V 50), Steuart and Co. Ltd. v. C. Mackertich | 11 |
| (1959) AIR 1959 Cal 181 (V 46)= 63 Cal WN 29, Krishna Das Nandy v. Bidhan Chandra Roy | 7, 11 |
| (1952) AIR 1952 SC 23 (V 39)= 1952 SCR 269, Ram Kumar Das v. Jagadish Chandra Deo | 9 |
| (1952) AIR 1952 Cal 320 (V 39)= 86 Cal LJ 12, Sati Prasanna Mukherjee v. Md. Fazal | 7, 11 |
| (1946) AIR 1946 Cal 317 (V 33)= 50 Cal WN 441, Jayanti Hosier Mills v. Upendra Chandra Das | 7 |
| (1866) 1866 HLC 223=35 LJ CP 49, Ralston v. Smith | 7 |

N. M. Lahiri, for Appellants; S. K. Ghose, J. P. Bhattacharjee and M. H. Chaudhury, for Respondent.

JUDGMENT: This second appeal is directed against the judgment and decree of the learned Subordinate Judge No. 2, Silchar, affirming the judgment and decree of the learned Munsif of Silchar.

2. The plaintiffs' case is that the defendant is a tenant under them in respect of the suit holding, which is a room in a two-storeyed building. The rent was payable at the rate of Rupees 12/- per month according to the Bengali calendar month. They, therefore, gave a notice to the defendant on 7th Bhadra 1336 B. S., corresponding to 24th August, 1959, by registered post asking the defendant to vacate at the end of the month of Bhadra. They also demanded payment of all arrears of rent within seven days of the receipt of that notice. The defendant did not reply to the notice nor complied with the demand and hence the plaintiffs filed the present suit.

3. The defendant pleaded that he took the settlement for starting his trunk factory and gold-smith work-shop. Hence the notice is invalid and insufficient under the law. He also denied that the plaintiffs have any bona fide requirement of their own for the premises.

4. The learned Munsiff held that the lease was for manufacturing purpose and hence the notice given in this case was invalid and insufficient. The learned Munsiff, however, held that since the defendant has admitted that he has acquired a residence at Silchar Bilpar, he is liable to be evicted under section 6 (1) (f) of the Assam Urban Areas Rent Control Act. He also held against the plaintiffs regarding their bona fide requirement. Since, however, the notice was held to be invalid, the learned Munsiff dismissed the suit. The learned Subordinate Judge dealt only with the point of notice and agreed with the finding of the learned Munsiff that the lease was for manufacturing purpose, and, as such, the notice giving the defendant only fifteen days' time expiring with the month of the tenancy is insufficient in law.

5. Mr. Lahiri, the learned Counsel for the appellants, submits that both the courts below erred in law in deciding against the plaintiffs regarding the validity of the notice of eviction served in this suit. He contends that there is no averment in the written statement that the notice is invalid on the ground taken, namely that the lease was for manufacturing purpose. On the other hand, it is submitted that the admitted position being that rent was payable monthly according to Bengali calendar, the lease must be held to be from month to month. He further submits that even

on the facts found by the court below, the case does not come within the ambit of the expression "manufacturing purpose" within the meaning of section 106 of the Transfer of Property Act. He submits that the popular rather than the etymological meaning should be given to the expression "manufacturing purpose".

6. I have gone through the findings of the courts below on this point. Both the courts below found after appreciation of the evidence that the lease was for manufacturing purpose. The defendant in paragraph 7 of his written statement describing the real facts averred that he has been running the business of manufacturing and selling trunks and of gold and silver there in the suit premises.

In paragraph 4 of the written statement, the defendant avers that the notice described in the plaint is illegal, invalid and insufficient. Paragraphs 4 and 7 read together do not support the contention of Mr Lahiri that the ground of invalidity of the notice, which was pleaded in the courts below and accepted by the courts, was absent in the written statement. The question of validity of the notice was definitely pleaded by the defendant in his written statement and the courts below rightly went into it although no specific issue was framed in the suit. The courts below discussed this issue while discussing issue no 2 regarding the maintainability of the suit. No objection, therefore, can be taken by the plaintiffs on this technical ground in a second appeal.

7. The next important point is whether on the facts found by the courts below, the lease could be held to be taken for manufacturing purpose. Mr Lahiri submits that the facts disclosed in the evidence do not warrant the conclusion that any manufacture takes place in the premises in suit. The word 'manufacture' in the Chambers' Dictionary is stated to mean "to make, originally by hand, now usually by machinery and on a large scale". The Webster Dictionary also gives the same meaning "a making of goods and articles by hand or specially by machinery often on a large scale with a division of labour". The root of the word 'manufacture' in Latin is 'Manu' (hand) and Factura (making) from Latin 'Factus'.

Mr Lahiri relies on a decision of the Calcutta High Court in the case of *Sati Prasanna Mukherjee v Md. Fazal*, AIR 1952 Cal 320 of p. 321, to support his contention that the present case is not one of manufacturing purpose and reads the following passage:

"The word 'manufacture' must in this context in my opinion be construed in

a popular sense. The popular concept is that there must be production of a new or a different article or the process must be such as converts one kind of article into another kind. The observations of Lord Westbury, Lord Chancellor in '*Ralston v Smith*' (1866) H. L. C. 223 at p. 246 are material on the point. They are

"Your Lordships are well aware that by the large interpretation given to the word 'manufacture' it not only comprehends productions, but it also comprehends the means of producing them. Therefore in addition to the thing produced it will comprehend a new machine or a new process or an improvement of an old process."

The learned Judge in the Calcutta case was dealing with a lease, the material portion of which ran as follows:

"I shall pay the rent Rs 175/- per month according to the English calendar month and I shall occupy the same for dwelling purpose, for setting up a press and for ordinary business purposes."

The learned Judge, on construction of these words, held the lease to be for multiple purposes, and, as such, not a lease for manufacturing purpose within the meaning of Section 106 of the Transfer of Property Act. Regarding 'manufacture' also, the learned Judge held that printing simpliciter is not always 'manufacture'.

On the other hand, Mr. Ghose, the learned Counsel for the respondents, relied on a Division Bench decision of the Calcutta High Court in the case of *Jayanti Hosiery Mills v Upendra Chandra Das*, 50 Cal WN 441 : (AIR 1946 Cal 317) and read the following passage therefrom:

"A lease of a premises where cotton sheets were worked into articles of hosiery and made ready for the market by cutting and knitting machines is a lease for manufacturing purposes within section 106 of the Transfer of Property Act, 1884, although the yarn and the sheet from the raw material were not prepared there."

Mr. Lahiri also drew my attention to a decision of the Calcutta High Court in the case of *Krishna Das Nandy v Bidhan Chandra Roy*, AIR 1959 Cal 181, and relied on the following passage at Para 33:

"The overall position thus seems to be that the tenancy was taken for starting a motor repair 'works' or a motor repairing workshop which would not, even ordinarily or prima facie and, certainly not, necessarily, be a manufacturing purpose."

The test laid down in the Calcutta decision 50 Cal W. N. 441 : (AIR 1946 Cal

317) which has been also noticed in the Calcutta decision AIR 1952 Cal 320 at p. 321, is that there must be production of a new and different article or the process must be such as to convert one kind into another. This feature was absent in the case AIR 1952 Cal 320 (at p. 321), but was present in the Jayanti Hosiery Mills' case 50 Cal W. N. 441 : (AIR 1946 Cal 317). In view of the dictionary meaning as also the popular meaning noticed in these Calcutta decisions, I am in respectful agreement with the views expressed therein and applying the same test, I am of the opinion on the facts found in this case that in the present case the main purpose was to prepare in large scale trunks from iron sheets and the secondary purpose was for sale. Obviously, new articles, namely trunks were produced out of the iron sheets and the tests laid down in the Calcutta decisions as also by Lord Westbury, Lord Chancellor in 1866 HLC 223, clearly apply to the instant case. There is, therefore, no error of law committed by the courts below in holding that the lease was for manufacturing purpose. Obviously, therefore, section 106 of the Transfer of Property Act was attracted and the notice giving only fifteen days' time is invalid in law and the plaintiffs' suit has rightly been dismissed on this ground alone.

8. Mr. Lahiri also strongly relied on a Single Bench decision of this Court in Second Appeal No. 156 of 1962 D/- 11-2-1965 (Assam) for the purpose of his submission that mere conducting of manufacture in the house will not convert this to be a lease for manufacturing purpose. But the following passage in that very judgment would clearly show that Mr. Lahiri does not get aid from this decision at all:

"To attract the operation of section 106 of the Transfer of Property Act, it is not enough if a premises is taken on lease, and subsequently a factory is established at the convenience and wish of the tenant. As the clear language of the section indicates, the lease itself must have been given for manufacturing purposes, that is for the purpose of using the premises for manufacturing purposes."

I have already noticed that there is a definite finding in favour of the defendant by both the courts below that he took the premises for manufacturing purpose. There is, therefore, no question of the purpose being introduced at a subsequent stage after taking of the lease.

9. Mr. Lahiri also relied on a decision of the Supreme Court in the case of Ram Kumar Das v. Jagdish Chandra Deo,

AIR 1952 SC 23, for his proposition that in this case admittedly the mode of payment of rent being a monthly payment, the lease should be presumed from month to month and hence the notice given in this case is a valid notice. He relied on the following passage:

"It has no doubt been recognised in several cases that the mode in which a rent is expressed to be payable affords a presumption that the tenancy is of a character corresponding thereto. Consequently, when the rent reserved is an annual rent, the presumption would arise that the tenancy was an annual tenancy unless there is something to rebut the presumption."

If we carefully read this decision, we find that the mode of payment is taken into account amongst other things for ascertaining whether there is a contract to the contrary. This will appear from the argument advanced by Mr. Setalvad who relied very strongly upon the fact that the rent paid in that case was an annual rent and he argued that from this fact it can fairly be inferred that the agreement between the parties was certainly not to create a monthly tenancy. Mr. Setalvad's difficulty in this case was that the contract which he was trying to establish on the facts of this case was palpably contradicted by the admitted facts of the case.

Their Lordships of the Supreme Court disposing of this contention held as follows:

"It is one thing to say that in the absence of a valid agreement, the rights of the parties would be regulated by law in the same manner as if no agreement existed at all; it is quite another thing to substitute a new agreement for the parties which is palpably contradicted by the admitted facts of the case."

It must also be observed that in this case before the Supreme Court, it was conceded that the tenancy was not for manufacturing nor for agricultural purpose, which is not the case in this second appeal before me. Here the defendant is asserting that the lease was for manufacturing purpose and there is a concurrent finding of fact in his favour in that respect".

Their Lordships particularly observed:

"The section lays down a rule of construction which is to be applied when there is no period agreed upon between the parties. In such cases the duration has to be determined by reference to the object or purpose for which the tenancy is created. The rule of construction embodied in this section applies not only to express leases of uncertain duration but also to leases implied by law which may be inferred from possession and

acceptance of rent and other circumstances"

This decision of the Supreme Court is, therefore, of no assistance to Mr Lahiri in this case where section 106 of the Transfer of Property Act is to be applied and no contract to the contrary has been established in the case

10. Mr Lahiri next contended that even if it is conceded that the lease is for manufacturing purpose, such a lease in absence of a registered instrument will be void under section 107 of the Transfer of Property Act. To appreciate this submission we may read the material portion of section 106 of the Transfer of Property Act

"106 In the absence of a contract or local law or usage to the contrary, a lease of immoveable property for agricultural or manufacturing purposes shall be deemed to be a lease from year to year, terminable, on the part of either lessor or lessee, by six months' notice expiring with the end of a year of the tenancy; and a lease of immoveable property for any other purpose shall be deemed to be a lease from month to month, terminable, on the part of either lessor or lessee, by fifteen days' notice expiring with the end of a month of the tenancy"

Section 106 lays down a rule of construction. Even if an oral lease of immoveable property for manufacturing purpose is established and nothing to the contrary is proved, the rule of construction provided for in section 106 will be applicable. Such a lease by its deeming provision shall be deemed to be a lease from year to year terminable by six months' notice expiring with the end of the year of the tenancy. For the purpose of section 106 of the Transfer of Property Act, in the absence of a contract etc. there will be a presumption under the law in view of the purpose of the lease, in favour of a lease from year to year, even though a written lease for manufacturing purpose from year to year or for any term exceeding one year must be by a registered instrument. For the purpose of section 106 in respect of the duration of the lease and for the purpose of the period of the notice for terminating such lease, the lease will be deemed to be a lease from year to year or from month to month according to the purpose for which it has been made. In my judgment, there is no conflict between section 106 and section 107 of the Transfer of Property Act. The rubric of S 106 clearly indicates that it refers to only duration of certain lease in absence of a written contract or local usage. If no contract is established in a particular case, the provision of section 106 of the

Transfer of Property Act will operate and section 107 will not stand as a bar to giving effect to section 106 of the Transfer of Property Act.

11. Mr Lahiri relied on the decision of the Calcutta High Court AIR 1952 Cal 320 and read the following passage

"A lease which under the law (e.g. under section 106) is 'deemed' to be a lease from year to year is nonetheless 'a lease from year to year' under section 107 of the Act and must therefore satisfy the statutory requirement of registration subject of course to the provision of section 53A, of the Transfer of Property Act"

The learned Judge was unable to hold in that case that there was a lease for manufacturing purpose in absence of a registered lease. Mr Ghose, on the other hand placed strong reliance in the decision reported in AIR 1959 Cal 181, which took a contrary view of the decision on which Mr Lahiri relied, wherefrom the following passage may be quoted

"Section 107 does not control section 106 and notwithstanding the former section, the latter will apply to a manufacturing lease, whether registered or unregistered so as to make it a lease from year to year for purposes of that section (section 106), terminable with a six months' notice to quit, or in other words, to control its duration and period of notice in the absence of a contract or local law or usage to the contrary. The lease will be a lease from year to year for the limited purpose of section 106, that is, for the limited purpose of its duration and period of notice, the duration being until the notice expires. This will not raise any conflict with S 107". The same view was adopted also by another Division Bench of the Calcutta High Court in the case AIR 1963 Cal 198, and the contention of Mr Lahiri is, therefore, devoid of any substance

12. Since the plaintiffs' suit stands dismissed on the ground of invalidity of the notice, it is not necessary to deal with the other points raised by Mr Lahiri regarding some of the issues decided against the plaintiffs by the learned Munsif. These issues are, therefore, left open for adjudication in any future proceeding between the parties

13. In the result the appeal fails and is accordingly dismissed but in the entire circumstances of the case, there will be no order as to costs in any of the courts.

14. Prayer for leave to appeal under Clause 15 of the Letters Patent is allowed

TVN/D V C

Appeal dismissed.

AIR 1969 ASSAM & NAGALAND 139
(V 56 C 31)

S. K. DUTTA, C. J.
AND M. C. PATHAK, J.

U. Prelllyshon Lyngdoh Nongum, Petitioner v. Executive Committee, District Council, United Khasi-Jaintia Hills, Shillong and others, Respondents.

Civil Rule No. 137 of 1967, D/- 27-2-1969.

(A) Constitution of India, Sixth Schedule, Paras 2 (4), 3 (1) (g) — Powers of District Council of autonomous district— Nature of — Appointment and removal of Myntri and declaration of his election as void is within jurisdiction of District Council — (United Khasi Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act (Assam Act 2 of 1959), Pre — Applicability) — (Assam Autonomous Districts (Constitution of District Councils) Rules (1951), Rr. 28, 3 (1)).

The District Council is both an administrative as well as a legislative body and the District Council is in charge of administration of autonomous district which carries with it the power to appoint officers to carry on administration. Under para 3 (1) (g) of the Sixth Schedule to the Constitution it has power to make laws with respect to the appointment or succession of Chiefs or Headmen and this naturally includes the power to remove them, but it does not follow from this that the appointment or removal of Chief is a legislative act or that no appointment or removal could be made without there being first a law to that effect. Para 2 (4) of the Sixth Schedule provides that the administration of an autonomous district shall vest in the District Council and this is comprehensive enough to include all such executive powers as are necessary to be exercised for the purposes of the administration of the District. The authority concerned have at all relevant times the power to appoint or remove administrative personnel under the general power of administration vested in them by the Sixth Schedule before laws are framed under para 3 (1) of the Sixth Schedule. AIR 1961 SC 276 Foll. (Para 10)

The Syiem is an officer under the District Council, a Myntri, which is included in the term 'Headmen', also is an officer under the District Council to carry on the administration of the autonomous district. Therefore even prior to Act 2 of 1959, namely the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act, 1959, which came into force in October 1959, the District Council had jurisdiction to appoint a Myntri and to remove him. (Paras 11, 16)

Moreover, Act No. 2 of 1959 which is passed under Para 3 (1) (g) of the Sixth Schedule is a valid law and is applicable to the case of removal of a Myntri by the District Council, even though his election took place prior to commencement of the Act.

(Para 15)

(B) (Assam) United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act (2 of 1959), S. 7 — Election of Myntri— Its Confirmation by Syiem and his Durbar — Appeal against, to the Executive Council of District Council is maintainable. (Para 17)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 276 (V 48)=

(1961) 1 SCR 750, T. Cajee v. U.

Jormanik Siem

10, 15

J. P. Bhattacharjee and B. M. Mahanta, for Petitioner; N. M. Lahiri and B. S. Guha, for Respondents.

PATHAK, J.: This writ petition is directed against the order dated 30-1-67 passed by the Executive Committee, District Council, United Khasi-Jaintia Hills and the order dated 3-2-67 passed by the Chief Executive Member, District Council, United Khasi-Jaintia Hills, Shillong.

2. The petitioner's case is that in the year 1954 the office of the Myntri from the Lyngdoh Nongum clan fell vacant and the Durbar of Nongkhlaw Syiemship issued a parwana dated 15-2-54 to the said clan to elect a Myntri from it. The election was held on 21-5-56 and the petitioner secured 23 votes as against 7 votes secured by his nearest rival U Siton Lyngdoh Nongum and accordingly the petitioner was duly elected as a Myntri from the Lyngdoh Nongum clan and the election was confirmed by the Syiem of Nongkhlaw and his Durbar and this fact was reported to the Executive Committee, District Council United Khasi-Jaintia Hills (Respondent No. 1) on 29-5-56. In the said election, U Hedri Lyngdoh Nongum (Respondent No. 3) was not a candidate. Thereafter, U Siton Lyngdoh Nongum filed an application to the Executive Member, District Council against the election and confirmation of the petitioner as Myntri of the Durbar of Nongkhlaw Syiemship. The Executive Member, by his order dated 18-9-57 held that the petitioner was not qualified to be a candidate in the election and that U Siton Lyngdoh Nongum secured 17 votes and that 13 of the 23 votes secured by the petitioner were invalid. The petitioner thereafter filed a civil suit being Title Suit No. 1/58 in the Subordinate District Council Court, praying for a declaration inter alia that he was duly

elected Myntri on the result of the election held by the Syiem of Nongkhlaw Issue No. 10 in that suit was as follows:

"Whether the Executive Committee of the District Council has jurisdiction to entertain appeal against the order of the Syiem regarding the election of the Myntri in the Nongkhlaw Syiemship?"

The learned Presiding Officer of the Subordinate District Council Court by his order dated 9-5-59 decided the issue in favour of the petitioner and declared the impugned order dated 18-9-57 passed by the Executive Member to be without jurisdiction on the ground that there was no provision for appeal against the election held by the Syiem. U Siton Lyngdoh preferred an appeal before the District Council Court against the said order and the learned Judge, District Council Court, by his order dated 8-9-59 dismissed the appeal and directed the suit to proceed as expeditiously as possible. The petitioner then filed a revision petition before the High Court against the said order of the learned Judge of the District Council Court and the case was numbered as Civil Revision No 29 (H)/59. The High Court by a common judgment and order dated 17-8-60 passed in Civil Revision Nos. 27(H)/59, 28(H)/59 and 29(H)/59 dismissed the petition. Title Suit No 1 of 1958 was however ultimately dismissed by the Presiding Officer of the Subordinate District Council Court in view of the coming into force of the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen), Act, 1959 (United Khasi-Jaintia Hills Act No II of 1959), hereinafter called 'the Act'. That thereafter the petitioner was holding the office of a Myntri in the Durbar of Nongkhlaw Syiemship. The respondent No 3, U Hedri Lyngdoh Nongum, reported to the District Council that the petitioner was acting as a Myntri in spite of the order dated 18-9-57 of the Executive Member in Political Case No 2/56 and the District Council sent the matter for decision by the Syiem of Nongkhlaw U Siton in the meantime died. Respondent No 3 U Hedri Lyngdoh Nongum substituted himself to the position of the deceased U Siton. The Syiem of Nongkhlaw and his Durbar by their order dated 9-9-66 confirmed the election of the petitioner as Myntri on consideration of all the relevant facts and on the basis of the aforesaid order dated 9-5-59 passed in Title Suit No 1 of 1958. The decision of the Syiem and his Durbar dated 9-9-66 was conveyed to the District Council but the Chief Executive Member of the District Council issued an order dated 3-2-67 holding that the petitioner was not a Myntri according to the previous order dated 18-9-57 passed by the

Member, Executive Committee, and that fresh election should be held for electing a new Myntri in the vacancy. In the said order dated 3-2-67, reference was made to an order dated 30-1-67 of the Executive Committee of the District Council.

3 The petitioner has filed this application under Article 226 of the Constitution of India for quashing the order dated 30-1-67 passed by the Executive Committee of the District Council and also the order dated 3-2-67 passed by the Chief Executive Member of the District Council.

4. The point that falls for determination in the case is whether the order dated 30-1-67 passed by the Executive Committee and the order dated 3-2-67 passed by the Chief Executive Member of the District Council were within their jurisdiction and were legally valid.

5. Mr Bhattacharjee, the learned counsel appearing for the petitioner submitted that the Act, namely Act II of 1959, had no application to the instant case inasmuch as the election took place in 1956 and as such the jurisdiction that had been conferred by the said Act upon the Executive Committee regarding the election matters was not with it and therefore the impugned orders were without jurisdiction. The second submission made by the learned counsel was that even assuming that the Act was applicable, the impugned orders dated 30-1-67 and 3-2-67 were contrary to the provisions of the said Act.

6. In order to deal with the first point raised by the learned counsel, we have to consider the fact whether the election of the petitioner took place prior to the coming into force of the said Act and his election continued and stood as valid. There is no dispute regarding the fact that an election of a Myntri from the Lyngdoh Nongum Clan took place in pursuance of a parwana dated 15-2-54 issued by the Durbar of Nongkhlaw Syiemship. The election was held on 21-5-56. The petitioner's case is that he secured 23 votes and U Siton secured 7 votes and as such he was elected as Myntri. It is also admitted in the petition itself that U Siton filed an application to the Executive Member of the District Council against the election and confirmation of the petitioner as a Myntri and the Executive Member by his order dated 18-9-57 set aside the order of Syiem of Nongkhlaw and his Durbar confirming the election of the petitioner and ordered that U Siton should be appointed as a Myntri in place of late U Insingh. Against this order, the petitioner filed the Title Suit No 1/58 in the Subordi-

nate District Council Court. Issue No. 10 as mentioned above in that suit was heard as a preliminary issue and the learned Presiding Officer of the Subordinate District Council Court held that the District Council was not an election tribunal, nor a civil court and the District Council acted illegally in entertaining the appeal of U Siton and its order was without jurisdiction and he held that the order passed in Political Case No. 2/56 was void. Thus, the issue No. 10 in that suit was decided in favour of the plaintiff (petitioner).

On appeal, the learned Judge, District Council Court, held that it was not necessary to decide issue No. 10 and therefore he remanded the case to the learned trial Court to proceed with the suit. Against this order of the learned Judge, District Council Court, Civil Revision No. 29 (H)/59 was filed in the High Court wherein the High Court held as follows:

"As regards Civil Revision No. 29 (H)/59, filed on behalf of the plaintiff, we are of the opinion that there is no substance in this petition also. The decision of the lower appellate Court was in favour of the plaintiff inasmuch as the suit was held to be maintainable and the case was sent back for trial on merits by the court below. The applicant, therefore, can have no grievance against the order of the appellate Court. The contention of the petitioner, however, is that the decision of the trial Court was conclusive so far as the suit itself was concerned, and, therefore, the appellate Court was not right in not going into that issue and holding that it was not material to decide that issue. The decision of the trial Court on that issue was that the decision of the District Council was without jurisdiction and therefore, the suit was maintainable. To that extent the decision of the trial Court was in favour of the present petitioner. That decision is still there, and it cannot be said that that decision has been wiped out by the decision of the appellate Court. If the petitioner wants to contend that the decision of the trial Court on that point is conclusive, in so far as the suit is concerned, it is open to him to raise that point before the trial Court; but it cannot be said that the petitioner has in any way been affected by the order of the appellate Court. There is, therefore, no force in this revision either."

The High Court sent back the case to the trial Court for its disposal on merits.

7. Accordingly the case went back to the Presiding Officer, Subordinate District Council Court, who by his judgment and

order dated 7-7-61 held that in view of Act II of 1959, namely the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen), Act, 1959, the Civil Court had no jurisdiction to try the suit and the suit was therefore liable to be dismissed for want of jurisdiction. The learned Presiding Officer of the Subordinate District Council Court held that the suit also abated as the main defendant was dead and the plaintiff waived his right to substitute the deceased defendant and had voluntarily allowed the suit to stand abated. The suit was thus dismissed for want of jurisdiction and for abatement. The petitioner did not move any higher Court or authority against the judgment and decree dated 7-7-61 passed by the Presiding Officer, Subordinate District Council Court. In the result, the order that was passed by the Executive Member on 18-9-57 setting aside the election of the petitioner and declaring U Siton as a Myntri stood as it was. The finding of the Subordinate District Council Court on issue 10 in the suit that the District Council had no jurisdiction to pass the order lapsed and became ineffective when the suit itself was dismissed finally for want of jurisdiction and abatement.

In the circumstances, I hold that whatever might have been the position prior to 7-7-61 but with effect from that date the petitioner must be bound by the order dated 18-9-57 passed by the Executive Member, District Council declaring his election invalid and as such the petitioner could not have continued to hold the office of Myntri. I therefore hold that when the said Act II of 1959 came into effect the election of the petitioner did not continue as valid and the Executive Committee of the District Council had jurisdiction to pass the impugned orders dated 30-1-67 and 3-2-67 which were passed in a case that arose out of a petition dated 23-3-63.

8. Mr. Bhattacharjee, the learned counsel for the petitioner submitted that even though the finding on issue No. 10 in the above suit might not exist after the dismissal of the suit, the order dated 18-9-57 passed by the Executive Committee was without jurisdiction inasmuch as there was no custom or customary law providing an appeal to the Executive Committee or the District Council from the order of the Syiem and the Durbar of Nongkhlaw.

9. Mr. Lahiri, the learned counsel appearing for the respondents submitted that even prior to Independence these elections of Syiem and Headmen were approved and confirmed by the Deputy Commissioner, representing the Crown

and that was the custom prevalent and after the Constitution came into force the power and jurisdiction that was exercised by the Deputy Commissioner vested in the District Council and as such the District Council had the jurisdiction to deal with these matters concerning elections and that custom in fact had been recognised under the said Act II of 1959 by which jurisdiction had been vested in the Executive Committee, representing the District Council and as such the order dated 18-9-57 passed by the Executive Member on behalf of the District Council was in accordance with the existing custom and was within jurisdiction. He further submitted that no competent court had set aside that order and it stood as valid and consequently the petitioner's election stood set aside with the dismissal of T S 1/58

10 In this connection Mr Lahiri referred to the case of T Cajee v U Jormanik Siem, AIR 1961 SC 276. In that case, their Lordships of the Supreme Court have held that the District Council is both an administrative as well as a legislative body and the District Council is in charge of administration of autonomous district which carried with it the power to appoint officers to carry on administration. Under para 3 (1) (g) of the Sixth Schedule to the Constitution it has power to make laws with respect to the appointment or succession of Chiefs or Headmen and thus would naturally include the power to remove them, but it does not follow from this that the appointment or removal of Chief is a legislative act or that no appointment or removal could be made without there being first a law to that effect. Para 2 (4) of the Sixth Schedule provides that the administration of an autonomous district shall vest in the District Council and this is comprehensive enough to include all such executive powers as are necessary to be exercised for the purposes of the administration of the District. That the authority concerned would at all relevant times have the power to appoint or remove administrative personnel under the general power of administration vested in them by the Sixth Schedule before laws are framed under para 3 (1) of the Sixth Schedule.

11. As the Syiem is an officer under the District Council, as held by the Supreme Court, a Myntri, which is included in the term 'Headmen', also must be deemed to be an officer under the District Council to carry on the administration of the autonomous district. In this view, I hold that prior to Act II of 1959, namely the United Khasi-Jaintia Hills Autonomous District (Appointment and Succession of Chiefs and Headmen) Act,

1959, which came into force in October 1959, the District Council had jurisdiction to appoint a Myntri and to remove him. This is also clear from the fact that after election of the petitioner in 1954, his election was reported to the Executive Committee of the District Council before whom the defeated candidate U Siton also filed an application and the matter was decided by the Executive Committee by its order dated 18-9-57. The executive functions of the District Council are vested in the Executive Committee under Rule 28 of the Assam Autonomous Districts (Constitution of District Councils) Rules, 1951 and under R 31 (1) of the said Rules, each Member of the Executive Committee is entrusted with specific subjects. Rule 31 (1) runs as follows.

"Each member of the Executive Committee shall be entrusted with specific subjects, the allocation of the subjects being made by the Chief Executive Member. The Executive Committee shall be collectively responsible for all executive orders issued in the name of the District Council in accordance with these rules, whether such orders are authorised by an individual Member of the Executive Committee on a matter appertaining to his subject or as a result of discussion at a meeting of the Executive Committee, or howsoever otherwise." The order dated 18-9-57 was passed by the Executive Member in charge of Election, District Council, United Khasi-Jaintia Hills. It is not disputed that the particular member was in charge of Election. It must therefore be held that the order dated 18-9-57 was the order passed on behalf of the Executive Committee of the District Council and it was within its jurisdiction.

12. From the counter affidavit filed by the Chief Executive Member of the District Council, it is found that the orders dated 3-2-67 and 30-1-67 were passed in a case which started before the Syiem of Nongkhlaw and his Durbar on the representation dated 23rd March 1963 of U Jrang Singh and other members of the Lyngdoh Nongum Clan praying for confirmation of their nominee namely, U Hedri Lyngdoh Nongum as Myntri representing the Lyngdoh Nongum Clan of Nongkhlaw Syiemship. That U Hedri never approached the Syiem and his Durbar or, for that matter, the Executive Committee, in the capacity of a substitute in place of late U Siton. That the office of a Myntri was a personal right and neither U Hedri nor U Prellyshon nor anybody else for that matter could claim the right of succession.

13 From the order of the Syiem of Nongkhlaw and his Durbar dated 9-9-

66 (Annexure 5 to the petition), it is found that the case arose out of the petition filed by U Hedri Lyngdoh Nongum in the District Council. In that petition, U Hedri Lyngdoh Nongum claimed that U Prellyshon Lyngdoh Nongum was no longer a Myntri and secondly he claimed that he should be a Myntri in the place of U Prellyshon. The District Council sent the matter to the Durbar of the Syiem of Nongkhlaw for disposal. Both U Prellyshon and U Hedri were heard and the Syiem and his Durbar held as follows:

"In the judgment of the High Court in the Civil Revision No. 29(H) of 1959 it is stated that the above judgment of the District Council Court still stands. So the order of the Durbar regarding appointing U Prellyshon as Myntri still stands."

"About the claim made by U Hedri Lyngdoh that he should be declared a Myntri in the place of U Prellyshon the Durbar hereby rejects because U Prellyshon is still a Myntri, and even if U Prellyshon is no longer a Myntri there should be fresh election for a Myntri in his place."

From this order of Syiem of Nongkhlaw and his Durbar, it appears that U Prellyshon, the petitioner, was deemed to be a Myntri because of the finding of the High Court in Civil Revision No. 29(H)/59. They, of course, rejected the prayer of U Hedri to be declared as Myntri in place of U Prellyshon. The finding of the Syiem and his Durbar that U Prellyshon continued as Myntri was really passed on the decision of issue No. 10 in T. S. 1/58. But when the T. S. 1/58 was itself dismissed, the trial court's finding that the District Council had no jurisdiction to pass the order dated 18-9-57 could not stand. In the circumstances the order of the Syiem of Nongkhlaw and his Durbar to the effect that the appointment of the petitioner, U Prellyshon still held could not stand in the eye of law.

14. By their order dated 30-1-67, the Executive Committee had pointed out that U Prellyshon, the petitioner, was never a Myntri from the Lyngdoh-Nongum clan in view of the order dated 18-9-57 of the Executive Committee and therefore the Executive Committee ordered fresh election of the Myntri by the Durbar of Nongkhlaw clan Syiemship. By his order dated 3-2-67, the Chief Executive Member of the District Council also had referred to the order dated 18-9-57 and held that U Prellyshon, the present petitioner, was not a Myntri. By the two impugned orders, the Executive Committee only referred to the earlier order dated 18-9-57 and that order as

discussed above has not been set aside by any competent court and must be held to be effective.

15. Under para 2 (4) of the Sixth Schedule to the Constitution, the administration of an autonomous district has been vested in the District Council for such district, subject to the provisions of the Sixth Schedule. Under para 3 (1) (g) and (j) of the Sixth Schedule, the District Council has power to make laws with respect to the appointment or succession of Chiefs or Headmen and social customs. It has been held in the case of AIR 1961 SC 276 that the District Council is both an administrative as well as a legislative body. United Khasi-Jaintia Hills Act II of 1959 has been passed under para 3 (1) (g) of the Sixth Schedule and in the aforesaid decision of the Supreme Court this Act has been held to be a valid law. In the circumstances, I hold that the said Act II of 1959 is applicable to the facts of the present case.

16. Under Rule 28 (1) of the Assam Autonomous Districts (Constitution of District Councils) Rules, 1951, the executive function of the District Council has been vested in the Executive Committee. The impugned order dated 30-1-67 was passed by the Executive Committee, by which it ordered for fresh election of a Myntri by the Durbar of Nongkhlaw Syiemship as the office of the Myntri was lying vacant. By the order dated 3-2-67 passed by the Chief Executive Member of the District Council, he drew the attention of the Syiem of Nongkhlaw to the order dated 30-1-67 passed by the Executive Committee and directed the Durbar of Lyngdoh Nongum Clan to hold the election of the new Myntri as soon as possible according to the rules and customs. On a consideration of the above provisions of law, I am clearly of the opinion that when the petitioner's election stood set aside and the vacancy occurred, the Executive Committee of the District Council had every jurisdiction to order for a fresh election of the Myntri. In the circumstances, I hold that the petitioner has no legal right to move this writ petition for declaring his election to be valid when his election had been set aside by the Executive Committee's order dated 18-9-57. I further hold that the impugned order dated 30-1-67 passed by the Executive Committee and the order dated 3-2-67 passed by the Chief Executive Member of the District Council are within their jurisdiction and are valid in law.

17. The next point urged by Mr. Bhattacharjee is that there was no appeal before the Executive Committee from the decision of the Syiem and his

Durbar and as there was no such appeal, the orders passed by the Executive Committee and the Chief Executive Member of the District Council were without jurisdiction. Under section 7 of the said Act, there must be first an election of the Myntri which shall be confirmed by the Syiem and his Durbar and the name of such Myntri shall forthwith be sent by the Syiem to the Executive Committee. If any dispute arose regarding any matter relating to or connected with the election of Headmen, the disputes shall be referred by the party or parties concerned to the Syiem and his Durbar for decision. An appeal against such decision shall lie to the Executive Committee, whose decision shall be final.

In the instant case, however, after the order of the Executive Committee passed on 18-9-57, the office of the Myntri in question remained vacant. The other contestant U Siton, who was declared Myntri by the Executive Committee, in the meantime died. Consequently the office remained vacant, and the Executive Committee's direction was to hold a fresh election for electing a Myntri. U Jrang Singh and other members of the Lyngdoh Nongum Clan filed a petition dated 23-3-63 praying for confirmation of their nominee, namely U Hedri Lyn-

godh Nongum as a Myntri representing the Lyngdoh Nongum Clan of Nongkhaw Syiemship. This petition was not filed by U Hedri in the capacity of a substitute in place of late U Siton. That petition was heard inter partes by the Syiem and his Durbar and they rejected the claim of U Hedri Lyngdoh and at the same time they held that U Prellyshon Lyngdoh Nongum still remained as a Myntri. If it was found that U Prellyshon was no longer a Myntri, there should be a fresh election for a Myntri in his place. As discussed hereinabove, the fact remained that the office of Myntri fell vacant and therefore the Executive Committee which was in charge of the executive functions of the District Council had the jurisdiction to direct for a fresh election and for this purpose no appeal need be preferred by anybody as contemplated under S 7 of the said Act.

18. In the result, the petitioner is not entitled to any remedy in this writ petition, which is accordingly dismissed. The Rule is discharged. In view of the facts and circumstances of the case, I make no order as to costs.

19. S. K. DUTTA, C. J. I agree
DVT/D V.C. Petition dismissed.

E N D

AIR 1969 BOMBAY 401 (V 56 C 69)

(NAGPUR BENCH)

DESHMUKH AND CHANDURKAR, JJ.

Union of India owning & administering Central Railway per General Manager and another, Appellants v. M/s. Kalinga Textiles Private Ltd. Company and another, Respondents.

First Appeal No. 33 of 1961, D/- 26-2-1968, under decision of Joint Civil J., Sr. Dvn., Akola in Spl. Civil Suit No. 6B of 1958.

(A) Railways Act (1890), S. 74E (old)—Wagon catching fire in transit — Duty of Railway Administration to prove how the wagon was handled on the way — Negligence of Railway servant — Burden of proof — (Contract Act (1872), Ss. 151, 152, 161) — (Evidence Act (1872), S. 106).

The responsibility of the railways as carriers is that of bailees under the provisions of sections 151, 152 and 161 of the Contract Act, subject to the provisions of the Railways Act. Where an entire wagon was hired and fire had taken place to the wagon on the way, it is for the Railway Administration to lead evidence about the transit of this wagon from place to place and to disclose the entire information about the care taken in the handling of these goods. When the wagon is found to have caught fire, it would be appropriate for the defendant-railway administration to lead evidence of the Train Examiner who examined the wagon before it was allotted and also of the Train Examiner who was supposed to examine it after the fire took place. These two reports would give the court some idea about the condition of the wagon and the probable cause why the wagon should catch fire. Where the Railway Administration have not rationally explained how the fire took place nor have the railway servants taken proper steps for extinguishing the fire immediately with a view to minimise the damage to the goods, negligence of the servants of the defendant-railway administration will have to be presumed as the cause which caused the fire. (Negligence of Railway servants held proved).

(Paras 6, 7)

(B) Railways Act (1890), S. 72 (old) — Loss of goods in transit due to fire — Negligence of railway servants—Damages — Assessment — Joint survey by Railway Inspector and Insurance Company made immediately — Figure of quantum agreed upon — Damages at the agreed figure would be decreed in case Railway were held liable.

(Para 6)

(C) Evidence Act (1872), S. 115—Pleadings — Suit by plaintiff 1 the consignee and plaintiff 2 the insurer as subrogee of rights of plaintiff 1 by payment of the

claim of plaintiff 1 against railway for damages for loss of goods in transit by fire — Railway, in their pleading, denying the subrogation and the right of plaintiff 2 — In appeal against decree in favour of plaintiff 1, Railway cannot turn round and utilise allegations of subrogation made by plaintiffs, as ground for non-suiting plaintiffs. — (Civil P. C. (1908), O. 41, Rr. 1 and 2) (Para 8)

(D) Railways Act (1890), S. 77 (old) — Consignee entitled to damages from Railway — Payment made by insurer of goods — Insurer subrogated to right of consignee but policy requiring consignee to join in the legal actions taken by insurer — Notice of claim by consignee after being paid by insurer is valid — Contract between him and railway is not affected — (Contract Act (1872), Ss. 2, 69) — (T. P. Act (1882), S. 92).

Where the loss is suffered by the consignee due to fire in the wagon during the transit of the goods, and the loss is made good by the insurer who according to the terms of the policy is subrogated to the rights of the consignee and a clause in the policy requires the consignee to concur and join the insurer in all the legal actions that would be taken by the insurer, notice of claim under S. 77 by the consignee after his claim is paid up by the insurer is good and cannot be attacked on the ground that by subrogation he does not remain a claimant. The fact of payment by the insurer does not in any way affect the contractual liability between the consignee and the Railway administration. The consignee's right to recover damages from the railway administration is not affected in any manner and the mere payment of the amount of damages by the insurer to him does not terminate his right to claim damages from the railway administration.

(Para 8)

(E) Railways Act (1890), Ss. 74-E, 77, 80, 140, 3(6) (old)—Goods booked on Central Railway — Destination on South Eastern Railway — Notice — Presumption under S. 140 in respect of notice sent by ordinary post — Presumption under S. 114 Evidence Act — Purpose of notice — Notice sent to destination railway — Loss on Central Railway — Notice on Central Railway held not necessary — (Evidence Act (1872), S. 114) — (Civil P. C. (1908), Ss. 79, 80).

Where goods which were consigned from a station on Central Railway to a station on South Eastern Railway, were damaged by fire in transit at a station on the Central Railway, the cause of action arose, on the Central Railway and no part of cause of action arose on the South Eastern Railway. A notice under S. 77, Railways Act sent by ordinary pre-paid post and addressed to the General Manager, South Eastern Railway and General

Manager Central Railway, Bombay, with an endorsement that its copies are despatched to the Chief Commercial Superintendent South Eastern Railway Calcutta and the Superintendent of Claims, Central Railway, Bombay for necessary action and information but the evidence disclosed that the letter was never despatched to the General Manager, Central Railway, Bombay but to the General Manager South Eastern Railway Calcutta. This is a case where there is no notice to the General Manager Central Railway, Bombay. (Para 10)

A communication which is required or authorised by the Railways Act to be served on a railway administration may be served in the case of a railway administered by the Government, on the Manager and in the case of a railway administered by a railway company, on the Agent in India of the Railway Company, in any of the three manners specified in clauses (a), (b) and (c) of Section 140 of the Railways Act. [Quaere — Whether notice to the Superintendent of Claims is enough notice to the Manager? (Paras 18, 19)] (Para 10)

If a communication is to be sent by post, then the party may resort to the method provided by Section 140, namely, by forwarding it by post in a pre-paid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866. If this is done as provided by Section 140, the presumption under Section 142 may arise about the receipt of the letter at the other end. If a party chooses to adopt one of the modes provided by S 144 and proves that, that mode has been adopted, then the party will be entitled to rely on the presumption under Sec 142 so far as service is concerned. However, section 148 does not restrict the method of service. If some other mode is resorted to, it will be equally good, but in that case the presumption under Section 142 will not be available to the party. The party concerned may have to prove the fact of service like any other fact in a litigation. When the fact of receipt of notice is denied, it is for the plaintiff to prove that fact by leading cogent, convincing and sufficient evidence. (Para 11)

If a letter properly directed, containing a notice is proved to have been put into the post office it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office and was received by the person to whom it was addressed and that presumption would apply even in the case of a letter sent by ordinary post. AIR 1918 PC 102 Rel. on. (Para 17)

Compliance with the provisions of Section 140 of the Railways Act will entitle a party to claim a presumption of service under Section 142. The moment the facts contained in Section 140 are proved, it shall be deemed that the said letter is served. Such a presumption, as a matter of right, is not available to a party under Section 114 of the Evidence Act. The Court also is not obliged to presume certain consequences or results. Section 114 of the Evidence Act is only an enabling section. If from the given facts and circumstances, of a case, the Court thinks that a certain inference should be drawn, it is permissible to do so. (Para 18)

Held that in this case looking to the facts proved and the existing circumstances, an inference should be drawn that the letter was received by the General Manager of the South Eastern Railway in due course of business. It must have been received at about the same time when the Chief Commercial Superintendent of that railway received that letter, and that it must, in the circumstances of this case, be held that a notice of claim under Section 77 by the plaintiff was duly served upon the General Manager of the South Eastern Railway, but no such notice was served on the General Manager Central Railway. (Para 18)

The provisions of Section 77 of the Railways Act must be independently examined and effect must be given to them as they are found in that Section. Section 80 of the Railways Act may have relevance in understanding which administration is liable. However, Section 80 must be understood in the manner in which it came to be introduced in the Act. The provisions of Section 80 are overriding provisions. Whatever the contract of carriage, the liability in damages is statutorily fixed under the provisions of Section 80. Even today that section has to serve the very purpose for which it was enacted. (Para 38)

As a result of the amalgamation of the various company railways and the State-owned railways and the reorganisation thereof, the railway system owned and administered by the Union of India came to be divided into six zones. But still there were some railways owned and administered by private companies, as also owned and administered by District Boards. The various zonal railways in which the Union railways are now divided did not become separate railway administrations with independent existence and legal status. The provisions of S 140 of the Railways Act, cannot be of particular assistance in interpreting the provisions of Section 77 of the Railways Act. (Paras 39, 40)

The definition of the expression "railway administration" being an inclusive definition, the Manager of any of these railways always includes the Government. The entire system of Indian railways should be 'railway' as also any portion of it. The expression "Manager of the railway" would mean the Manager of a particular portion which may have been separated for the purpose of administrative convenience. It is the Union of India or the Government which is included in all the Managers representing the various portions of railways, that is the contracting party and that is ultimately responsible for making good the loss due to destruction or otherwise. (Para 41)

The provisions of Sections 79 and 80 of the Code of Civil Procedure lend considerable support to this view. (Para 42)

The provisions of Section 77, Railways Act should be liberally construed. AIR 1962 SC 1879, Foll. (Para 43)

The purpose and object of Section 77 being to make the railway administration aware of a claim so that stale and fraudulent claims may not be lodged against it, information which would serve the purpose of bringing the claim to the notice of the railway administration is enough. (Para 44)

Considering the fact that the railways are administered by the Government, there is nothing in the provisions of the Railways Act which gives each of the zonal railways which is headed by a Manager a separate legal existence. Neither the definition contained in Section 3(6) nor any other provision seems to give an independent legal existence to such separate zonal railways. Emphasis be laid on the unity of administration and unity of ownership of the railways. (Para 45)

Section 77 is primarily meant to make the railway administration aware of the claim, so that immediate investigation is started. The notice under Section 80 of the Code is also meant to enable the Government to consider whether the claim is just and should be compounded. Whether the contents of a particular notice are sufficient compliance with the provisions of Section 77 may be, in the facts and circumstances of each case, a question to be decided independently. The service notice upon the Manager of any of the railways which have handled the goods would serve the purpose of Section 77 and would be sufficient compliance with it. Since all the railways are now owned and administered by the Government, the Manager of any of those railways which has dealt with the goods and gets enough particulars from the claimant about the number of the railway receipt, the nature of the goods and the date of booking etc., should be in a

position to know from the record of his own section what has happened to the goods. A notice to any of these Managers through whose railway systems the goods have passed is a sufficient notice to the Government which is administering all these railways. (Paras 46, 47)

The expression "that railway" in S. 80 only means that particular railway which has handled the goods and nothing more. If more than one zonal railways have handled the goods and the suit is contemplated against the Union, the General Manager of any one of the zonal railways would answer the description "the General Manager of that railway". Since there is now unity of administration and ownership, the General Manager of any of these zonal railways, through whose territories the goods have passed, would be in a position to make a report to the Union of India, as also be in a position to communicate with the General Managers of other zones over whose territory the goods have passed. (Para 48)

Notice on South Eastern Railway is sufficient notice under the provisions of Section 77 of the Railways Act and it was not necessary for the plaintiff to serve separate notices upon the General Managers of the South Eastern Railway and the Central Railway. AIR 1966 All 16 & AIR 1962 Punj 262 (FB) & AIR 1960 Mad 58, Rel. on; AIR 1966 Cal 540 & AIR 1949 Pat 329 & AIR 1960 Orissa 154 & AIR 1959 Andh Pra 594 & AIR 1962 Madh Pra 301 & AIR 1950 Nag 85, Ref.

(Para 55)

(F) Railways Act (1890), S. 72 (old) — Section deals with limits of liability of Railway Administration — Section does not create responsibility — It arises out of contract of carriage the Railway Administration makes. (Para 27)

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K. V. Tambe and W. K. Sheorey, for Appellants, P. D. Thakar, for Respondent No 2

DESHMUKH, J.— This is an appeal by the Union of India owning and administering the Central Railway as well as the South Eastern Railway. A large part of the fact is not in dispute. The plaintiff no 1 Messrs, Kaling Textiles Private Limited, a company registered under the Indian Companies Act having their office at Rajgangpur, admittedly booked 100 bales of cotton from Akola on the Central Railway for being delivered at Rajgangpur on the South-Eastern Railway. The railway receipt in that behalf was no 9208/11 dated 2-6-1957. A complete wagon was hired and allotted for that purpose and it started with the goods train on the same day. The evidence in the case shows, and it is not now in dispute, that fire took place first at Khapri station on 4-2-1957 and the wagon in which the plaintiff no 1's cotton bales were loaded was set on fire. After some half-hearted attempts to find out the cause of the fire and to try to extinguish it, a decision was taken by the Assistant Station Master, Khapri, to allow the wagon to travel up to Ajani which was about six miles from Khapri. The wagon with the fire was then allowed to travel and at Ajani, the railway staff extinguished the fire. This was on 5-6-1957. Whatever goods were saved were forwarded to the destination and delivery was given to the plaintiff no 1. As they found that the goods were damaged by fire, they brought that fact to the notice of the railway officials at the destination station on the South-Eastern Railway. The Inspector of Claims actually assessed the damage and issued a

certificate. It is this claim which is the subject-matter of the suit. According to the plaintiff, the damages suffered were Rs 11,693 80 P. However, the plaintiff no 1 had insured the goods with the plaintiff no 2, and according to the terms of the insurance policy, the amount payable to the plaintiff no 1 was found to be Rs 11,634 67 P. The plaintiffs have claimed in this suit only this amount as that was the amount paid by the plaintiff no 2 to the plaintiff no 1 in full discharge of the insurance under the policy.

2. The plaintiffs have pointed out that after the joint survey and assessment of the damages, the plaintiff no 2 reimbursed the plaintiff no 1 and as per terms of the policy, obtained a letter of subrogation. That letter is dated 18-9-1957. After the payment of the amount by the plaintiff no 2 to the plaintiff no 1, a notice under Section 77 of the Indian Railways Act, (IX of 1890), was issued on behalf of the plaintiff no 1 alone through an advocate. That notice was produced before the Commissioner who examined evidence at Bombay and is marked as Ex. A in the commission papers. That was a notice addressed by Advocate Mirchandani, to the General Manager, South Eastern Railway, Calcutta, and the General Manager, Central Railway, Bombay. Copies of this letter were addressed to the Chief Commercial Superintendent, South Eastern Railway, Calcutta, and the Superintendent of Claims, Central Railway, Bombay, for necessary action and information. It may be noted that though the notice was so addressed to the General Managers of the two Railways, in fact it is admitted that the notice was despatched to the General Manager, South Eastern Railway, Calcutta, alone. Copies were however forwarded to the two Claims Superintendents as the endorsement on the notice shows. There was some correspondence and the only letter that is brought on record is Ex. P-4 by which the South-Eastern Railway repudiated the claim. After that letter dated 12-12-1957 was received, a notice to the Union of India was addressed by another Advocate, Mr. S. N. Dwivedi, on behalf of both the plaintiffs as his clients. As the claim was not settled, nor any damages were offered by the Union of India or any of the Railways, the plaintiffs have filed this suit for recovering Rs. 11,634 67 P.

3. In this suit, the plaintiff no 1 is the original consignor Messrs Kalinga Textiles Private Limited. The plaintiff no 2 is the Indian Globe Insurance Company Limited with whom the goods in transit were insured by the plaintiff no. 1 and who ultimately reimbursed the plaintiff no 1 by paying the amount which is claimed in the suit. The plaintiff points out why the two plaintiffs appear as

party plaintiffs. The fact of insurance and the reimbursement thereafter and the subrogation as a result of the terms of the policy are recited in the plaint. It is however pointed out that a decree may be passed in favour of either of the plaintiffs. The party defendants are two; the first is the Union of India owning and administering the Central Railway and the second is the Union of India owning and administering the South-Eastern Railway.

4. Only one written statement has been filed on behalf of both the defendants. It purports to have been signed and verified by one V. S. Kulkarni, who is described as "A. D. C. I. Akola." We are told that this is the short form of "Assistant District Commercial Inspector" which is the designation of that officer. There is a general denial of facts about the price of the cotton bales as also about the amount of insurance for which they were insured. It is admitted in terms that a fire did take place and that the goods were transhipped at Ajani from the original wagon to some other wagon. It is also admitted that there was a request made for assessment of damages of goods and an assessment was in fact made. It is however added that the assessment was without prejudice to the rights of the parties and was only a formal estimate of the damage caused to the plaintiff's goods. The extent of the damage, as also the price thereof is denied. It is then pointed out that though damage has taken place by fire, it was not the result of the misconduct, negligence or any fault on behalf of the servants of the defendant Railway Administration. On the contrary, when the fire was detected, all efforts were made to extinguish it. In paragraph 6 of the written statement, it is stated that the defendants did not dispute that the plaintiff no. 1 is paid the claim. They however denied that the plaintiff no. 2 is subrogated in place of the plaintiff no. 1 for making a claim against the defendants. It is then stated that the plaintiff no. 2 has no concern and they have no contract with the defendants. The plaintiff no. 2 could not claim anything from the defendants. In paragraph 7 follows an important statement which would be the subject-matter of considerable discussion in the further part of this judgment. It is stated that the notices under Section 77 of the Indian Railways Act referred to in paragraph 7 of the plaint are not traceable. The defendants therefore deny the same. It is further stated in the paragraph: "The plaintiff is put to the proof of the same." So far as the notice under Section 80 of the Code of Civil Procedure is concerned, it is admitted to have been received by the addressees. It is however submitted that the notice was not legal and

the suit was not maintainable. We will point out here only that this appears to be a formal plea as no issue was ever pressed and in the arguments before us it was admitted that the notice appears to be legal. A plea of the suit being premature was also taken but it was also not pressed at any stage. Some account of how the fire took place and what efforts were made to extinguish it is then given in paragraphs 17 and 18 of the written statement. It is alleged that the wagon was water-tight having no leakages or holes, nor had it hot-axles. The engine that was attached to that train was provided with a full plate type of spark arrester and a brick arch. It is then alleged generally that all possible care as bailees was taken and no part of the damage could be attributed to the negligence, misconduct or carelessness of the railway employees.

5. On these pleadings the parties entered upon the trial. The learned Civil Judge has framed several issues. He found that the bales of the plaintiff no. 1 got damaged due to fire at Khapri and Ajani railway stations on the Central Railway. He also found that the damage caused amounted to Rs. 11,693.80 P. and that this was the result of the negligence and misconduct of the defendants' railway servants. So far the notice of claim under Section 77 of the Railways Act is concerned, the learned Judge held that a notice addressed to the Superintendent of Claims, Central Railway, as also to the Chief Commercial Superintendent, South Eastern Railway was good notice in view of the rules made by the Central Railway. By these rules, the Central Railway have asked all the members of the public to prefer their claims to the Superintendent of Claims, Central Railway, Byculla. On this footing, the notice that is issued is accepted as good notice. He also found that the notice under Section 80 of the Code of Civil Procedure was a valid notice and the suit was neither premature nor barred by limitation. Having come to these conclusions, he also found that there was evidence that the plaintiff no. 1's claim was fully satisfied by the plaintiff no. 2 and subrogation obtained. Under the circumstances, a decree for the suit came to be passed in favour of the plaintiff no. 2 against both the defendants. Being aggrieved both the defendants have filed this appeal.

6. Mr. Tambe, learned counsel for the appellants, has challenged the decree on several grounds. Before we go to the technical challenges that are held out, we will dispose of the factual aspect of the cause of damage and the amount of damage. The responsibility of the railways as carriers is that of bailees under

the provisions of Ss 151, 152 and 161 of the Indian Contract Act, subject to the provisions of the Indian Railways Act. An entire wagon was hired in this case and undoubtedly fire has taken place in the circumstances, it is for the Railway Administration to lead evidence about the transit of this wagon from place to place and to disclose the entire information about the care taken in the handling of these goods. The learned Judge found that the evidence led by the defendants in that behalf does not properly explain either the origin of the fire or the steps taken for extinguishing that fire. When the wagon is found to have caught fire, it would have been appropriate for the defendants, to lead evidence of the Train Examiner who examined the wagon before it was allotted and also of the Train Examiner who is supposed to examine it after the fire took place. These two reports would have given the Court some idea about the condition of the wagon and the probable cause why the wagon should catch fire. No such effort at all is made. So far as the steps that were taken after the goods caught fire is concerned, the evidence of Kisanlal (D W 2), Assistant Station Master, Khapri, shows that nothing much was done at the Khapri station to extinguish the fire. His explanation is that there was hardly any water available at the station. If he had exhausted the water in the engine for the purpose of extinguishing the fire, he was afraid that the train might get stuck up. A decision was therefore taken that the train should travel ahead six miles up to Ajani station. At that station, arrangements were sought to be made to extinguish the fire. Even at Ajani, though the message sent was that the train would go to the downyard, arrangements for extinguishing the fire were made at the upyard. It is true that ultimately the goods were taken out and the fire was extinguished at Ajani. The wagon was then changed and such of the goods as were saved were loaded in another wagon and that wagon was attached to the goods train.

7. This is all the evidence that has been led on behalf of the railways. From this evidence, we are satisfied that the Railway Administration have not rationally explained how the fire took place, nor have the railway servants taken proper steps for extinguishing the fire immediately with a view to minimise the damage to the goods. In the circumstances negligence of the servants of the defendants will have to be presumed as the cause which caused the fire. So far as the attempts to minimise the damage is concerned, there is direct proof that nothing was immediately done. On the contrary, the wagon with the fire was allowed to travel about six miles ahead.

The learned Judge refers to the existence of a well at Khapri. No attempt seems to have been made to utilize that facility for the purpose of extinguishing the fire. Agreeing with the learned Judge, we would hold that the loss caused to the plaintiff in this case is due to the negligence of the defendants' servants. So far as the quantum is concerned, there could hardly be any dispute in this case, because the claim of damages is based upon the certificate issued by the Railway Inspector. As assessment was immediately made at the Ajani railway station and there was a joint survey by the Railway Inspector and the Insurance Company's Surveyor. Since an agreed figure has been given in the joint survey, we would hold that in case the decree of the trial Court is to be confirmed, it would have to be confirmed for the amount for which it is passed.

7A. Mr. Tambe, learned counsel for the appellants, has raised several technical defences and they will have to be considered now. The first defence which he seeks to raise is the defence which was not taken up in the trial Court. He says that the plaintiff no 1 is the consignee. He is however paid the entire amount of damages by the plaintiff no 2 on 18-9-1957. A letter of subrogation has been produced when evidence was led before the commissioner at Calcutta. In the written statement, the defence taken is that the plaintiff no 1 might have been paid by the plaintiff no 2 but it was denied that the plaintiff no 2 was subrogated. Mr. Tambe now wants to argue on behalf of the defendants-appellants that the plaintiffs have proved subrogation. That may be accepted as a fact proved. On the proved facts, he wants to raise a question of law. That question of law, according to him, is that the plaintiff no 1 had no title on 18-10-1957 when the notice under Section 77 of the Railways Act was given. He had received damages and had executed the letter of subrogation. There was no subsisting right in the plaintiff no 1 on that day. A notice by such a person under S 77 is a notice by an unauthorized person. It can be ignored. It is not a valid notice by a claimant who is impliedly conceived of by that section as it is a notification of claim. Section 77 therefore requires that the notification of claim must be by a claimant or by someone on his behalf. No third person could give such a notice. He then argues that on 18-10-1957 the plaintiff no 1(2?) alone was the person who was entitled to make a claim for damages. That plaintiff has not admittedly given any notice under Section 77. The notice under Section 77 is an imperative notice. That section lays down that unless such a notice as

is contemplated by that Section is given, or to use the language of that section, unless the claim is preferred in writing by a person or someone on his behalf, that person shall not be entitled to a refund of overcharge or to compensation for loss etc. He therefore says that the alleged notice of the plaintiff no. 1 is no proper notice at all and there is no notice admittedly by the plaintiff no. 2. On this short ground alone, the claim of the plaintiffs deserves to be dismissed.

8. We have already pointed out that at the stage of pleadings the defendants denied the fact of subrogation and refused to recognise the plaintiff no. 2 as a person authorised to file a suit. Having taken up that stand, they now want to turn round and utilize the allegations made by the plaintiffs as a ground of attack for non-suiting the plaintiffs. This defence is now sought to be raised as a pure point of law. Even if therefore it may be permissible for the defendants to argue in that manner, it must be noted that they are blowing hot and cold in the same breath. Having refused to recognise the plaintiff no. 2 as a subrogee, they cannot now advert to the same position which is pleaded by the plaintiffs and then seek to non-suit the plaintiffs. Apart from this technical aspect we think that the terms of contract of insurance as well as the letter of subrogation in terms of that insurance policy authorised the plaintiff no. 1 to lend his name for the purpose of carrying on correspondence with the Railway Administration, as also for the purpose of taking appropriate legal remedies in Court. The subrogation clause at paragraph 15 of the insurance policy (Ex. P-1) requires the plaintiff no. 1 to do and concur in doing and permitting to be done all such acts and things as may be necessary or reasonably required by the Company for the purpose of enforcing any rights and remedies, or of obtaining relief or indemnity from other parties to which the Company shall be or would become entitled or subrogated at the expense of the Company. The original contract with the railways in this case is between the plaintiff no. 1 and the Railway Administration. The plaintiff no. 1 being the consignee, is entitled to recover damages. The fact of payment to the plaintiff no. 1 by the plaintiff no. 2 with a condition as we find in clause 15 of the insurance policy does not in any way affect the contractual liability and the results flowing therefrom between the plaintiff no. 1 and the Railway Administration. In the notice given on behalf of the plaintiff no. 1 it has been clearly mentioned that the insurers are the Indian Globe Insurance Company Limited. A full description of the railway receipt, its number, the name of the consignor, the name of the insurer,

the name of the consignee and the fact of non-delivery of 100 cotton bales together with the amount of damages claimed have been clearly mentioned in the subject-matter of that notice. By an act inter partes between the plaintiff no. 1 and the plaintiff no. 2, we do not think that the liability that arises out of the contract to carry goods between the Railway Administration and the plaintiff no. 1 is affected in any manner. Even though the plaintiff no. 1 is paid by the plaintiff no. 2 by an express term, it is reserved that the plaintiff no. 1 will lend its name to every proceeding that may be necessary for the recovery and enforcement of the claim. In terms of clause 15 of the insurance policy, the letter of subrogation has been got executed. In these circumstances, we are satisfied that the plaintiff no. 1's right to recover damages is not affected in any manner and the mere payment of the amount of damages by the plaintiff no. 2 to the plaintiff no. 1 does not terminate the right of the plaintiff no. 1 to claim damages from the defendants railways. Though this point is allowed to be taken being a question of law, though not pleaded earlier, we are satisfied that there is no substance in it and it does not affect the right of the plaintiff no. 1 to give the notice as well as to file the suit. In the plaint, a specific recital has been made that in spite of the earlier recitals, the Court may pass a decree in favour of any one of the plaintiffs. The Court has chosen to pass a decree in favour of the plaintiff no. 2 as it found that plaintiff no. 1 admitted to have received the amount from the plaintiff no. 2. The plaint is therefore properly filed by authorised persons and the notice dated 18-10-1957 is also by a person who was authorised to give such a notice.

9. The next and important plea raised is that there is no valid notice at all served upon either of the two railways, namely, the Central Railway and the South-Eastern Railway. In order to understand the factual aspect of this point a few facts may be stated. The notice which is marked Ex. A before the Commissioner who recorded evidence at Bombay is in the form of a letter from Advocate Mirchandani addressed to the General Manager, South-Eastern Railway, and the General Manager, Central Railway, Bombay. It is dated 18-10-1957. Below this letter, there is an endorsement that copies are despatched to the Chief Commercial Superintendent of Claims, South-Eastern Railway, Calcutta, and the Superintendent of Claims, Central Railway, Bombay, for necessary action and information. The first impression therefore we get is that this is a letter which is despatched to the General Manager, South Eastern Railway, and

the General Manager, Central Railway. However, the evidence led by the plaintiffs itself shows that a copy of this letter was never sent to the General Manager, Central Railway, Bombay. It is an admitted position therefore that the letter (Ex. A) was never despatched to the General Manager, Central Railway, Bombay. Undoubtedly, therefore this is a case where there is no notice to the General Manager of the Central Railway Bombay, under Section 77 of the Railways Act. It may be recalled that Khapri and Ajani are stations both on the Central Railway. Whatever damage was caused to the goods, that took place or was when the goods were being handled on the lines of the Central Railway. No part of the damage took place while the goods were entrusted to the South-Eastern Railway.

10. Mr. Tambe therefore argues in the face of this admitted position that there is no notice to the General Manager of the South-Eastern Railway, also. This is because the letter (Ex. A) is again admittedly alleged to have been sent by an ordinary pre-paid post and not by registered pre-paid post, under Part III of the Indian Post Office Act, 1866. A communication which is required or authorised by the Railways Act to be served on a Railway administration may be served in the case of a Railway administered by the Government, on the Manager, and in the case of a Railway administered by a Railway company, on the Agent in India of the Railway company, in any of the three manners specified in clauses (a), (b) and (c) of Section 140 of the Railways Act. Mr. Tambe argues that if a communication is to be sent by post, then the party may resort to the method provided by Section 140, namely, by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his Office and registered under Part III of the Indian Post Office Act, 1866. If this is done as provided by Section 140, then he concedes that a presumption under Section 142 may arise about the receipt of the letter at the other end. Mr. Tambe however further concedes that this is not the only way in which a notice could be served or a claim could be lodged with the Manager. The wording of Section 140 shows that a communication may be served in one of the manners indicated in that section. If a party chooses to adopt one of the modes provided by Section 144 and proves that the mode has been adopted then the party will be entitled to rely on the presumption under Section 142 so far as service is concerned. However, section 140 does not restrict the method of service. If some other mode is resorted to, it will be equally good, but in that case the pre-

sumption under Section 142 will not be available to the party. The party concerned may have to prove the fact of service like any other fact in a litigation.

11. Having pointed out the legal position about the service of notice or communication under the Railways Act, Mr. Tambe argued that the General Manager, South-Eastern Railway, has denied having received any such notice. When the fact of receipt of notice is denied, it is for the plaintiff to prove that fact by leading cogent, convincing and sufficient evidence. On the record of this case, according to him, no such evidence has been led. We should therefore hold that no notice was served on the General Manager, South-Eastern Railway. So far as the notice under Section 77 of the Railways Act is concerned, the learned trial Judge had proceeded to give a finding in favour of the plaintiffs in paragraph 41 of his judgment by referring to certain rules of the Central Railway. The learned Judge says that the Central Railway by its rules has asked all members of the public to prefer their claims to the Superintendent of Claims, Central Railway, Byculla. A similar endorsement is also to be found on the reverse of the railway receipt. On the basis of this assumption, the learned Judge says that there is evidence in this case that the Superintendent of Claims, Central Railway, Byculla, has received the letter and that would be enough notice to the Railway Administration itself. Mr. Tambe argued that there are no such rules and the reference is inaccurate. Mr. Thakar, who appears for the plaintiffs-respondents, was also unable to point out any rule made by the Central Railway in that behalf. We think that the reference is clearly erroneous so far as it refers to rules. The reference to the endorsement on the reverse of the railway receipt is correct. However, from the discussion which we shall make hereafter, it will appear that it is not necessary to consider in this litigation whether the notice to the Superintendent of Claims is enough notice to the Manager himself.

12. Since the fact of notice to the Manager of the South-Eastern Railway is challenged, we will have to find out as a matter of fact whether any such notice or a claim under Section 77 of the Railways Act was ever lodged with the Manager or the General Manager of the South-Eastern Railway. On behalf of the plaintiffs, witness Chetan Parshram Malkani has been examined on commission at Bombay. He claims to be the proprietor of the Claims Recovery Bureau at Bombay and gives his capacity as the Company Limited. He claims to have Agent of Messrs. Indian Globe Insurance

instructed Advocate Mirchandani to give a notice under Section 77 of the Railways Act on behalf of the plaintiff no. 1. He also alleges that the plaintiff No. 1 instructed Advocate Mirchandani through him. He then produces the copy of the notice which is marked Ex. A. He further says that Mirchandani gave to him for despatch the original letter after making exact copies of the said original letter dated 18-10-1957 and he despatched the said notice to the General Manager, South-Eastern Railway; the General Manager, Central Railway; the Chief Commercial Superintendent, South Eastern Railway, Calcutta, and the Superintendent of Claims, Central Railway, Bombay. The copy of the letter Ex. A was marked as an exhibit by consent of both sides. He then produced entries from his despatch book and a copy of those entries is retained on the record as Ex. B. The original despatch book was produced before the commissioner and was returned to the witness. He proved from the despatch book that three letters were despatched on that day addressed respectively to the Superintendent of Claims, Central Railway, Byculla, the Chief Commercial Superintendent, South-Eastern Railway, Calcutta; and the General Manager, South Eastern Railway, Calcutta, on 18-10-1957. The copy of the despatch book at Ex. B mentions the despatch by ordinary post with a postal stamp of 15 naya paise each on the three letters addressed to the said three officers. Each of these letters bears the No. IGI/ASM/2470/57 of 18-10-1957. This is the number of the communication, and from the further correspondence we will show that a letter of this number has been received by the Chief Commercial Superintendent of the South Eastern Railway.

13. The witness further proves that a letter from the Chief Commercial Superintendent South-Eastern Railway, was received by Advocate Mirchandani and was handed over to him. That letter in its original appears at Ex. P-4 and is dated 12/17-7-1957. The cross-examination of this witness is very limited. He is first asked about his connection with the Claims Recovery Bureau and to be the sole proprietor of that Bureau. He admits that he has not power of attorney on behalf of the Indian Globe Insurance Company. He however adds that by a letter they authorised him to recover that claim but he was not in possession of that letter of authority when he gave evidence. He admits as a fact that the notice under Section 77 of the Railways Act was not sent by him by registered post but the same was despatched by ordinary post. He is then asked about the handwriting of these entries in the despatch book and he says that his clerk

made those entries. The last question whether he had any other documentary evidence to prove that the said notice under Section 77 of the Railways Act was despatched and his obvious reply was that he had no other document. This is all the cross-examination of this witness. If we look back in his examination-in-chief, we find that he is making a very important statement on oath that he despatched the notices addressed to the three officers concerned and he received them from Advocate Mirchandani for the purpose of despatch. He wants to prove the fact of despatch by producing the despatch book. Undoubtedly, there is no other document. There could be any other document if only the letters were despatched either under a certificate of posting or by registered post. In either case, some document in addition to these documents would have been available. When admittedly, the letters are sent by ordinary post, there could be no further evidence of the despatch. The despatch has got to be accepted or rejected on the oral testimony of the witness who says that he despatched those letters. The statement of witness Chetan in that behalf was therefore the most important statement in the examination-in-chief. We find that there is not even an attempt to cross-examine him in that behalf. From the manner in which a few questions are asked to this witness and no serious attempt is made to cross-examine him on the question of despatch, we think that there is nothing on the record which disentitles Chetan to be believed. In this state of the record and particularly the cryptic cross-examination, we are satisfied that Chetan is a witness of truth. When he stated on oath that he received three copies of the letter from Advocate Mirchandani and debited 15 naya paise against each of those letters in his despatch book showing the prepaid ordinary post and further adds that he despatched them, we think that there is direct evidence of the letters being carried up to the post office and put into the proper place where they are supposed to be placed for the purpose of despatch.

14. There are some other developments which may be taken into account and they will confirm the finding that we are inclined to give. At the stage when the claim was being merely notified to the authorities, Chetan could have no interest as a person recovering the claims to despatch one letter and not the others. His evidence can be accepted as a whole or rejected as a whole. There is no suggestion that this evidence of despatch may be good in respect of one of the letters and not in respect of the other two. We look at this evidence from this point of view because the record

shows that at least one letter has been considered and dealt with by the officers of the South-Eastern Railway. We may now look Ex. P-4 in that behalf. This is a letter addressed by the Chief Commercial Superintendent of the Eastern Railway, to Advocate Mirchandani at Bombay. It refers to the subject-matter in identical terms as we find the description of the subject-matter in the letter Ex. A. The reference to which this reply is given is "Your letter No 1GI/2470/57 dt. 18-10-57 on behalf of your clients Messrs. Kalinga Textiles Private Ltd." This reference in the letter of the Chief Commercial Superintendent convincingly shows that the letter received by him and replied to is the same letter as Ex. A. Out of the three letters therefore, there is direct evidence that the Chief Commercial Superintendent of the South-Eastern Railway received that letter and has acted upon it.

15. There is also further evidence to show, though indirectly that the Superintendent of Claims, Central Railway, Bombay, must have also received this letter Ex. P-4 is the reply of the Chief Commercial Superintendent of the South-Eastern Railway Calcutta, to the plaintiff and that letter has been exhibited being original. However, a copy of that letter endorsed to the Superintendent of Claims Central Railway, Bombay, is also on record though it is not exhibited. We asked Mr Tambe whether this is the letter produced by the defendants but not being an advocate in the trial Court, he merely asked us to verify whether the record shows it to be so. We therefore searched the record but somehow do not find the list under which this document has come on record. In file D of the original record we found a letter issued by Mr P E Wani, Joint Civil Judge, Senior Division Akola, addressed to the Small Causes Court at Calcutta for the purpose of executing commission as certain witnesses were to be examined at Calcutta. This letter appearing at page 124 of the D file contains in it a list of witnesses to be examined and also a list of enclosures. At serial No 9 of the enclosures there is a remark that the letter dated 12/17-12-1957 filed by the defendants (one sheet) is enclosed. There is the description of other enclosures and among these enclosures we find at page 131 the copy which should be in the possession of the Central Railway. There is an endorsement with the usual rubber stamp of the Court that this is produced by the defendants. It is obvious that at that stage no particular attention was paid to the exhibition of that document, because the original of that was already on record as Ex. P-4. However, being a document which has the inward number of the Office of the Superin-

tendent of Claims, Central Railway, Bombay, and a rubber stamp of the Court and a reference to it in the list of documents sent by the Court to the Court of Small Causes, Calcutta, there is no doubt that this is the original document produced by the defendants. Since one copy of it is already exhibited, this copy could also be read in this case. The importance of this document is that having given a reply to the plaintiff no. 2 through Advocate Mirchandani, the Chief Commercial Superintendent of the South-Eastern Railway, forwards a copy of this letter to the Superintendent of Claims, Central Railway, Bombay, for information in reference to his No. C-191-c-63/4079/58 dated 25-11-1957. The endorsement further says that he will please confirm the repudiation and accept liability for the consequences of repudiation.

16. When we told Mr Tambe the learned counsel for the railways that we wish to read this letter in a certain manner, he objected to the endorsement being interpreted in the absence of direct evidence. We told him that from the endorsement it is obvious that there was a communication by the Superintendent of Claims, Central Railway, to the Chief Commercial Superintendent, South-Eastern Railway, which letter is dated 25-11-1957. Since a copy of Ex. P-4 is endorsed to the Superintendent of Claims Central Railway, with a specific reference to his letter dated 25-11-1957, followed by a further direction that he should repudiate the liability and accept the consequences of such repudiation, it is clear to us that the earlier letter from the Superintendent of Claims, Central Railway, related to nothing else but the claim in question. Mr Tambe says that the correspondence may merely refer to a query of an accident. Since accident has taken place on the Central Railway which is an admitted position, we will not be wrong in assuming that the inquiry will be made by the Central Railway and not by the South-Eastern Railway. From this fact also, we think that it could be legitimately held that the Superintendent of Claims, Central Railway, was in correspondence with the Chief Commercial Superintendent, South-Eastern Railway, over the question of claim put in by the plaintiffs. The plaintiffs' claim lodged with either of these railways is nothing but the letter Ex. A. From this endorsement on the reverse of Ex. P-4 put at the copy of that letter at page 131 of the D file, we are satisfied that the Superintendent of Claims, Central Railway, also received the letter which was despatched by Chetan.

17. It is true that the letter Ex. A was not despatched under registered cover. The presumption which could be

available to a party under Section 142 of the Railways Act is not available to the plaintiffs in this case. However, there is no legal bar to prove the receipt of these letters by the respective addressees if otherwise it could be done. We have pointed out by now that out of the three endorsees, two have received the letter. We have believed Chetan when he says that he despatched all the three letters himself. Normally, therefore, looking to the common course of business that has been followed in this case, it would be legitimate to presume that the letter addressed to the General Manager, South Eastern Railway, must have reached him in due course. In the case of letters which are sent through post, their Lordships of the Privy Council have the following observations to make in *Harihar Banerji v. Ramshashi Roy*, AIR 1918 PC 102:

"If a letter properly directed, containing a notice to quit, is proved to have been put into the post office, it is presumed that the letter reached its destination at the proper time according to the regular course of business of the post office, and was received by the person to whom it was addressed and that presumption would apply, with still greater force to letters which the sender has taken the precaution to register, and is not rebutted but strengthened by the fact that a receipt for the letter is produced signed on behalf of the addressee by some person other than the addressee himself."

We are concerned here not with a letter sent under registered cover but under ordinary post. Even in that behalf it is permissible to infer that in due course of the business of the post office, a letter which is properly addressed and actually despatched must have reached its destination in course of time.

18. It may be remembered that compliance with the provisions of Section 140 of the Railways Act will entitle a party to claim a presumption of service under Section 142. The moment the facts contained in Section 140 are proved, it shall be deemed that the said letter is served. Such a presumption, as a matter of right, is not available to a party under Section 114 of the Evidence Act. The Court also is not obliged to presume certain consequences or results. Section 114 of the Evidence Act is only an enabling section. If from the given facts and circumstances of a case, the Court thinks that a certain inference should be drawn, it is permissible to do so. When looked at from that point of view, we find that there is an additional circumstance which should be taken into account before a final conclusion with respect to the service on the General Manager of the South-Eastern Railway is drawn. We may now refer

to the written statement. Paragraph 7 of the plaint alleged that the plaintiffs sent on 18th October 1957 to the General Managers of the South-Eastern Railway and the Central Railway statutory notices under Section 77 of the Railways Act by the letter of Advocate Mirchandani, a copy of which was enclosed with the plaint. The reply given by the defendants is worth noting in their own words. Paragraph 7 of the written statement is as follows:

"As to para 7, the notices referred viz, under S. 77 Indian Railways Act are not traceable. The defendants therefore deny the same. The plaintiff is put to the proof of the same."

Occurring of damage to properties while being handled by the railways may be a common occurrence and the railways might be receiving several notices in that behalf. Even then, the notification of a claim under Section 77 of the Railways Act is an important type of document. When a letter of this type is alleged to have been posted and now we find that there is sufficient, believable and cogent evidence of its despatch, the plea of the defendants makes peculiar reading. They have not the courage to say that they never received such a notice. They merely give a non-committal reply that no such notice is traceable and hence it is denied. This is an additional circumstance which we think should be taken into account in considering the cumulative effect of the evidence regarding the service of notice. In view of the circumstances which we have detailed earlier, read with the written statement of the defendants, we are satisfied that in this case looking to the facts proved and existing circumstances, an inference should be drawn that the letter dated 18-10-1957 was received by the General Manager of the South-Eastern Railway in due course of business. It must have been received at about the same time when the Chief Commercial Superintendent of that railway received that letter. The copy, Ex. A, shows that the appropriate name and the correct address of the addressee was there. We therefore hold in the circumstances of this case that a notice of claim under Section 77 by the plaintiff no. 1 was duly served upon the General Manager of the South-Eastern Railway. We have already pointed out that admittedly no such notice has been served upon the General Manager of the Central Railway.

19. Before we go to the discussion of a further technical defence, we would point out that we are not deciding in this appeal a point raised by the learned counsel for the respondents, though that point was discussed at considerable length. The learned counsel for the res-

pondents argued that a notice to the Superintendent of Claims, Central Railway, was sufficient notice to the Manager of the Central Railway or the Railway Administration itself. This position was hotly contested by Mr Tambe, and the learned counsel for both the sides referred us to several decisions of various High Courts including some decisions of this Court. We are neither dealing with the point nor deciding it in this appeal, as we will presently point out that on the view of the notice under Section 77 of the Railways Act served upon the General Manager of the South-Eastern Railway which we are taking, it is not necessary to decide this question.

20. Even though we have found that the General Manager of the South-Eastern Railway received a claim notice under Section 77 of the Railways Act, Mr. Tambe, learned counsel for the railways, argued that that cannot enable the plaintiffs to obtain any relief. The goods belonging to the plaintiff no. 1 were accepted by the Central Railway and they travelled over the routes of the Central Railway, as also of the South-Eastern Railway. The destination station was on the South-Eastern Railway and the delivery was effected by the South-Eastern Railway. However, it has been conclusively proved, which finding is accepted by this Court, that the damage took place on the lines of the Central Railway, and no part of the damage took place while the goods were being handled by the South-Eastern Railway. On these proved facts, he says that there are two distinct Administrations, namely, the Central Railway and the South-Eastern Railway. The liability of a railway administration for damages is now a matter of statutory provision. Section 80 of the Railways Act points out the railway that is to be held responsible. At present, section 80 stands amended in 1961; but we are dealing with a matter where the cause of action arose in 1957. As section 80 then stood, only two railways were answerable for the claim. The contracting railway administration was always liable to pay, but it was also open to a party to claim damages from that railway administration over whose routes the damage or loss took place. The railway administration which merely delivered the goods and on whose lines no part of the loss or damage took place was not answerable before the amendment of 1961. Taking that position into account and on the assumption that there are two distinct railway administrations concerned in this litigation, Mr. Tambe argued that there may be a notice to the General Manager of the South-Eastern Railway. However, that railway is not liable to pay any damages because no part of the damage or loss took place while the

goods were being handled by that railway. So far as the Central Railway is concerned, the loss occurred while they were in charge and they might have been answerable; but to them there is no notice under Section 77. In this manner, he says that even the finding given by this Court could not enable the plaintiffs to obtain a decree against either of the defendants.

21. According to Mr. Tambe, the notification of claim contemplated by Section 77 is to be made to each of such railway administrations which are sought to be held liable. Unless that is done it is not permissible to pass a decree against the particular railway administration. The opening clause of S 77 says that a person shall not be entitled to a refund or damages etc., until he does what is prescribed by the latter part of that section. Even if therefore damage has been caused and the claim is otherwise good, the person concerned who does not observe the provisions of Section 77 shall not be entitled to recover any damages or refund from the railways. This being an imperative section, it must be strictly observed. According to him the provisions of Section 80 of the Railways Act must be read in conjunction with Section 77 for understanding the relevant railway administrations which are to be served with notices. Since section 80 of the Railways Act permitted a party to claim damages from the contracting railway, or where the goods travelled over the lines of other railway administrations and which traffic is described as through traffic, from the railway administration over whose lines the damage took place there is an option to the party to sue either the contracting railway administration or the railway administration over whose lines the damage took place. Since Section 80 points out the railway administrations which are to become liable, unless the claim under Section 77 is notified to that railway administration which is to be held liable, there can be no proper notice at all. Having made out these premises, he says that each of these so-called railways of the Union of India like the Central Railway and the South-Eastern Railway are separate Railway administrations or administrations within the meaning of that expression contained in Section 3(6) of the Railways Act. There is considerable divergence of opinion among the High Courts over the correct meaning of Sections 77 and 80 and the sufficiency of notice under S 77 before a plaintiff succeeds in a suit for damages. Both the learned counsel therefore addressed us at great length over the correct meaning of the expression "railway administration" as used in Section 77.

22. Mr. Tambe for the appellants pointed out to us that the scheme of the Act must be taken into account in order to understand the definition of "Railway Administration" or "administration". About the ownership of the railways and the historical survey of the ownership and transfer of management of the railways to the Union of India, information was placed before us from the judgment of the Madras High Court in *Narayan-swami v. Union of India*, AIR 1960 Mad 58. Mr. Tambe admitted that substantially the references to facts were correct. However, he points out that the ownership of the railways by the Union of India has nothing to do with the definition of "railway administration" or "administration." Factually, it may be correct to say that the ownership of the large stock and property of the railways in the Central Government started in 1890. The taking over of the administration began in 1925 and was well-nigh complete in 1944 except for a few minor railways. Mr. Tambe added as a fact from the information that he had collected from the Department that the mileage of the state-owned railways stood at 56,923 kilometres, whereas the mileage covered by other railways not administered by the Union is hardly 818 kilometres. According to him neither the ownership of the railways nor the passing of the Indian Independence Act have any relevance while deciding the implication of the expression "railway administration" or "administration". These references appear in our judgment because in some of the judgments cited by the respective parties on which reliance is placed, there are repeated references to a position developed in law because of the passing of the Indian Independence Act. What exact difference the independence of this country makes to the interpretation of the expression "railway administration" or "administration" was not brought to our notice by either of the learned counsel.

23. In order to show that the ownership of the railways has nothing to do with that expression, Mr. Tambe points out that the definition may be properly analysed. The definition is as follows:

"3(6) 'railway administration' or 'administration' in the case of a railway administered by the Government means the manager of the railway and includes the Government and, in the case of a railway administered by a railway company, means the railway company;"

He says that another definition which may be looked into is that of "railway" contained in Section 3(4) which is as follows:

"'railway' means a railway, or any portion of a railway for the public car-

riage of passengers, animals or goods and includes—

(a) all land within the fences or other boundary marks indicating the limits of the land appurtenant to a railway;

(b) all lines of rails, sidings or branches worked over for the purposes of, or in connection with, a railway;

(c) all stations, officers, warehouses, wharves, workshops, manufactories, fixed plant and machinery and other works constructed for the purposes of, or in connection with, a railway; and

(d) all ferries, ships, boats and rafts which are used on inland waters for the purposes of the traffic of a railway, and belong to or are hired or worked by the authority administering the railway;"

24. Mr. Tambe argued that the essence of this definition of "railway administration" or "administration" is the administration of it and not ownership. Where a railway is administered by the Government, the definition says that the Manager of the railway shall be the administration, and it being an inclusive definition, it will also include the Government. Where a railway is administered by a company, it will mean the railway company. In the definition of "railway" itself we find references to various establishments, and ferries, ships, boats and rafts which may be hired by a railway for its own use and in that case, even that ferry, ship, boat and raft would be part of the railway under the definition. When a railway hires some of these vehicles or other property, undoubtedly the ownership rests somewhere else. The railway is a mere hirer. Even then that property so long as it is used for the purposes of the railway is included in the definition of "railway". When such a railway is administered by the Government, then the Manager of that railway which also includes the Government, becomes the administration. We think that looking to these two definitions, the ownership may not have particular relevance. However, in the various judgments referred to us, the reference to ownership has been made possibly because after 1925 the ownership as well as administration of all the major railways in this country have vested in the Government. The repeated references to the ownership therefore appear to be meant for the purpose of describing the fact of administration of the railway by the Government.

25. Mr. Tambe then pointed out to us that the Central Government has two different capacities. In one capacity, by the inclusive definition given in Section 3(6) it will also become 'railway administration' or 'administration.' In another capacity, it still remains the Central Government which has several functions to

perform as the Central Government vis-a-vis the railway administration. For the purposes of convenience, it may be stated that the position of the Central Government while it discharges purely governmental functions is one, and the duties which the Government has to discharge as railway administration on its commercial undertaking of the railways are quite another. The commercial activity namely the railways, is only one wing of the Government of India, but the Central Government has a separate existence as Government. Thus, he says, it is obvious if we look at the various provisions of the Railways Act.

26. Though Mr Tambe took us through the various provisions of the Act, we think that it is not necessary to refer to all of them. One or two instances would be enough to illustrate his argument. He referred us to the provisions of Section 17 of the Railways Act which lays down that subject to the provisions of sub-section (2), a railway administration shall, one month at least before it intends to open any railway for the public carriage of passengers, give to the Central Government notice in writing of its intention. Sub-section (2) of Section 17 authorises the Central Government to reduce the period of, or dispense with, the notice mentioned in sub-section (1). He therefore argues that this section contemplates the Central Government as something different from the railway administration which also includes the Government so far as the definition of that expression is concerned. Another instance which may be referred to is the provisions of Section 19. That section deals with the procedure in sanctioning the opening of a railway. This section in terms requires *the railway administration to obtain the sanction of the Central Government for doing certain acts*. Various other provisions were brought to our notice which clearly illustrate that the Central Government has two distinct capacities and therefore has two functions to perform so far as the Railways Act is concerned.

27. Having pointed out the difference between the different types of functions that the Central Government has to perform, he referred us to Chapter VII of the Railways Act which deals with the responsibility of railway administrations as carriers. Mr Tambe started his argument in this behalf by saying that the provisions of Chapter VII and particularly of S. 72, are a provision by which the responsibility of the railway administration is created. We find it difficult to accept this statement of the legal position. According to us the responsibility of the railway administration arises out of the contract of carriage it makes. Section 72 deals with the limits of that responsibility and does not speak of creat-

ing the responsibility. Sub-section (1) of Section 72 in terms says that the railway administration shall be responsible for loss, destruction or deterioration of animals or goods delivered to the administration and that responsibility shall be that of a bailee under Sections 151, 152 and 161 of the Indian Contract Act. It also enacts that this responsibility of the bailee shall be subject to the other provisions of the Railways Act. The responsibility of the railway administration therefore has its origin in the contract of carriage and that responsibility is limited by two circumstances. It is first pointed out by Section 72 that the responsibility will be of a bailee under the appropriate provisions of the Indian Contract Act, and there is a further limitation that it will be subject to the other provisions of the Railways Act. This section, according to us, is a section which limits the responsibility but does not create it. However, that by itself may not be a serious difficulty in proceeding further with the argument of Mr. Tambe. Having pointed out that there is a certain type of responsibility on the railway administrations to make good the loss, he comes to the provisions of section 77, the non-observance of which would disentitle a party from claiming any refund or damages. Section 77 is as follows.

"A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by railway."

So far as this section is concerned he emphasises the use of the Article "the" used before "railway administration" with which the claim is to be lodged. He says that the implication necessarily is that the claim must be preferred to that particular railway administration which is sought to be held liable for the loss or damage. In order to understand the correct meaning of Section 77, it is argued that it must be read in conjunction with Section 80. Section 80 deals with the liability of the several railway administrations, whereas Section 77 merely deals with the preferring of the claim before a legal remedy is resorted to. It is therefore necessary that the appropriate railway administration is to be first found out which is responsible for answering the claim. Section 80 of the Railways Act is as under:

"Notwithstanding anything in any agreement purporting to limit the liability

of a railway administration with respect to traffic while on the railway of another administration, a suit for compensation for loss of the life of, or personal injury to a passenger, or for loss, destruction or deterioration of animals or goods where the passenger was or the animals or goods were booked through over the railways of two or more railway administrations, may be brought either against the railway administration from which the passenger obtained his pass or purchased his ticket, or to which the animals or goods were delivered by the consignor thereof, as the case may be, or against the railway administration on whose railway the loss, injury, destruction or deterioration occurred."

According to this section, only two railway administrations are answerable — the contracting railway as well as the railway on whose routes the loss or damage took place. Mr. Tambe argues that either of these railway administrations being answerable, the plaintiff or a claimant must first make up his mind as to against which railway administration he wants to make a claim. Having done so, he may prefer a claim to that railway administration under Section 77. Mr. Tambe further argues that in many cases of this type, several railway administrations are being joined, but strictly speaking, it is not necessary. The contracting railway being always liable, the purpose of the claimant would be served if he gives a proper notice to the contracting railway administration alone and sues it in due course if the claim is not settled. However, if the claimant chooses to serve a notice under Section 77 on some other railway administration than the contracting railway administration, then he cannot succeed unless that railway administration is shown to be responsible under Section 80.

28. Mr. Tambe also made some reference to Sections 79 and 80 of the Code of Civil Procedure also. According to him, the provisions of section 79 merely lay down the description of the Government concerned in case a suit is to be filed by or against the Government. It does not require that a claim against the railway should necessarily be filed against the Central Government. Section 80, according to him, in the same manner merely lays down how a notice shall be served upon the Government if a suit against Government is intended. Clause (b) of Section 80 merely tells a claimant that in the case of a suit against the Central Government where the suit relates to a railway, then the notice must be served upon the General Manager of that railway. According to him, the expression "that railway" after the words "the General Manager of" is also important.

This again indicates that a notice under Section 80, even though intended to make a Government a party defendant must be addressed to the General Manager of that railway which is sought to be made liable. The wording of Section 80 of the Code of Civil Procedure also gives the clue to the understanding of the real meaning of Ss. 77 and 80 of the Railways Act. He therefore argues that in the present case, the notice under Section 77 ought to have been addressed to the General Manager of the South-Eastern Railway as well as the General Manager of the Central Railway.

29. According to Mr. Tambe, the definition of the word "railway" means not only the entire railway system but any portion of it. It is therefore possible to visualise that a railway administration could be one administration for all the railways or there could be separate administrations for portions of the railways. As even a portion of the entire system is a railway, a separate unit, by whatever name called, either a division or a zone, would constitute a separate railway administration. If this is so, then he says that the definition in Section 3(6) may again be closely seen. In the case of Government-administered railways the definition speaks of the Manager of "the" railway as being the railway administration. Primarily, therefore, it is the Manager of "the" railway. Where the entire railway system of the country is divided into parts or zones, and each part or zone has a separate Manager as is apparent from the present structure of the Indian Railways each part or zone would be "the" railway for the purposes of understanding the Manager thereof. He therefore says that the Manager of such a railway, namely, zone has all the rights of the Manager over that zone alone and not over the rest of the network of the Indian Railways. He says that so far as he knows, a General Manager for the entire country has not been appointed. What we therefore have is the division of the Indian Railways administered by the Government into zones, with each zone having a separate Manager of its own. Primarily, therefore, each such zone headed by a Manager is a railway administration or administration for the purposes of this Act. It is entirely different, he argues, that the definition being inclusive, in the case of each Manager, the Government would also be included in the administration. However, the Government being capable of discharging different functions in different capacities would be answerable as administration in respect of a certain part or zone when a claim relates to that particular zone. There is nothing inconsistent in the definition which requires any other meaning to be given to the expression "rail-

way administration" or "administration". The inclusion of the Government in the definition cannot therefore be something which is decisive of the real meaning. Government, he says, has several parts to play, as Government, as railway administration etc., and therefore has been included in the definition as representing several zones.

30. Mr Tambe then pointed out as a mere historical fact that the definition of "railway administration" was amended twice. Before 1948 there were certain railways owned and managed by the Indian States. In the case of those railways, in the definition, along with the Government was also included a reference to the Native States. The word "Native" was omitted by the amending Act of 1948 and the reference to the "States" itself was omitted by the Adaptation of Laws Order, 1950, after which the Indian States merged with the adjoining territories and the entire country emerged as the Union of India, with the ownership and administration of all the major railways vesting in the Union of India. The reference to the "Native States" or "States" therefore became unnecessary and was properly deleted.

31. According to Mr Tambe, even though the administration of all the major railways was transferred to the Central Government by about 1944, there has been no change or amendment made in Section 80 of the Railways Act. That section still conceives of more railway administrations than one and the responsibility of each one is fixed according as the administration is a contracting party or a party on whose lines the damage took place. This reference therefore could not be to any other administration than each of the separate administrations which are headed by a separate Manager. This is the only rational way in which the provisions of the Railways Act must be understood and interpreted. If that is done then it is obvious that in the present case the damage occurred on the lines of the Central Railway whose Manager has no notice at all under Section 77 of the Railways Act. The South-Eastern Railway, whose Manager had a notice according to the finding of this Court, is not liable because no part of the damage took place on its lines.

32. How Sections 77 and 80 of the Railways Act should be understood is therefore the main question that falls to be decided in this appeal. There are two distinct views which are subscribed to by the various High Courts and Mr Tambe relied upon a number of judgments which took the view which he is canvassing. The first case on which he relies is *Dominion of India v. Firm Musaram Kishunprasad*, AIR 1950 Nag 85. That

judgment relates to a cause of action which arose on or about 8-5-1946 253 bags of dry coconuts were despatched from Rajahmundry Station on the M. S. M. Railway to the plaintiff firm at Howbagh station (Jubbulpore) on the B. N. Railway. As there was a short delivery, the plaintiff instituted a suit after serving a notice upon the Secretary to the Central Government "Commerce and Railway Department". The defence was that the loss did not occur on the B. N. Railway. The loading of the wagon was done at Rajahmundry and the consignment booked under a "said to contain" railway receipt. The wagon was received intact at Gondia but only 251 bags were found inside. The B. N. Railway authorities intimated this fact to Rajahmundry and transhipped the bags as found and later delivered the same to the consignee at Howbagh station. The main contention was that a notice ought to have been served upon the M. S. M. Railway and that railway ought to have been made a party. This contention of the B. N. Railway was accepted by the Division Bench of the Nagpur High Court on the footing that under Section 80 of the Railways Act, each railway administration is to be treated as a separate entity with a separate existence and personality. The injured party has the option to sue the railway administration with whom the contract was made or the railway administration on whose railway the loss has occurred. Merely suing the Governor-General as representing the entire State-owned railways (at least before the Indian Independence Act was passed, which is (sic) the case here) is not a proper form of suit because that would render Section 80 otiose and meaningless. It was further observed that whatever may be the position after the Indian Independence Act, it is clear that the suit as laid ought to have been against one or the other railway administration or both. Suing the Governor-General would not make the railway administration a party as it is not only contrary to the scheme of the Act but would also make Section 80 of the Act inoperative. This judgment has been followed subsequently by the Madhya Pradesh High Court in *Central India Chemicals Private Ltd v Union of India Railways*, AIR 1962 Madh Pra 301. It was held in that case that where a consignment reaches the consignee in a damaged form, it is for him to decide whether he is able to spot the particular railway administration over whose railway his goods were damaged. If he is sure of it, he need implead that administration only. If he is not, he should implead the administration which received the goods from the consignor. The choice given by Section 80 is not between suing one or more rail-

way administrations and not suing any of them at all; it is between suing this or that out of two or more administrations involved. It is no answer to state that the Union of India having been impleaded, the non-joinder of one or more railway administrations is immaterial; it is a statutory requirement based on sound principles. The Division Bench based these observations upon the judgment to which we have referred earlier.

33. The next judgment relied upon is *K. Virraju v. Southern Railway*, AIR 1959 Andh Pra 594. According to the learned Judges, Section 77 read with Section 80 of the Railways Act makes it clear that Section 77 treats each of the railway administration as a separate entity with separate existence and personality, though they may now happen to be owned by the Central Government. The purpose underlying Section 77 is that the authorities concerned should be apprised of the loss or damage promptly in order to enable them to investigate into the matter quickly and get some information as regards the loss or damage. This interpretation of Section 77 of the Railways Act, according to the learned Judges, is reinforced by the terms of Section 80 of the Code of Civil Procedure, as also Section 140 of the Railways Act. Hence, according to the Andhra Pradesh High Court, any railway administration against whom relief is sought must be served with notice under Section 77 of the Railways Act and failure to do so will disentitle the aggrieved party to maintain a suit for any of the reliefs mentioned in that section. The Andhra Pradesh High Court was addressed on the point that Section 80 was enacted at a time when the different railway systems belonged to different owners and, therefore, such a provision was necessary. According to them, however, that does not alter the situation as otherwise Parliament would have amended Section 80 suitably. That section, as it stands, points to the conclusion that the individuality of each of the railway administrations is continued. Thus, Section 80 furnishes a clue to the interpretation of Section 77.

34. A similar view has been taken by a learned single Judge of the Orissa High Court in *K. P. Cloth Stores v. Union of India*, AIR 1960 Orissa 154. The learned Judge held that in case of through booking of goods where the goods consigned are carried over several railway administrations, notice of claim for the loss or damage to the goods has to be given to each of the railways concerned, and notice to one railway administration is not sufficient notice to the other railways in order that they may be made

liable for the alleged loss or damage. The learned Judge referred to several judgments and prefers to follow the view of the Andhra Pradesh High Court and the Patna High Court in preference to the view of the Madras High Court.

35. Mr. Tambe then referred us to the judgment of the Patna High Court in *Governor-General v. Sukhdeo Ram*, AIR 1949 Pat 329, which takes a survey of a large part of the case law on the point. The facts of that case show that the suit was filed against the Governor-General-in-Council as representing the railway which delivered the goods. The evidence in that case showed that no part of the destruction or damage took place while the goods were being handled by the delivering railway. With reference to S. 80 of the Railways Act, the judgment proceeds to hold that it only gives a choice of claiming his remedy either against the railway administration to which the goods are consigned or against the railway administration on which the loss occurs. If the loss has not taken place on the railway which is sued, a suit against the Governor-General representing that railway could not succeed and the Governor General could not be held liable for the loss on the theory of agency or partnership. This judgment has mainly proceeded upon the construction of Sec. 80 of the Railways Act as giving the clue to the understanding the railway administration which is required to be apprised of the claim under Section 77. The learned Judges referred to the divergence of opinion between various High Courts before Section 80 of the Railways Act was enacted in 1890. Since that section was enacted for the purpose of setting at rest the controversy, the learned Judges held that that section must be read in conjunction with Section 77 in order to ascertain which railway administration is in fact liable. The notice of claim has got to be given to that Administration which is to be held responsible. On that view of the matter, the plaintiff there was non-suited because he brought a suit, may be, in the name of the Governor General but representing a certain railway administration which was not at all responsible for the loss.

36. Mr. Tambe also drew considerable support from the judgment of the Calcutta High Court in *Jagannath Chetram v. Union of India*, AIR 1966 Cal 540. In the case before the Calcutta High Court, the suit was laid against the Eastern Railway on whose routes no part of the loss or damage had occurred. On the basis of Section 80 of the Railways Act, the learned single Judge of the Calcutta High Court holds that the Union of India will be liable as carrying on business of railway administration provided the railway administration in respect whereof

the liability arose is the railway administration to which liability can be fastened by virtue of the provisions of the Railways Act. In the case where the goods were accepted by the Western Railway for transhipment and the Eastern Railway merely delivered them, the Court at Calcutta could not be said to have jurisdiction on the ground that the Union of India carries on the business of one of its railways, namely, the Eastern Railway, at Calcutta. The proposition for which support is sought from this case is that the various zonal railways like the Eastern Railway, Western Railway etc., are recognised as separate entities and as such notice must be served upon that railway administration which is sought to be made liable.

37. In all these cases, the basis accepted for the particular interpretation is that each zonal railway is a separate administration. This conclusion is drawn on the basis that the definition of "railway administration" or "administration" speaks of the Manager of the railway where it is administered by the Government, and also included the Government. Since the Manager of a railway represents the administration as such, it is contended that the same meaning must be given to the expression "railway administration" when used in Section 77 of the Railways Act. It is further held that Section 80 of the Railways Act, which speaks of the railways that are answerable for a claim, conceives of different administrations, and only that administration is responsible which is either the contracting railway or the railway over whose routes the damage or loss took place. This section is supposed to control the provisions of Section 77 and gives a clue to the interpretation of that section. Since different administrations are involved in the case of what is known as "through traffic", the responsibility of each administration must be separately ascertained. Aid is also taken in furtherance of this argument from the provisions of Section 140 of the Railways Act, as also of Section 80 of the Code of Civil Procedure. Under Section 140, the service of any document in the case of a railway administered by the Government is required to be made on the Manager. Emphasis is laid upon the article "the". It is stated that the Manager of the particular railway which is responsible either as the contracting railway or the railway on whose lines the damage took place, was in the view of the Legislature while making use of that article. Section 80 of the Code of Civil Procedure is also relied upon as furnishing a guide or clue to the interpretation of Sections 77 and 80 of the Railways Act. So far as Section 79 of the Code of Civil Procedure is concerned, it only deals with

the description of the Government if it is required to be made a party either as a plaintiff or as a defendant in a suit S 80 of the Code has been recently amended in 1948. This amendment is particularly referred to as indicating the manner in which notice must be given to the Central Government where it is going to be a party defendant in a suit. The Union of India could be responsible to answer the claim of a party dealing with the Indian railways because of the definition of the expression "railway administration". Reference is made to clause (b) of Section 80 of the Code of Civil Procedure which requires that in the case of a suit against the Central Government where it relates to a railway, notice is to be given to the General Manager of 'that railway' (the underlining (herein

') is ours). Emphasis is laid again on the expression "that railway". "That railway" means the particular railway which is either the contracting railway or is otherwise responsible as the railway on whose lines the damage took place. As a cumulative effect of reading the provisions together, it is held that unless the particular administration which is responsible or liable in damages is made aware of the claim by a notice under Section 77 of the Railways Act, there is no proper compliance with section 77. As a logical corollary it is assumed that Section 80, though enacted in 1890, has remained unamended till today despite the Government owning and administering all the major railways of this country. It therefore means that Parliament in terms continued the existence of this section in the same form, because the different zonal railways for which the Union of India appointed Managers are being treated as separate railway administrations which have a separate legal existence and are legal entities capable of suing and being sued. Even though the ultimate liability may be of the Union of India, it is assumed that the Union of India, as owning and administering the railway which may be a zonal railway according to the present set-up is responsible only as such and not in its ultimate capacity as the Union of India. This reasoning has been placed before us by Mr. Tambe and he relied upon the above-mentioned judgments for supporting the propositions canvassed before us.

38. According to us, the provisions of Section 77 of the Railways Act must be independently examined and effect must be given to them as they are found in that section. Section 80 of the Railways Act may have relevance in understanding which administration is liable. However, Section 80 must be understood in the manner in which it came to be introduced in the Act. The legislative his-

tory of Section 80 as also the history of ownership and administration of the various major railways in this country by the Union of India must be remembered for the purpose of understanding the import of each of these sections. There was considerable controversy before 1890 over the liability of the various company-owned and administered railways. Many company railways were in the habit of inserting a clause by which their liability was restricted to their handling of the goods and until they were travelling on their lines. In spite of such a clause, the contract of carriage was from one station to another, which many times fell upon the railway owned and administered by another company. The consignor or the consignee had not always the means to know where precisely the loss or damage occurred. In the circumstances, various shades of opinion were current in the decisions of the different High Courts. Some held that the contracting railway was an agent of the other administration over whose rails the goods were ultimately carried and delivered. Some held that the other administration was an agent for and on behalf of the contracting railway. The liability was accordingly being fixed either in the capacity of principal or agent. In order to set at rest this controversy, Section 80 came to be introduced in the Railways Act. The provisions of Section 80 are overriding provisions. That section opens with the clause "Notwithstanding anything in any agreement, etc." This means that whatever the contract of carriage, the liability in damages is statutorily fixed under the provisions of Section 80. Even if a clause of terminating the liability of the contracting railway after the goods are handed over to the other railway were to be introduced in the contract, after 1890 the provisions of Section 80 would override such a contract. Undoubtedly, the administration of the various company-railways vested in various companies when that section was introduced. Each company-railway was a separate railway administration in the eye of law. Each one of them was a separate legal entity capable of suing and being sued as such. This being the purpose for which section 80 was introduced even today that section has to serve the very purpose for which it was enacted.

39. According to an agreed statement of facts made before us, there is no doubt that most of the property belonging to the various railways became of the ownership of the Union of India or the erstwhile Government of India by about 1890. The process of taking over the administration of the various railways from the companies started in or about 1925

and continued till about 1944. The railways owned by the former princely States still remained of their ownership and those railways were merged with the Union-owned railways in or about 1950. By about 1950, therefore, a broad picture emerged where the Union of India was the owner as well as administering all the major railways in this country. A reorganisation of these railways started by 1-4-1951 and was completed by 1-4-1952. As a result of the amalgamation of the various company-railways and the State-owned railways and the reorganisation thereof, the railway system owned and administered by the Union of India came to be divided into six zones. Each of such railways was given a name, like the Western Railway, Central Railway, Southern Railway, etc. Even though the major portion of the railways began to be administered by the Union of India, still there were some railways owned and administered by private companies, as also owned and administered by District Boards. Mr. Tambe emphasised the fact that the mileage covered by such railways was very meagre. That may be so and it may be a correct statement of fact. How does it make any difference in principle? So long as there exist even today railways administered by the Union of India, as also railways administered by private companies, there may be occasions when goods have to travel over both these railways. Provision must continue to be made for a consignor who books goods which travel on both these railways. Section 80 is still the section to which resort must be had by such a party for holding either this or that railway responsible. The purpose and the intention for which Section 80 was enacted still subsist and the mere continuance of Section 80 in the form in which it was enacted cannot lead to the conclusion that the various zonal railways in which the Union railways are now divided became separate railway administrations with independent existence and legal status.

40. In the same manner, the provisions of Section 140 of the Railways Act, which merely speak of the manner of service of a document on the various railways cannot be of particular assistance in interpreting the provisions of Section 77 of the Railways Act.

41. According to us, in the matter of claim for damages, what is mainly relevant is the incident of these damages. In other words, who is really the contracting party and who is really responsible to a claimant? The claimant no doubt deals primarily with some portion of the railway which is known by one of the names given to the zonal railways. However, the definition of the expression

"railway administration" being an inclusive definition, it appears to us that the Manager of any of these railways always includes the Government. It may be noted that the expression "railway" means a railway or any portion of the railways. The entire system of Indian railways should be "railway", as also any portion of it. The expression "Manager of the railway" would mean the Manager of a particular portion which may have been separated for the purpose of administrative convenience. Even if there is a small unit which is also 'railway', in the eye of law the Manager of any such smaller unit would always include the Government. The responsibility for loss, destruction etc arises under the Indian Contract Act, as we have already pointed out and not under the Indian Railways Act. It is the Union of India or the Government which is included in all the Managers representing the various portions of railways, that is the contracting party and that is ultimately responsible for making good the loss due to destruction or otherwise. This basic fact, according to us, is the main factor which must be taken into account in understanding the function, purpose and sufficiency of notice under Section 77 of the Railways Act.

42. We think that the provisions of Sections 79 and 80 of the Code of Civil Procedure lend considerable support to the view we are taking. Section 79 merely describes how the Government shall be described as a party in a suit, whether as a plaintiff or as a defendant. Section 80 deals with a notice to be served upon the Government when a suit is contemplated against it. The amended section after 1948 lays down that when such a suit is contemplated against the Central Government where it relates to a railway, then a notice of the suit shall be served upon the General Manager of that railway. The expression "a suit against the Central Government where it relates to a railway" does indicate that in a case where a suit in respect of railway is to be filed, it is to be filed against the Central Government after complying with the provisions of Section 80 of the Code. The party that is therefore conceived of as responsible for making good the loss or damage is the Central Government. It is because the Central Government is required to be sued that a prior notice under Section 80 of the Code becomes necessary. In respect of that notice, the present section as it stands amended after 1948, speaks of a particular type of notice when the claim relates to a railway. We think that these provisions clearly indicate that the responsibility for making good the loss lies upon the Central Government and a suit for claiming such

damages has got to be filed against the Central Government.

43. With this background of the history of ownership and administration of the Indian railways, as also the legislative history of Section 80, the provisions of section 77 may now be examined. Undoubtedly, a notice of claim has got to be given within the period stated in that section, without which no person shall be entitled to a refund or claim. Even though there is a difference of opinion over the incidence of damages as we have already pointed out earlier, there seems to be unanimity of opinion among all High Courts over the purpose of Section 77. The Supreme Court in *Jetmull Bhojraj v D H. Railway*, AIR 1962 SC 1879 points out that in enacting Section 77 the intention of the legislature must have been to afford only a protection to the railway administration against fraud and not to provide a means for depriving the consignors of their legitimate claims for compensation for the loss of or damage caused to their consignments during the course of transit on the railways. The therefore pointed out that bearing the object in mind, the provisions of Section 77 should be liberally construed. It is true that in the case before the Supreme Court, the dispute was not as to which of the railways should be served but the dispute related to the contents of the notice. A notice undoubtedly was served upon the Manager of the railway concerned, but it was more or less a letter informing the Manager that certain packages were short-delivered and seemed to have been lost or misplaced. He should therefore make inquiries in that behalf. This was all that was stated and there was no claim as such for short delivery. The Supreme Court says that the purpose and object of Section 77 being to make the railway administration aware of a claim, so that stale and fraudulent claims may not be lodged against it, that purpose is already served by such a letter. In the circumstances, on a liberal construction of that section, the Supreme Court holds that that notice was sufficient notice under the provisions of Section 77.

44. Three questions seem to arise so far as the notice under Section 77 is concerned. One relates to the contents of the notice. In that behalf, we have now an authoritative pronouncement that information which would serve the purpose of bringing the claim to the notice of the railway administration is enough and the judgment of the Supreme Court is illustrative of one such incident.

45. The other two questions relate to the service of notice on a particular officer. On whom the notice should be served is also a question open to debate. We have already pointed out that in this appeal we are not deciding the question

whether a notice upon a subordinate officer of a high rank but not upon the Manager himself is or is not sufficient notice. The third question is whether in the case of through traffic each of the Managers is entitled to a notice or in the case of railways owned and administered by the Union of India, preferring of such a claim to one of the Managers whose railway has dealt with the consignment is sufficient compliance with Section 77. So far as the last point is concerned, we have already pointed out the purpose and the intention of Section 77. We have also pointed out that today most of the major railways are owned and administered by the Union of India. It is the Union of India that is ultimately responsible in damages. With this background, if we look at the fact that the railways are administered by the Government, we find that there is nothing in the provisions of the Railways Act which gives each of the zonal railways which is headed by a Manager a separate legal existence. Neither the definition contained in Section 3(6) nor any other provision seems to give an independent legal existence to such separate zonal railways. According to us, emphasis must be laid on the unity of administration and unity of ownership of the railways. It may be that there are certain functions to be performed by the Manager of a railway administration which are laid down in the Act. For the purpose of carrying out those functions, a Manager has to be provided for and the fact that such a Manager is the head of each section of the railways which is styled as a zone does not give him any separate legal existence in the eye of law. We do not think that each such zonal railway can sue or be sued in its own name.

46. A claimant, who ultimately must file a suit against the Union of India for recovering his claim relating to loss or destruction during the course of the consignment being handled by the State-owned and administered railway, has to comply with two distinct provisions. He must prefer a claim under Section 77 of the Railways Act and he must again serve a notice under Section 80 of the Code of Civil Procedure. The purpose and function of both these notices is more or less similar. Section 77 is primarily meant to make the railway administration aware of the claim, so that immediate investigation is started. The notice under Section 80 of the Code is also meant to enable the Government to consider whether the claim is just and should be compounded. Both the sections conceive of the possibility of compounding of just claims and avoidance of unnecessary litigation. According to us, therefore, two important conclusions are now reached. One is that each zonal rail-

way is not a separate legal entity and the other is that the purpose and functions of the notice under Section 77 of the Railways Act, as also Section 80 of the Code of Civil Procedure, are primarily to avoid fraudulent and delayed claims, and in the second place, to enable just claims being compounded.

47. We have also pointed out that so far as the content of the notice under Section 77 of the Railways Act is concerned, it is now accepted as a uniform rule that that notice has to be liberally construed. Whether the contents of a particular notice are sufficient compliance with the provisions of Sec. 77 may be, in the facts and circumstances of each case, a question to be decided independently. However, the principle on which that question has to be decided appears to be a settled one. If that is the primary purpose of Section 77 of the Railways Act, we think that the service of notice upon the Manager of any of the railways which have handled the goods would serve the purpose of Section 77 and would be sufficient compliance with it. Since all the railways are now owned and administered by the Government, the Manager of any of those railways which has dealt with the goods and gets enough particulars from the claimant about the number of the railway receipt, the nature of the goods and the date of booking etc. should be in a position to know from the record of his own section what has happened to the goods. It should be possible for him to immediately communicate with the Managers of other sections or zones on whose rails the goods have also passed. A notice to any of these Managers through whose railway systems the goods have passed is a sufficient notice to the Government which is administering all these railways. Emphasis is laid upon the Article "the" used before the expression "railway administration" in Section 77. Mr. Tambe for the appellants argued that the intention is that the particular railway which is responsible must alone be served. If more than one railways are sought to be made liable, then each one of them must be served with a notice. We think that the only import of the expression "the railway administration" used in Section 77 is to point out to the claimant that he must serve a notice upon that railway which has handled the goods. Any portion of a railway is also "railway" according to the definition contained in Section 3(4). Therefore, the reference in Section 77 is only meant to emphasise the fact that the notice must go out to some railway which has actually dealt with the goods and not to others. In this approach, we do not think that Section 80 of the Railways Act either furnishes a clue or controls the in-

terpretation. Section 80 is an independent provision made to point out the statutory liability irrespective of a contract.

48. So far as Section 80 of the Code of Civil Procedure is concerned, it was argued that the notice contemplated has got to be served upon the General Manager of "that railway". Here again, the argument was that it is that railway which is sought to be made liable that is conceived of by this section. According to us, this clause which is introduced after 1948 only illustrates that fact that the Central Government has multifarious activities, and so far as its commercial undertaking in the matter of railways is concerned, it wants the notice of suit against it to be addressed to the General Manager of the railway. If the notice relates to a railway and is addressed to the General Manager of that railway, the General Manager is in a position to report to the Central Government whether the claim is just or should be compounded or should be repudiated. The expression "that railway", according to us, only means that particular railway which has handled the goods and nothing more. If more than one zonal railways have handled the goods and the suit is contemplated against the Union, the General Manager of any one of the zonal railways would answer the description "the General Manager of that railway". Since there is now unity of administration and ownership, the General Manager of any of these zonal railways, through whose territories the goods have passed, would be in a position to make a report to the Union of India, as also be in a position to communicate with the General Managers of other zones over whose territory the goods have passed. We think the provisions of Section 80, clause (b), support the interpretation we are putting on the provisions of Section 77 of the Railways Act.

49. Mr. Thakar for the respondents relied upon a judgment of the Madras High Court in AIR 1960 Mad 58. In that case, a Division Bench of the Madras High Court has taken a survey of the case law relating to the provisions of Sections 77, 80 and 140 of the Railways Act. They have also considered the legislative history of Section 80, as also the history of ownership and administration of the major railways in this country. The implications of Sections 79 and 80 of the Code of Civil Procedure are also considered. The conclusion at which the Madras High Court arrived is that one notice under Section 77 to a General Manager of one Government railway concerned in the route over which through traffic passed will be sufficient because all the railways over which the traffic

passed are owned by the Central Government. They also pointed out that in the absence of any specific enactment either in Section 77 or in section 140 indicating the particular General Manager, to whom notice ought to be given in a case of through traffic carried over more than one zonal unit of the Government railways, notice to any one such General Manager is sufficient compliance with these provisions. We are in respectful agreement with the conclusions arrived at in that judgment.

50. Another important judgment we must refer to is Union of India v. Landra Engineering and Foundry Works AIR 1962 Punj 262. This is a decision of a Full Bench to which the question was referred whether notice under Section 80 of the Code of Civil Procedure was required to be served on both the Eastern and Northern Railways or service on the Northern Railway alone is sufficient compliance with the provision of this section. That was not a case directly dealing with the provisions of Section 77 of the Railways Act. However, the facts in that case show that the goods travelled over two systems of railway, namely, the Eastern Railway and the Northern Railway. The notice to the Government was served upon the General Manager of the Northern Railway alone and not upon the General Manager of the Eastern Railway as well. It was also held proved in that case that no part of the loss or damage occurred on the route of the Northern Railway. It was being contended on behalf of the Union of India before the Punjab High Court that the reference in clause (b) of Section 80 of the Code of Civil Procedure being to a notice to the General Manager of that railway, the notice ought to have been served upon the General Manager of the Eastern Railway as the damage occurred over the lines of that railway. The General Manager of the Eastern Railway alone could answer the description of "the General Manager of that railway" within the meaning of that expression as used in Clause (b) of Section 80 of the Code. Negating this contention of the Union of India, the Full Bench held that the principle on which a single notice to any one of the General Managers of the zonal railways which handled the goods is to be given is the same which we have pointed out earlier. For construing the provisions of Section 80 of the Code, the Full Bench refers to Sections 77 and 80 of the Railways Act and concludes that in view of the unity of ownership and unity of administration and looking to the purpose and function of the notice under Section 80 making the Government aware of the claim through the General Manager of any of the railways owned and administered by it is sufficient notice

under Section 80 of the Code of Civil Procedure. We are also in respectful agreement with the approach of the Full Bench of the Punjab High Court and we think that this approach lends considerable support to the conclusion to which we have arrived.

51. Though several other judgments were cited before us, we may refer to a judgment of the Allahabad High Court in *Firm Deekishan v. Union of India*, AIR 1966 All 16. This is a judgment of a single Judge dealing with the sufficiency of notice under Sections 77 and 80 of the Railways Act. The facts in that case show that the consignment travelled over the systems of various railways. The consignor was unable to locate the loss on a particular railway. The judgment holds that a notice to one of the railways meets the requirements of Section 77. What is important is that the learned Judge refers to the conclusion arrived at by a Division Bench of that Court in *Dominion of India v. M/s. Madan Engineering Tool Products*, First Appeal No. 161 of 1950, D/- 21-12-1962 (All). The learned counsel for the respondents made considerable search to find out whether this judgment was reported but he was unable to trace any report of this judgment. The passage quoted by the learned Judge is as follows:

"If, therefore, 'Railway Administration' includes the Government, and if notice of the claim under Section 77 of the Railways Act is served on the Government, could it be said that it has not been given to the 'Railway Administration'?"

Relying upon that reasoning the conclusion arrived at by the learned Judge is that a notice upon Manager of any of the zonal railways that handled the goods is a sufficient and enough notice under Section 77 of the Railways Act.

52. We may point out that no specific judgment of this Court dealing with the question discussed above was cited before us except 1966 Mah LJ 555 decided by one of us (Deshmukh J.). Mr. Tambe said that he could not find any other reported judgment directly dealing with the point. He however made available typed copies of three decisions. One is a judgment of a learned single Judge in *Civil Revn. Appln. No. 285 of 1957, D/- 17-3-53 (Bom)* at the Nagpur Bench. Whatever the facts of that case, the judgment in the civil revision application dismissed the revision on the ground that the railway station Mahim was not on the Central Railway and the notice to the Central Railway was not a proper notice to the Western Railway. In fact, the Central Railway had not handled the goods at all. This judgment cannot be of any assistance in the present appeal.

53. The second judgment made available is a decision of another learned

single Judge in *Civil Revn. Appln. No. 425 of 1959 D/- 13-7-1960 (Bom)*. In that case, the plaintiff, who had filed the suit, had given a notice under Section 80 of the Code of Civil Procedure. Though two points are covered by the judgment, the judgment mainly dismisses the revision application on the ground that the plaintiff did not make out a case of himself being an assignee of the goods and as such entitled to give notice. A cause of action has got to be properly made out in the notice under Section 80 of the Code. Since that was not done, the suit was liable to be dismissed. Incidentally, it was observed that the other ground, namely, that one of the railways was not served, was also well founded. In this case, the question of sufficiency of notice under Section 77 was not discussed at all.

54. The third judgment is also of a learned single Judge in *Second Appeal No. 351 of 1951, D/- 8-7-1953 (Bom)*. In that case also the sufficiency of notice under Section 77 of the Railways Act is considered, but the arguments addressed, as well as the trend of the judgment show that everybody assumed that notices to different railway administrations were necessary. The cause of action arose in June 1947 and the names of the railways are referred to as G. I. P. Railway etc. This is a case before the reorganisation of railways and the sufficiency of notice as we have dealt with has not been raised as a point of law at all. None of the judgments therefore covers the point which we have decided in this appeal.

55. So far as the factual position in the present appeal is concerned, we have already held that the notice under Section 77 issued by ordinary prepaid post to the General Manager of the South-Eastern Railway has been served upon him. That notice, according to us, is sufficient notice under the provisions of Section 77 of the Railways Act and it was not necessary for the plaintiff-claimant to serve separate notices upon the General Managers of the South-Eastern Railway and the Central Railway. If this is so, the appeal filed by the Union of India must fail and is dismissed with costs.

RGD

Appeal dismissed.

AIR 1969 BOMBAY 423 (V 56 C 70)

NAIN, J.

Smt. Indumatiben Chimanlal Desai,
Appellant v. Union of India and
another, Respondents.

Appeal No. 77 of 1967, D/- 3-7-1968,
against order of J. City Civil Court Bom-
bay D/- 8-3-1967.

LL/AM/G448/68/P

(A) Specific Relief Act (1963), Ss. 34, 37, 38 — Relative scope.

The difference between Section 34 on the one hand and Sections 37 and 38 on the other is that the Court may not grant a declaration where the matter is capable of consequential relief. But there is no such restriction put on injunctions and the Court may grant an injunction as a substantive relief without any prayer for declaration, although in many cases a declaration may be implicit in the grant of a perpetual injunction. (Para 5)

(B) Court-fees and Suits Valuations — Bombay Court-Fees Act (36 of 1959), Section 6 (iv) (d) — Suit, not for a declaration but for injunction only — S. 6 (iv) (d) has no application — Specific Relief Act (1963), S. 37

(Para 7)

(C) Court-fees and Suits Valuations — Bombay Court-Fees Act (36 of 1959), Section 6 (ix), Sch. II, Art. 23 (f) — Suit for injunction — Prayer for asking defendants to discontinue attachment — Prayer is equivalent to prayer for setting aside attachment — Suit falls under Section 6 (ix) — Civil P. C. (1908), Sections 15, 9, O 7, Rule 10 — Value of property exceeding Rs. 25,000 — Suit is beyond jurisdiction of Bombay City Civil Court even assuming that suit falls under Article 23(f) of Sch. II — Suit held to be within jurisdiction of Bombay High Court on its original side under CL 12 of Letters Patent — Suits Valuation Act (1887), Ss. 3, 4 — Letters Patent (Bombay), CL 12.

Plaintiff A was widow of B Defendant No 1 was Union of India. Defendant No 2 was Additional Collector Bombay in charge of Income-tax recoveries B was assessed to income-tax amounting to Rs 8,82,427 65 P. In realisation of the said amount of income tax, defendant No 2 had attached a property bearing city survey No 7/596 at Bhulabhai Desai Road Bombay Total area of land was 950 square yards Ground rent was Rs. 360/- per mensem. A alleged that the defendants had no right to attach or to continue the attachment of the said property for recovery of income-tax due by her husband. She prayed for permanent injunction against them asking them to discontinue attachment. The suit was filed in Bombay City Civil Court who returned the plaint for want of jurisdiction and for presentation to proper Court. In appeal against the order

Held (1) that the prayer in the plaint was equivalent to a prayer for setting aside the attachment. But even if it were not so, the prayer for setting aside the attachment would be implicit in the prayer in the plaint because without setting aside the attachment the Court could not ask the defendants to discontinue the attachment. Before the Court asked the defendants to

discontinue the attachment, the Court must come to the conclusion that the attachment was liable to be set aside. Thus, the suit fell under Section 6 (ix) of the Bombay Court-fees Act.

(Para 9)

(2) that even if the building was not included, the value of land alone would far exceed Rs. 25,000/- and would put the suit outside the jurisdiction of the Bombay City Civil Court. (1902) ILR 4 Bom 515 (FB) Reifd

(Para 9)

(3) that where the suit related to interest in land prior to the coming into force of the Bombay Court-Fees Act, 1959, it would have fallen under Section 7(iv)(c) of the Court Fees Act, and would have been valued in accordance with Sections 3 and 4 of the Suits Valuation Act, and if no rules were prescribed by the State Government, the suit would have been valued in accordance with the value of the interest in land at the market rate prevailing at the date of the institution of the suit. Even assuming that the suit fell under Art 23(f) of Schedule II of Bombay Court-Fees Act, for the purpose of jurisdiction the suit would have to be valued at the market value of the property which would in any case exceed Rs 25,000 and be beyond the jurisdiction of the Bombay City Civil Court. (1906) 8 Bom LR 85 & AIR 1937 Pat 560, Foll.

(Paras 11, 12)

(4) that if the subject matter of the plaintiff's suit was not capable of being estimated in money value, for the purpose of jurisdiction under the Suits Valuation Act, she could not state that it did not exceed Rs 25,000 in value, and unless she could state this the suit could not fall within the jurisdiction of the Bombay City Civil Court and must inevitably fall within the jurisdiction of the Bombay High Court on its original side AIR 1961 All 395 (FB) Appld.

(Paras 14, 15)

Cases Referred: Chronological Paras

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|-----------------------------------|----|
| (1961) AIR 1961 All 395 (V 48) = | |
| ILR (1961) 1 All 932 (FB), Paras- | |
| ram v Janka Bai | 15 |
| (1959) AIR 1959 Bom 517 (V 46) = | |
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| (1959) AIR 1959 Mad 253 (V 46) = | |
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| Mudaliar v Kumaraswami Muda- | |
| liar | 16 |
| (1957) AIR 1957 Pat 560 (V 44) = | |
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| v Syed Najmuzzaman | 11 |
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| 55 Bom LR 418, Burjor Pestonji | |
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| (1939) AIR 1939 Pat 531 (V 26) = | |
| 20 Pat LT 638, Deokali Kuari v. | |
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| (1906) 8 Bom LR 85 = ILR 31 Bom | |
| 73 Dayaram Jagjivan v. Gover- | |
| dhandas Dayaram | 11 |

(1902) ILR 4 Bom 515 (FB), Daya-chand Nemchand v. Hemchand Dharamchand

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Hemendra K. Shah with B. J. Kapadia, Inst. by M/s. Ratilal Desai and Co., Attorneys, for Appellant; V. H. Gumaste, Govt. Pleader and R. R. Jahagirdar, Asstt. Govt. Pleader, for Respondents.

JUDGMENT :— This is an appeal against an order dated 8th March 1967 passed by a Judge of the Bombay City Civil Court returning the plaint to the plaintiff for want of jurisdiction and for presentation to the proper court under the provisions of Order 7, Rule 10 of the Civil Procedure Code.

2. The plaintiff has filed the suit from which the present appeal arises in the Bombay City Civil Court on the following allegations:

The plaintiff is the widow of one Chimanlal Chhotalal Desai who died on or about 22nd January 1965. The defendant No. 1 is the Union of India. The defendant No. 2 is the Additional Collector of Bombay in charge of income-tax recoveries. The deceased Chimanlal Desai, the husband of the plaintiff, was assessed to income-tax amounting to Rs. 8,82,427.65 p. In realization of the said amount of income-tax the defendant No. 2 had attached a property bearing city Survey No. 7/596 of Malbar and Cumbala Hill Divisions, situated at Bhulabhai Desai Road, in the compound known as 'Oomer Park', Bombay. The building on the land is known as 'American View'. The total area of the land is 950 square yards. The tenure is pension and tax (sic) and the ground rent is about Rs. 360/- per mensem. The plaintiff contends that by a deed of assignment dated 6th November 1950 she and her husband Chimanlal purchased the said property in their joint names and as joint tenants and that on the death of her husband she has become the absolute owner of the said property by survivorship. According to her, as the attachment of the property is after the death of her husband, the property is not liable to attachment because she is the absolute owner of the said property. The second contention of the plaintiff is that her husband left a Will under which he has wrongfully disposed of the said property as if the same belonged absolutely to him, giving to her a permanent right of residence in the said property during her life-time and enjoyment of all the rents and profits of the said property during her life-time. The plaintiff contends that her husband had no right to dispose of this property by his Will in the aforesaid manner. Her third contention in the alternative is that in any event she has the right of residence and maintenance for which the said property is charged.

Her fourth and the last contention is that she made an application to the authorities to investigate her claim but without any investigation the authorities are putting the property to sale which they are not entitled to do. The plaintiff contends that the defendants, had no right to attach or to continue the attachment of the said property in proceedings for recovery of income-tax due by her deceased husband. In the plaint, the relief prayed for is only for an injunction in the following terms:

"That the Defendants be decreed and ordered by a permanent injunction and order both by themselves and by their agents and servants, from attaching, or continuing to attach, or from selling or dealing with or disposing or taking any proceedings relating to or from interfering with the plaintiff's rights in relation to the said property, being 'American View', situated at Oomer Park, Bhulabhai Desai Road, Bombay 26, or any part thereof."

3. The plaintiff had valued the suit relief in para 13 of the plaint and states that the said relief is incapable of monetary valuation and that for the purpose of Court-fees the suit would fall under Art. 23 (f) of Sch. II of the Bombay Court-fees Act. After lodging the plaint the plaintiff took out a Notice of Motion for interim injunction and applied to the learned Judge for ex parte ad interim order, on 8th March 1967. Instead of granting the ad interim order, the learned Judge ordered the plaint to be returned to the plaintiff. The order of the learned Judge is in the following terms:—

"Plaint returned for want of jurisdiction and for presentation to the proper Court as in my view, the "subject matter" of suit is beyond the pecuniary jurisdiction of the Court".

It is against the said order that the present appeal has been preferred.

4. Mr. Shah appearing for the plaintiff drew my attention to the provisions of Order 7 Rule 1 (i) of the Code of Civil Procedure which provides that the plaint shall contain a statement of the value of the subject-matter of the suit for the purposes of jurisdiction and court-fees, so far as the case admits. He contended that para 13 of the plaint did not set out the value of the subject-matter of the suit for the purpose of jurisdiction. He, therefore, asked me to remand the suit to the Bombay City Civil Court where he would amend para 13 of the plaint so as to put the valuation below Rs. 25,000/- The result of this would be that the City Civil Court would have jurisdiction to entertain the suit. I, however, did not accede to this request of Mr. Shah, because it appears to me on the face of it

that the subject-matter of this litigation was land admeasuring 950 sq yds on Bhulabhai Desai Road, Bombay, with a building thereon which property would be of a value not less than Rs 5 lacs of which the land alone would exceed rupees three lacs in value. I asked Mr. Shah to make a statement as to the market value of the property according to the plaintiff. Mr. Shah was unable to make a statement in absence of any valuation by a qualified valuer, but he stated that at the previous attempted sale by the income-tax authorities the highest bid was Rs 35,000/-. In my opinion, this would not be the market value of the property. But even if it were, it would be beyond the jurisdiction of the Bombay City Civil Court.

5 Coming to the form of the suit, the suit is so framed as to be a suit for an injunction. Under section 34 of the Specific Relief Act of 1963, a person may file a suit for a declaration as to any legal character, or as to any right to any property. This is a discretionary relief. Section 34 provides that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Section 37 pertains to injunctions. Sub-section (2) provides that a perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit, the defendant is thereby perpetually enjoined from the assertion of a right, from the commission of an act which would be contrary to the rights of the plaintiff. Section 38 prescribes when a perpetual injunction may be granted. The difference between Section 34 on the one hand and Sections 37 and 38 on the other hand is that the Court may not grant a declaration where the matter is capable of consequential relief. But there is no such restriction put on injunctions and the Court may grant an injunction as a substantive relief without any prayer for declaration, although in many cases a declaration may be implicit in the grant of a perpetual injunction.

6 In this appeal I am concerned with the valuation of the suit for the purpose of jurisdiction under the provisions of the Suits Valuation Act. But for this purpose one would have to consider the relevant provisions of the Court Fees Act applicable to a suit of this nature. Prior to 1959 the court fees in this State were governed by the Court Fees Act VII of 1870, which is a Central Act, as amended in its application to the State of Bombay. Section 7 (iv) (c) provided for a declaration with consequential relief. Section 7 (iv) (d) provided for suits for injunctions only. In both these cases it was provided that the plaintiff may put any valuation on the suit. Under the Bombay amendment of Section 8A of the

Suits Valuation Act, the valuation put by the plaintiff if inadequate could be questioned. With this however we are not concerned. Article 17 (iii) of Schedule II to that Act provided for a declaratory decree without consequential relief. Section 8 of the Suits Valuation Act applied to suits falling under Section 7 (iv) (c) and (d) with the result that the value of the suit for the purpose of jurisdiction was the same as the value for the purpose of Court-fees. The point to be borne in mind is that under the provisions of the Court Fees Act, 1870, in suits for declaration with consequential relief and in suit for injunction without declaration the plaintiff was allowed to put his own valuation on the suit, even though arbitrary, although in the State of Bombay arbitrary valuation could be questioned.

7. By virtue of the Bombay Court Fees Act XXXVI of 1959, the Court Fee Act, 1870 has been repealed in its application to this State. Mr. Shah appealing for the plaintiff contended before me that the present suit would fall either under Section 6 (iv) (d) first proviso or under Article 23 (f) of Schedule II to the Bombay Court Fees Act, 1959. Section 6 (iv) (d) provides for suits for declaration in respect of ownership, freedom or exemption from, or non-liability to attachment with or without sale or other attributes, of immovable property. The first proviso to this clause states that if the question is of attachment with or without sale the amount of fee shall be the ad valorem fee according to the value of the property sought to be protected from attachment with or without sale or the fee of Rs 15/- whichever is less. If the suit had been for a declaration of freedom or exemption from or non-liability to attachment of the property which is the subject-matter of the suit, the suit would undoubtedly have fallen under S 6 (iv) (d), first proviso. In that case, the Court-fees payable would have been ad valorem fee according to the valuation of the property subject to a maximum of Rs 15/-. Although the Court-fees may not have exceeded Rs 15/-, for the purpose of jurisdiction under Section 8 of the Suits Valuation Act, the valuation would have been the value of the property. But in my opinion, Section 6(iv)(d) has no application to the present suit, because this suit is not for a declaration. The plaintiff has chosen to bring the suit in the form of a suit for injunction only, and as I stated above under the provisions of the Specific Relief Act he is not compelled to seek a declaration.

8 The next contention of the plaintiff is that the suit would fall under Article 23 (f) of Schedule II of the Bombay Court Fees Act, 1959, which provides

fixed fee of Rs. 30/- in a plaint in a Civil Court not otherwise provided for and the subject-matter of which is not capable of being estimated in money value. Actually in the plaint, this is the provision relied upon by the plaintiff. Before I deal with this provision, I propose to deal with the contention of the learned Government Pleader appearing for the defendants.

9. According to the learned Government Pleader, the suit would fall under Section 6(ix) of the Bombay Court-fees Act, 1959. This provision pertains to suits to set aside an attachment of land or of an interest in land and states that the valuation shall be according to the amount for which the land or interest was attached. The proviso to this clause states that, where such amount, meaning the amount for which the land is attached, exceeds the value of the land or interest, the amount of fee shall be computed as if the suit were for the possession of such land or interest. If we examine the prayer in the plaint carefully, we find that the plaintiff has asked for a permanent injunction against the defendants restraining them from attaching or continuing to attach the property. This in effect would give to the plaintiff relief contemplated by the provisions of Section 6 (ix) of the Bombay Court Fees Act without using the exact words of that provision. That provision talks of suits to set aside the attachment of land. What the plaintiff wants the Court to do is to grant the plaintiff an injunction against the defendants asking them to discontinue the attachment. This is no more nor less than asking the Court to set aside the attachment. In my opinion, the prayer in the plaint is equivalent to a prayer for setting aside the attachment. But even if it were not so, the prayer for setting aside the attachment would be implicit in the prayer in the plaint because without setting aside the attachment the Court cannot ask the defendants to discontinue the attachment. Before the Court asks the defendants to discontinue the attachment, the Court must come to the conclusion that the attachment is liable to be set aside. I, therefore, hold that the suit falls under Section 6 (ix) of the Court Fees Act. Mr. Shah for the plaintiff invited my attention to a Full Bench decision of this Court in the case of 'Dayachand Nemchand v. Hemchand Dharamchand' (1902) ILR 4 Bom 515 (FB) where it has been held that the term "land" in Section 7 (viii) of the Court Fees Act, 1870, does not include a house. Whereas in this case what is attached is land with buildings thereon. Section 7 (viii) is in the same terms as Section 6 (ix) of the Bombay Court Fees Act. Mr. Shah therefore contended that Section 6(ix) was not

applicable. However even if the building is not included, the value of land alone would far exceed Rs. 25,000/- and would put the suit outside the jurisdiction of the Bombay City Civil Court.

10. Section 8 of the Suits Valuation Act in its application to the State of Maharashtra covers Section 6(ix) of the Bombay Court Fees Act. Accordingly, the value of the suit for the purpose of jurisdiction shall be the same as the valuation of the suit for the purpose of Court-fees. If we take the amount for which the property is attached, the said amount is Rs. 8,82,427.65. But in case on a proper valuation being made of the attached property, it is found that the value of the suit property is less than the amount for which it is attached, by virtue of the proviso the Court will have to compute Court fees on the value of the land as if it was a suit for possession. Section 6(v) provides for suits for possession of land, houses and gardens and states that they shall be valued according to the value of the subject-matter and that such valuation would be deemed to be, where the subject-matter is a house or garden, according to the market value of the house or garden. In case where the subject-matter is land the valuation would be as provided in the said clause.

11. Now I come to the contention of the plaintiff that the suit would fall under Article 23(f) of Schedule II to the Bombay Court Fees Act of 1959, because the subject-matter of the suit, according to the plaintiff, is not capable of being estimated in money value. Assuming that the subject-matter is not capable of being estimated in money value for the purpose of the Court Fees Act, it may still be capable of valuation for the purpose of Suits Valuation Act and jurisdiction. The suit obviously relates to land or interest in land. The plaintiff seeks to avoid the attachment of the suit land for payment of income-tax due by her husband. Section 4 of the Suits Valuation Act, 1887 provides that such interest in land is to be valued in accordance with the rules framed by the State Government under Section 3 of the Suits Valuation Act. It is conceded that no rules have been framed under Section 3 of the said Act. Under these circumstances, the judgment of the Bombay High Court in the case of 'Dayaram Jagjivan v. Gordhandas Dayaram, (1906) 8 Bom LR 85 provides that the valuation must be based on the market value of the land. The same question also came up for decision in the Patna High Court in the case of 'Jadunandan Gope v. Syed Najmuzzaman AIR 1957 Pat 560 where it is observed that suits relating to lands coming under the scope of Section 7 (iv) (c) of the

Court Fees Act are governed by Section 4 of the Suits Valuation Act, and, if no rules have been made under Ss 3 and 4 of the Suits Valuation Act for the valuation of an interest in land which is the subject-matter of a suit under Section 7 (iv) (c) of the Court Fees Act, the market value of the subject-matter has always been taken as the value for the purposes of court-fees and jurisdiction. Bearing the judgments of the Bombay and Patna High Courts in mind I have no hesitation in coming to the conclusion that where the suit related to interest in land prior to the coming into force of the Bombay Court Fees Act, 1959, it would have fallen under Section 7(iv)(c) of the Court Fees Act, and would have been valued in accordance with Sections 3 and 4 of the Suits Valuation Act, and if no rules were prescribed by the State Government, the suit would have been valued in accordance with the value of the interest in land at the market rate prevailing at the date of the institution of the suit.

12. Section 4 of the Suits Valuation Act as applicable to the State of Maharashtra expressly makes the said Section applicable to suits falling under Art. 23(f) of Schedule II of the Bombay Court Fees Act, 1959. Even if the contention of the plaintiff that her suit falls under that provision were correct, for the purpose of jurisdiction the suit would have to be valued at the market value of the property which would in any case exceed Rs 25,000/- and be beyond the jurisdiction of the Bombay City Civil Court.

13. If the suit fell under Article 23(f) of Schedule II of the Court Fees Act and it was incapable of being estimated in money value both for the purposes of Court Fees as well as for the purpose of jurisdiction under the Suits Valuation Act there would be another difficulty in the way of the plaintiff instituting this suit in the Bombay City Civil Court. In Bombay, by clause 12 of the Letters Patent the High Court in its original jurisdiction has been empowered to receive, try and determine suits of every description except those suits which fall within the jurisdiction of the Bombay Small Cause Court or the Bombay City Civil Court. The residuary jurisdiction vests in the High Court on its original side. It is not contended by the plaintiff that the suit falls within the jurisdiction of the Bombay Small Cause Court. In fact the suit has been instituted in the Bombay City Civil Court. We must see if the suit will fall within the jurisdiction of the Bombay City Civil Court. If it will not, it must fall within the residuary jurisdiction of the Bombay High Court on its original side.

14. Section 3 of the Bombay City Civil Court Act, 1948 provides that the City Civil Court shall have jurisdiction to receive, try and dispose of all suits and other proceedings of a civil nature not exceeding Rs 10,000/- in value and arising within the Greater Bombay except suits or proceedings which are cognizable by the Small Cause Court. The State Government is empowered to increase the jurisdiction of the City Civil Court by a notification upto a sum of Rs 25,000/-. The State Government has done so. The present jurisdiction of the Bombay City Civil Court therefore is to try and dispose of suits of a civil nature not exceeding Rs. 25,000/- in value. If, according to the plaintiff, her suit is not capable of being estimated in money value, it can not be predicted or stated that the suit will not exceed Rs. 25,000/- in value. In order to be able to state that the suit does not exceed Rs 25,000/- in value, the plaintiff should be able to estimate the money value of the suit. If she has not been able to estimate the money value the City Civil Court will have no jurisdiction and the suit must be filed in the Bombay High Court on its Original Side by virtue of the residuary jurisdiction under clause 12 of the Letters Patent.

15. A similar question arose before Allahabad High Court in the case of 'Paras Ram v. Janki Bai, ILR (1961) 1 All 932 = (AIR 1961 All 395) (FB). In an appeal from an order under Section 24 of the Hindu Marriage Act, 1955 made by the Civil Judge, Kanpur, the question arose whether in view of the fact that the subject-matter was incapable of monetary valuation, the appeal would lie to the District Court which heard appeals in matters not exceeding Rs. 10,000/- in value or to the High Court. It was held in that case by a Full Bench of Allahabad High Court that when no value was fixed on the petition and when there was no law also under which a certain value or a value not below or not exceeding a certain sum ought to have been fixed, it cannot be said that the value of the petition did not exceed Rs. 10,000/-. The Full Bench further held that the appeal in that case would lie to the court of the District Judge only if it could be predicted that the valuation of the petition did not exceed Rs 10,000/-. In the case of a subject-matter not capable of pecuniary valuation it cannot be said that it does not exceed any particular sum of money. It further held that the residuary power to entertain an appeal vests in the High Court not only when the value of the suit exceeds Rs 10,000/- but also when the subject-matter of the suit is incapable of pecuniary valuation. As I have observed in this case, if the subject-matter of the plaintiff's suit is not capable of being estimated in money value, for the pur-

pose of jurisdiction under the Suits Valuation Act, she cannot state that it does not exceed Rs. 25,000/- in value, and unless she could state this the suit will not fall within the jurisdiction of the Bombay City Civil Court and must inevitably fall within the jurisdiction of the Bombay High Court on its Original Side.

16. Mr. Shah appearing for the plaintiff invited my attention to the judgments in AIR 1939 Pat 531, AIR 1959 Mad 253, 60 Bom LR 587 = (AIR 1959 Bom 517), 55 Bom LR 418 = (AIR 1953 Bom 382). In my opinion, none of these judgments has application to the facts of this case because these cases pertain to valuation under Section 7(iv) (c) of the Court Fees Act, 1870, which permits the plaintiff to put arbitrary valuation on his plaint and they do not pertain either to Section 6(iv) (d) or Section 6(ix) or Article 23(f) of Schedule II of the Bombay Court Fees Act, 1959.

17. At the end of the arguments, Mr. Shah appearing for the plaintiff, handed me a draft of a proposed amendment and applied that I should permit the plaintiff to amend the plaint in terms of the said draft. This amendment introduces a fresh prayer (a) which in terms seeks a declaration that the attachment levied by the defendants on the suit property is null and void. The amendment retains the prayer for injunction. This amendment, if granted, may also take the suit to Section 6 (ix) of the Bombay Court Fees Act, 1959, and would require the suit to be valued in the manner provided in the said provision. In this amendment, the plaintiff seeks to value the prayer at Rs. 300/- for the purpose of Court fees and jurisdiction as if the suit fell under Section 6 (iv)(d) first proviso. However, in view of the fact that I have already held that the suit does not fall under that provision and would not fall under that provision even if the amendment were allowed, I reject the plaintiff's application for amendment. If the contention of the plaintiff is that such amendment would take the suit to Section 6 (iv)(d), third proviso, viz. a suit for declaration that the property is not liable to attachment with consequential relief, the suit would still be beyond the jurisdiction of the City Civil Court because ad valorem fee leviable in a suit for possession would be charged. The plaintiff would be free to repeat the amendment application before the Court to which she re-presents the plaint.

18. In the result, the appeal fails and is dismissed with costs.

19. The application for amendment to be treated as a civil application and the same is also dismissed with costs.
SSG/D.V.C. Appeal dismissed.

AIR 1969 BOMBAY 429 (V 56 C 71)
(NAGPUR BENCH)

CHANDURKAR AND BHOLE, JJ.

Sheshrao Parashram, Appellant v. Yeshwant Ambusa and others, Respondents.

Appeal No. 1 of 1964 D/- 2-11-1968, against judgment of S. P. Kotwal J. in S. A. No. 238 of 1959.

Limitation Act (1908), Arts. 142 and 144 — Tenant or his heirs holding over after expiry of lease are in juridical possession protected by law — Dispossession by person alleged to be heir of deceased lessor is dispossession by trespasser without any title — Suit for possession filed within 12 years from date of dispossession, held, maintainable — (Transfer of Property Act (1882), S. 116).

A suit for possession on the basis of a possessory title of the plaintiff who has been dispossessed by a person without any title is maintainable and the plaintiff is entitled to claim possession from the trespasser. AIR 1968 SC 1165, Foll.

(Para 10)

A tenant and after him his heirs are entitled to be in juridical possession after the expiry of the lease and are protected by law. When they are in such juridical and lawful possession, they are not liable to be ousted by a person who had no title to the property (in this case the alleged heir of lessor who had failed to establish their title and therefore, were trespassers. A suit for possession by the person who was in possession, filed within 12 years from the date of dispossession is maintainable. Case law discussed. AIR 1968 SC 620, Rel. on.

(Paras 9 and 10)

A party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title. Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title.

(Para 10)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 620 (V 55) =

1968 Mah LJ 496, Lallu Yeshwant Singh v. Rao Jagadish Singh 9

(1968) AIR 1968 SC 1165 (V 55) = 1968 SCD 500, Nair Service Society Ltd. v. K. C. Alexander 10

(1900) ILR 23 Mad. 179, Mustapha Sahib v. Santha Pillai 10

(1893) 20 Ind. App. 99 = ILR 20 Cal 834 (PC), Ismail Ariff v. Mahomed Ghous 10

(1888-89) 16 Ind. App. 186 = ILR 12 All 51 (PC), Mt. Sundar v. Mt. Parbati 10

FM/GM/C648/69/D

(1865) 1 QB 1 = 35 LJ QB 17, Asher v. Whitlock 10
 (1848) 11 QB 904=19 LJ QB 291, Burling v Read 10

V R. Padhye, for Appellant, C P Kalele, for Respondent No 1, S V. Natu, for Respondents Nos 1, 4 and 6

CHANDURKAR, J. The only question of law which arises in this Letters Patent appeal is whether a suit for possession on the basis of a possessory title by a person who was in the peaceful possession of the property and who was dispossessed by a trespasser without any title is maintainable against the trespasser

2. Field survey number 9/1B area 3 acres and 13 gunthas, of mouza Khanapur-najik, Rahmapur in Amrawati district originally belonged to the Ganusa Anusa. He executed a sale-deed Ex P 8 in respect of this field in favour of one Sadashioswami for an ostensible consideration of Rs 177/-. On 1st May 1940 he executed a lease deed Ex. 2 D-11 in favour of Sadashioswami (Ganusa) which entitled him to cultivate the field on lease for the year 1940-41. Possession of the field thus continued to remain with Ganusa. It is not disputed that even after the expiry of this lease the field continued to remain in possession of Ganusa Sadashioswami who was a celibate Sanyasi died about 6 months after the date of the sale-deed and Ganusa also died in July 1942. After Ganusa the field came in possession of his son Ambusa. Ambusa died in March 1943. Ambusa had 5 sons. Plaintiff Yeshwant is one of them. The field, however, actually remained in the cultivation of Ambusa's another son Khushal, who is defendant No 4. While Khushal was in possession of the field sometime in June 1948 he was dispossessed by defendant No. 1 Vishwanath, who claimed ownership of the field in two capacities. His main claim was as a Chela of deceased Sadashioswami and he claimed to have ascended his Gadi sometime in November 1947. His alternative claim was that he was an heir to Sadashioswami being the son of the sister of Sadashioswami.

3. After the defendant no 1 dispossessed Khushal, he sold the field to one Parashramsa Balkasansa by a registered sale-deed dated 12th February 1949 and handed over possession to the purchaser Parashramsa also parted with the field having sold it away by a sale-deed dated 24th January 1952 to the defendant no 2, who is the appellant in this appeal for a consideration of Rs 2,996-14-0. While thus defendant no. 2 was in possession of the field, the plaintiff, who is one of the sons of Ambusa, filed a suit for possession. His case was that contemporaneous with the sale-deed there was

an agreement of reconveyance which was entered into by Sadashioswami with the deceased Ganusa and that Ganusa had all along been trying to get a reconveyance in his favour. It was contended that the transaction was really a loan transaction. An effort was made to obtain a reconveyance by publishing a notice on 14-4-1941 in a local newspaper named Uday, and accordingly he attended the office of the Sub Registrar at Amrawati on 30-4-1941 awaiting the real owner to come there in pursuance of the advertisement to execute the document of reconveyance. None, however, turned up. However, according to the plaintiff, the ownership of the field continued with Ganusa and thereafter with his heirs. A relief of possession was thus claimed. The pleading of the plaintiff in paragraph 8 of the plaint was as follows

"The plaintiff hence sues for possession of the field on the basis of his prior possession till the date of his dispossession"

The sale by Ganusa to Sadashioswami was also challenged on the ground of want of legal necessity and it was alleged that it was not binding on Ambusa who had half share in the field. The price of the field was alleged to be Rs. 1000/- at the time of the sale.

4. The defence of the contesting defendants was that they denied the alleged agreement of reconveyance and title was claimed in the defendant no. 1 in two alternative capacities as already stated. The right of the plaintiff to file the suit was challenged on the ground that he had no subsisting title. It was also alleged that the plaintiff having allowed the claim to get a reconveyance to be barred by limitation the suit was liable to be dismissed. The defendant no 2 raised an additional plea that he was a transferee for value in good faith from an ostensible owner and he thus claimed protection under Section 41 of the Transfer of Property Act.

5. The trial Court and the first appellate Court concurrently found that there was an agreement of reconveyance entered into by Sadashioswami by which he agreed to reconvey the field to Ganusa within a period of one year on payment of Rs 177/-. The claim put forth by the defendant no 1, that he was either a Chela, or that he was entitled to succeed to the property of Sadashioswami by virtue of his being sister's son, was found against him. The plea raised by defendant no 2, appellant Sheshrao, that he was a bona fide transferee for consideration and was, therefore, protected under Section 41 of the Transfer of Property Act, was also negatived and it was found concurrently that the transferee had taken no steps to make any enquiry on the basis of which such a plea could be sustained.

The Courts of fact decreed the claim of the plaintiff and held that the plaintiff was entitled to file a suit claiming possession on the basis of possessory title from the defendant no. 1, who had forcibly ousted him from possession and who had no better title to the field.

6. Against the judgment of the first appellate Court, the defendant no. 2 filed an appeal. In that appeal it was contended before the learned single Judge that the plaintiff's suit was not maintainable because the plaintiff had failed to prove any subsisting title and also that he was in possession within 12 years from the date of the suit. Another contention which was raised in second appeal was that the plaintiff's suit was barred by time, because the plaintiff had allowed his remedy for specific performance of the agreement of reconveyance contained in the Karanama to be barred by time. The learned single Judge held that the suit as framed was not one for specific performance of an agreement of reconveyance, and therefore, the provision of Article 113 of the Limitation Act, 1908, did not bar the suit of the plaintiff.

7. The more substantial contention which was raised before the learned single judge was whether merely by virtue of the fact that a person was in lawful possession of the property he could file a suit against a trespasser, without any title, who had dispossessed him. On this question the learned Judge after reviewing a number of authorities, held that the defendant no. 2 had no title whatsoever, that he was a trespasser, that the title of the plaintiff on the basis of possession of Ganusa, his son Ambusa and Khushal from 7th June 1933 to June 1948 was clearly established, and that such title was sufficient to fulfil the requirements of Article 142 of the Limitation Act. The learned single Judge also held that the suit having been filed on 26-9-1956 the plaintiff's possession within a period of 12 years from the date of dispossession which was in June 1948 was proved. It was held that the possession of Khushal could at least be held to be on behalf of all the sons of Ambusa who were co-owners of the field. The learned Judge also confirmed the findings of facts recorded by the first appellate Court that Vishwanath had failed to establish that he was a Chela of Sadashioswami, or that he was the son of sister of Sadashioswami. The learned Judge confirmed the finding that Sheshrao had not taken any steps to ascertain that his transferor had no power to make the transfer to him and that he had not acted in good faith as required by the provisions of Section 41 of the Transfer of Property Act. The appeal was, therefore, dismissed by the learned Judge. On

leave under Clause 15 of the Letters Patent being granted by the learned Judge the appellant has filed this Letters Patent appeal.

8. In this appeal the learned counsel for the appellant fairly accepted the findings of fact that defendant no. 1 had failed to establish any title to the property. But the contention which he raised was that this was a dispute between two trespassers, namely, the defendant no. 1 and the plaintiff. According to him, the plaintiff had no kind of title to be in possession of the property after the expiry of the lease in favour of Ganusa executed by Sadashioswami and he must, therefore, also be taken to be a trespasser. The contention was that in such a case merely on the basis of prior possession a suit for restoration of possession on dispossession by a trespasser cannot be maintainable. According to the learned counsel, there was an additional factor in this case, namely, that the original owner Sadashioswami was dead and with the finding that the defendant no. 1 had no title to the property, the property was really without any owner against whom lawful possession could be claimed either by Ganusa or his heirs, and therefore, the possession of Ganusa and his heirs, namely, Khushal and the plaintiff, could not be said to be lawful possession to which they would be entitled to be restored.

9. We are unable to accept this contention. It is now well settled that the possession of a tenant after the expiry of the lease in his favour is juridical possession and is protected by law. If an authority for the proposition is needed it is to be found in a recent decision in *Lallu Yeshwant Singh v. Rao Jagdish Singh*, 1968 Mah LJ 496=(AIR 1968 SC 620). In this decision their Lordships of the Supreme Court, while dealing with the nature of possession of a tenant after his lease stands terminated, have observed as follows:—

"Under the Indian Law the possession of a tenant who has ceased to be a tenant is protected by law. Although he may not have a right to continue in possession after the termination of the tenancy, his possession is juridical and that possession is protected by statute. A lessor is not entitled to use force to throw out the lessee."

It will thus appear that after the lease in favour of Ganusa had terminated by efflux of time his possession and the possession of his heirs thereafter was a lawful and juridical possession which was protected by law. At the same time the defendant no. 1, who dispossessed Khushal, who was one of the co-owners being the heir of Ganusa, had no title to the property. He was, therefore, a trespasser who was not entitled to oust the

person in lawful and juridical possession, much less dispossess him by use of force.

10. The question whether merely on the basis of a lawful prior possession the person, who was in such possession and has been dispossessed by another who has no right to dispossess or who has no right to be in possession can file a suit for possession has now been decided by the Supreme Court in a recent decision in *Nair Service Society Ltd. v. K. C. Alexander*, AIR 1968 SC 1165. The plaintiff in that case who had been in possession of land was dispossessed by the defendant and in a suit for possession filed by the plaintiff the question was whether the plaintiff could maintain a suit for possession (apart from a possessory suit under the Travancore Laws analogous to Section 9 of the Indian Specific Relief Act) without proof of title basing himself mainly on his prior possession. The High Court found in favour of the plaintiff. In appeal before the Supreme Court the same contention was raised by the defendant and it was alleged that a suit for ejectment cannot lie without title and that a prior trespasser cannot maintain the suit against the later trespasser. The plaintiff's suit was held to be maintainable. While deciding the contention of the defendant their Lordships after observing that Section 8 of the Specific Relief Act did not prohibit a suit based on prior possession filed after the period of six months prescribed by Section 9 of the Specific Relief Act have approved the decision in *Mustapha Sahib v. Santha Pillai*, (1900) ILR 23 Mad 179 in which *Subramania Ayyar J.* observes

"that a party ousted by a person who has no better right is, with reference to the person so ousting, entitled to recover by virtue of the possession he had held before the ouster even though that possession was without any title."

"The rule in question is so firmly established as to render a lengthened discussion about it quite superfluous. *Asher v. Whitlock*, (1865) 1 QB 1 and the rulings of the Judicial Committee in *Mt. Sunder v. Mt. Parbat* (1888-89) 16 Ind App 186 (PC) and *Ismail Ariff v. Mahomed Ghous*, (1893) 20 Ind App 99 (PC) not to mention numerous other decisions here and in England to the same effect, are clear authorities in support of the view stated above. Section 9 of the Specific Relief Act cannot possibly be held to take away any remedy available with reference to the well-recognised doctrine expressed in *Pollock and Wright* on possession thus—

Possession in law is a substantive right or interest which exists and has legal incidents and advantages apart from the true owner's title"

Their Lordships of the Supreme Court with reference to these observations have observed in paragraph 13 of the judgment as follows:

"We entirely agree with the statement of the law in the Madras case from which we have extracted the observations of the learned Judges"

After quoting these observations their Lordships have further observed in paragraph 14 as follows—

"The uniform view of the courts is that if Section 9 of the Specific Relief Act is utilised the plaintiff need not prove title and the title of the defendant does not avail him. When, however, the period of 6 months has passed questions of title can be raised by the defendant and if he does so the plaintiff must establish a better title or fail. In other words, the right is only restricted to possession only in a suit under Section 9 of the Specific Relief Act but that does not bar a suit on prior possession within 12 years and 'title need not be proved unless the defendant can prove one'. The present amended Articles 64 and 65 bring out this difference. Article 64 enables a suit within 12 years from dispossession, for possession of immoveable property based on possession and not on title, when the plaintiff while in possession of the property has been dispossessed. Article 65 is for possession of immoveable property or any interest therein based on title. The amendment is not remedial but declaratory of the law" (Underlining (herein ' ') is ours)

The position is further summarised in Paragraph 18 of the judgment after making a reference to two English decisions in (1865) 1 QB 1 and *Burling v. Read*, (1848) 11 QB 904 and their Lordships have stated

"The effect of the two cases is that between two claimants, neither of whom has title in himself the plaintiff if dispossessed is entitled to recover possession subject of course to the law of limitation. If he proves that he was dispossessed within 12 years he can maintain his action"

Thus it is clear that a suit for possession on the basis of a possessory title of the plaintiff who has been dispossessed by a person without any title is maintainable and the plaintiff is entitled to claim possession from the trespasser. *Gunusa* and after him his heirs were entitled to be in juridical possession in spite of the expiry of lease and in fact were in such juridical and lawful possession, they were not liable to be ousted by the defendant no 1, who was a trespasser. The present suit was, therefore, maintainable and was rightly decreed because the suit admittedly is brought within 12 years from the date of dispossession, and it has been found on facts that the plaintiff was in possession with-

in the period of 12 years from the date of suit.

11. The contention, that the possession of Ganusa and his heirs could not be lawful because of the death of Sadashioswami, must also be rejected. Merely because the defendant failed to establish that he was the heir of Sadashioswami it could not be held that Sadashioswami did not have any other natural or religious heir and even assuming it to be so we fail to see how it can affect the nature of the possession of Gunusa and his heirs. The question whether he had any religious or natural heir does not arise in this case nor was the question as to who will become the owner of Sadashioswami's property in the absence of any such heir ever raised in these proceedings. It suffices, therefore, to say that the absence of any natural or religious or apparent heir of Sadashioswami coming forth to claim the property in suit cannot make unlawful the possession of Ganusa and his heirs, which was otherwise lawful.

12. The result, therefore, is that there is no reason to interfere with the judgment of the learned single Judge. The appeal, therefore, fails and is dismissed with costs.

LGC/D.V.C.

Appeal dismissed.

AIR 1969 BOMBAY 433 (V 56 C 72)

CHANDRACHUD AND NAIN, JJ.

Rangrao Bhausaheb Nalawade and another, Petitioners v. Bhimrao Babu Dhole and others, Opponents.

Spl. Civil Appln. No. 1617 of 1968, D/- 8-11-1968.

(A) Panchayats — Maharashtra Zilla Parishads and Panchayat Samitis Act (5 of 1962), S. 27 — Scope — Election petition under S. 27(1) merely challenging validity of election of declared candidate — Judge can only declare that election of returned candidate was void — He cannot declare any other candidate to be duly elected in his place in absence of any prayer in election petition — Rule equally applies even in cases falling under second proviso to S. 27(5)(b). (Representation of the People Act (1951), Ss. 100 and 101).

If in a petition under section 27(1) the candidate or the voter who has filed the election petition seeks no more than a declaration as to the validity of an election of a Councillor and does not seek a declaration in favour of any candidate, the Judge has nothing more to do than to declare the election of the returned candidate to be void. He can only declare a candidate to be duly elected in his place provided in the petition of the candidate or the voter a declaration is sought

in his favour and not otherwise.

(Para 11)

S. 27(2) provides only for the holding of an inquiry and not for any declaration of results. Declaration of result is provided for in Section 27(5) clauses (a) and (b). Clause (a) applies in cases of corrupt practices and clause (b) applies in cases where there are no corrupt practices. In cases where there are corrupt practices the election of the person guilty of the corrupt practices is to be set aside and no one is to be declared to be elected in his place. Where there is no corrupt practice the Judge has the power to set aside the election of a successful candidate and to declare the person who secured the highest number of votes elected in his place, provided a declaration is sought in his favour in the petition and not otherwise. (Paras 13, 14)

S. 27(5)(b) second proviso merely provides for the contingency of a tie and as to what is to be done in the event of a tie. But it does not permit a declaration of being duly elected to be made in favour of a person who succeeds in the casting of lots. Before such a declaration is made, the Judge will have to see whether a declaration is sought in his favour or not. It can only mean that if in casting of lots a candidate in whose favour a declaration is not sought succeeds, he cannot be declared to be duly elected. Thus, even under the second proviso to Section 27(5)(b) of the Act a candidate who is a party to a tie or equality of votes cannot be declared to be elected if no declaration is sought in his favour in the petition. That being so, it is unnecessary for a Judge to cast lots between a candidate in whose favour a declaration is sought or who has been declared to be elected and a candidate in whose favour no declaration is sought.

(Paras 12, 15, 16)

(B) Constitution of India, Arts. 226 and 227 — Application challenging decision in election petition under S. 27 of Maharashtra Act (5 of 1962) — Scrutiny of votes is a question of fact — High Court is not sitting in appeal over Judge designated to hear election petitions and would not be justified in interfering with the finding of fact. (Para 17)

B. Y. Deshmukh, for Petitioners; S. B. Bhasme, for Opponent No. 1.

NAIN, J. :— This is a petition under Articles 226 and 227 of the Constitution of India for setting aside an order dated 8th August 1968 made by the learned Assistant Judge, Kolhapur, in Miscellaneous application No. 76 of 1967 in an election petition and for declaring the petitioners to be duly elected as members of Panchayat Samiti Panhala from Wadiratnagiri constituency.

2. On 31st July 1967 election for Panchayat Samiti Panhala from Wadi-

ratnagiri constituency was held. It was a two-member constituency. The petitioners Nos 1 and 2 and respondents Nos. 1 to 3 were the candidates for these two seats. Respondent No 4 is the Returning Officer and respondent No. 5 is the learned Assistant Judge.

3. The votes were counted on 2nd August 1967 by the Returning Officer and he found that the petitioner No 1 polled 69 votes, respondent No 1 polled 69 votes and respondent No 2 polled 77 votes. Respondent No 2 having polled the highest number of votes was declared to be elected and as there was a tie between the petitioner No 1 and the respondent No 1, following the procedure prescribed by Sec 26 of the Maharashtra Zilla Parishads and Panchayat Samitis Act, 1961, Act No V of 1962, hereinafter for the sake of brevity referred to as the Act, the Returning Officer having been empowered in that behalf by the Collector decided by lots and as the lot fell for petitioner No 1, he was declared to be elected in the second seat.

4. Against the declaration of results by the Returning Officer, the respondent No. 1 filed an election petition under Section 27 of the Act. The learned Assistant Judge who heard the appeal appointed a Commissioner for recounting the votes. Before the learned Commissioner 17 voting papers were in dispute. The learned Commissioner could not take a decision with regard to these 17 voting papers. The learned Commissioner therefore counted the remaining votes and made a report to the trial Court. The trial Court scrutinised these 17 voting papers and ultimately found the result of the election to be as under —

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|----------------------|---------------|
| (1) Petitioner No 1 | ... 65 votes. |
| (2) Petitioner No 2 | ... 66 votes. |
| (3) Respondent No. 1 | ... 66 votes. |
| (4) Respondent No 2 | ... 68 votes. |
| (5) Respondent No 3 | ... 1 vote. |

5. There was no difficulty about respondent No 2 as he had secured the highest number of votes. He was, therefore, declared to be elected. The difficulty arose with regard to petitioner No 2 and respondent No 1 who had each secured 66 votes and there was a tie between them. The learned trial Judge came to the conclusion that as petitioner No 2 had filed no petition under Section 27 and had not even appeared in the proceedings, he could not be declared to be elected. He, therefore, declared the respondent No 1 to be elected. Accordingly, the learned trial judge declared the respondents Nos. 1 and 2 to be elected and he dismissed the petition of the petitioners. Against the said decision, the present petition has been filed.

6. As the case of the 1st and 2nd petitioners is on a different footing, Mr. Deshmukh appearing for the petitioners

first dealt with the case of the petitioner No 2. No declaration had been made in his favour although he had secured the same number of votes as respondent No. 1 on the ground that the petitioner No 2 had filed no petition under Section 27 of the Act and had not appeared in the proceedings.

7. The first contention of Mr. Deshmukh on behalf of the petitioner No 2 was that the further or second proviso of Section 27 (5)(b) provided that if, after computation by the Court, an equality of votes is found to exist between any candidates and the addition of one vote will entitle any candidate to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in favour of such candidates selected by lot drawn in the presence of the Judge in such manner as he may determine. Mr. Deshmukh contended that as there was a tie between the petitioner No 2 and the respondent No 1, the learned Judge ought to have followed the procedure prescribed by the second or the further proviso and should have cast lots between these two candidates and added one vote in favour of the person selected by lot and on the basis of such addition he should have declared the result. The contention of Mr. Deshmukh was that as the learned Judge had not followed this procedure, the declaration of election in favour of the respondent No. 1 was void.

8. In order to appreciate this contention, it is necessary to set out the provisions of the first five sub-sections of Section 27 of the Act. They read as under: "27(1) If the validity of any election of a Councillor or the legality of any order made or proceedings held under Section 26 is brought in question by any candidate at such election or by any person qualified to vote at the election to which such question refers such candidate or person may, at any time within fifteen days after the date of the declaration of the result of the election or the date of the order or proceeding apply to the District Judge of the District within which the election has been held, for the determination of such question.

(2) An enquiry shall thereupon be held by a Judge, not below the rank of an Assistant Judge, appointed by the State Government either specially for the case, or for such cases generally, and such Judge may, after such enquiry as he deems necessary, pass an order confirming or amending the declared result of the election or the order of the officer empowered by the Collector in that behalf under Section 26, or setting the election aside. For the purposes of the said enquiry, the Judge may exercise any of the powers of a Civil Court, and his decision shall be conclusive. If the elec-

tion is set aside, a date for holding a fresh election shall forthwith be fixed under Section 14.

(3) All applications received under sub-section (1) —

(a) in which the validity of the election of Councillors to represent the same electoral division is in question, shall be heard by the same Judge; and

(b) in which the validity of the election of the same Councillor elected to represent the same electoral division is in question, shall be heard together.

(4) Notwithstanding anything contained in the Code of Civil Procedure, 1908, the Judge shall not permit (a) any application to be compromised or withdrawn, or (b) any person to alter or amend any pleading, unless he is satisfied that such application for compromise or withdrawal or application for such alteration or amendment is bona fide, and not collusive.

(5) (a) If on holding such enquiry, the Judge finds that a candidate has, for the purpose of election, committed a corrupt practice within the meaning of sub-section (6), he shall declare the candidate disqualified for the purpose of that election and of such fresh election as may be held under sub-section (2) and shall set aside the election of such candidate if he has been elected.

(b) If in any case to which clause (a) does not apply, the validity of an election is in dispute between two or more candidates, the Judge, after a scrutiny and computation of the votes recorded in favour of each candidate, is of opinion that in fact any candidate in whose favour the declaration is sought has received the highest number of the valid votes, the Judge shall after declaring the election of the returned candidate to be void declare the candidate in whose favour the declaration is sought, to have been duly elected;

Provided that for the purpose of such computation no vote shall be reckoned as valid if the Judge finds that any corrupt practice was committed by any person known or unknown, in giving or obtaining it;

Provided further that, after such computation if any equality of votes is found to exist between any candidates and the addition of one vote will entitle any candidate to be declared elected, one additional vote shall be added to the total number of valid votes found to have been received in favour of such candidate selected by lot drawn in the presence of the Judge in such manner, as he may determine."

Sub-section (1) of Section 27 provides that if the validity of any election of a Councillor is brought in question by any candidate at such election or by any voter such candidate or voter may at any time within 15 days after the date of the

declaration of the result file an election petition. It will be observed that the election petition may be filed either by a candidate or by a voter and the election petition may bring into question the validity of an election of a Councillor. The candidate or the voter who files the petition need not seek a declaration of election in favour of any candidate. He may rest content with challenging the validity of the election and seek no further orders with regard to declaration in favour of any candidate.

9. Sub-section (2) provides that on an election petition being filed, an inquiry shall be held by a Judge designated by the State Government and such Judge may after such inquiry as he deems necessary pass an order confirming or amending the declared result of the election or he may set aside the election.

10. Clause (a) of sub-section (5) provides that if on holding such inquiry the Judge finds that a candidate has for the purpose of election committed a corrupt practice, he shall declare the candidate disqualified for the purpose of that election and for a fresh election and shall set aside the election of such candidate if he has been elected. This sub-section does not provide that a person getting the next highest number of votes shall be declared to be elected in place of the disqualified candidate.

11. Clause (b) of sub-section (5) provides that in cases in which there is no corrupt practice, but the validity of an election is in dispute between two or more candidates, the Judge after a scrutiny of voting papers and computation of the votes recorded in favour of each candidate is of the opinion that in fact any candidate in whose favour the declaration is sought has received the highest number of the valid votes, the Judge shall, after declaring the election of the returned candidate to be void, declare the candidate in whose favour the declaration is sought, to have been duly elected. It will be observed that under Section 27 (5)(b) the Judge has power after setting aside an election to declare only a candidate in whose favour a declaration is sought in the petition to be duly elected. If in a petition under Section 27(1) the candidate or the voter who has filed the election petition seeks no more than a declaration as to the validity of an election of a Councillor and does not seek a declaration in favour of any candidate, the Judge has nothing more to do than to declare the election of the returned candidate to be void. He can only declare a candidate to be duly elected in his place provided in the petition of the candidate or the voter a declaration is sought in his favour and not otherwise. If, for example, in a three-member-constituency, B is declar-

ed to be elected and the petition whether filed by candidate A or even by a voter seeks that A should be declared to be elected, A can only be declared to be elected if he has secured the highest number of votes. But candidate C can in no case be declared to be elected even if he has secured the highest number of votes, because he is not a person in whose favour a declaration is sought in the petition.

12 The second or the further proviso to clause (b) of sub-section (5) provides for the case of a tie between any two candidates and for casting of lots in the presence of the Judge. In our opinion this contingency would only arise if there is a tie between candidates in whose favour a declaration is sought or between such candidate and a candidate who has been declared to be elected. The contingency will not arise if the tie is between a candidate in whose favour a declaration is sought or who has been declared to be elected and a candidate who has neither sought to file an election petition himself, seeking a declaration in his own favour nor has a voter sought a declaration in his favour. The learned Judge has obviously followed this view of the matter and has come to the conclusion that the contingency for casting lots between the petitioner No 2 and the respondent No. 1 did not arise as in the election petition there was neither a declaration sought in favour of petitioner No 2, nor did the petitioner No. 2 even care to appear in the proceedings.

13 Mr. Deshmukh contended that Section 27(1) does not provide that an election petition must necessarily seek a declaration in favour of any candidate and that an election petition can merely challenge the validity of the election of a Councillor. He contended that it is for the Court to declare any candidate to be elected whether a declaration is sought in his favour or not, because under sub-section (2) an inquiry is held with regard to the votes of all the candidates. There does not appear to us to be much substance in this contention, because sub-section (2) provides only for the holding of an inquiry and not for any declaration of results. Declaration of result is provided for in section 27(5) clauses (a) and (b). Clause (a) applies in cases of corrupt practices and clause (b) applies in cases where there are no corrupt practices. In cases where there are corrupt practices the election of the person guilty of the corrupt practices is to be set aside and no one is to be declared to be elected in his place. Where there is no corrupt practice the Judge has the power to set aside the election of a successful candidate and to declare the person who secured the highest number of

votes elected in his place, provided a declaration is sought in his favour in the petition and not otherwise.

14. Mr. Deshmukh then contended that sub-section (2) of Section 27 gives power to the Judge, after an inquiry, to confirm or amend the declared result or to set aside the election. He contended that the power to amend would cover the power to declare as duly elected any candidate who had secured the highest number of votes even if no declaration was sought in his favour. There appears to be no substance in this contention also, because as we have stated above, sub-section (2) provides only for an inquiry being held and not for declaring any person to be elected in place of a person whose election is set aside. That can only be done only under sub-section (5)(b) which provides that such a declaration can only be made in favour of a person in whose favour a declaration is sought.

Sub-section (2) merely gives power to amend, but that power to amend would be subject to the provisions of sub-section (5)(b). The words of Section 27(5) (b) indicate that there must be dispute as to validity between two or more candidates. The dispute can only be between a candidate who files an election petition under Section 27(1) or on whose behalf a voter files an application and the candidate who has been declared to be elected. That a voter has filed petition on behalf of a candidate will be indicated by the fact that the voter seeks a declaration in his favour. If the voter does not seek a declaration in favour of any candidate, the only result will be that the election of a candidate may be set aside, but no one will be declared to be elected in his place. It is true that Section 27(5)(b) provides that votes recorded in favour of each candidate must be computed. But it then proceeds to provide that if in the opinion of the Judge a candidate in whose favour the declaration is sought has received the highest number of votes, the Judge shall set aside the election of the returned candidate and declare the candidate with the highest number of votes in whose favour a declaration is sought to be duly elected. There can be no manner of doubt that under clause (b) of sub-section (5) only a person in whose favour a declaration is sought by the candidate who has filed the petition or by the voter alone can be declared to be elected, and not any other candidate even if he secures the highest number of votes.

15. The next contention of Mr. Deshmukh is that the second or the further proviso to Section 27(5)(b) is an independent provision and it is not necessary under that proviso that a declaration should be sought in favour of a candidate in order to enable that he should be de-

lared elected. His contention is that this is an independent provision which carves out an exception out of section 27 (5)(b) and the limitation imposed by clause (b) of a declaration only in favour of a candidate in whose favour a declaration is sought does not apply to the proviso. There appear to us to be two objections to this contention. The first objection is that the proviso while it provides for casting of lots in case of a tie does not provide that the Judge shall declare the candidate who succeeds in the casting of lots to be duly elected. If, as is contended by Mr. Deshmukh, the proviso were an independent provision of law, it would provide that the person successful in the casting of lots would be declared to be duly elected by the Judge. In absence of any such provision in the proviso after the casting of lots, the Judge has to go back to the main provision of clause (b) for declaring any person to be duly elected. Here he will have to meet with the difficulty that he can only make such declaration in favour of a person in whose favour a declaration is sought. This by itself would negative the contention of Mr. Deshmukh that the proviso is an independent provision of law. In our opinion, proviso merely provides for the contingency of a tie and as to what is to be done in the event of a tie. But it does not permit a declaration of being duly elected to be made in favour of a person who succeeds in the casting of lots. Before such a declaration is made, the Judge will have to see whether a declaration is sought in his favour or not. It can only mean that if in casting of lots a candidate in whose favour a declaration is not sought succeeds, he cannot be declared to be duly elected. The second objection to such interpretation would be that it would create an anomaly. While the candidate in whose favour no declaration is sought could not be declared to be elected even if in a two-member constituency where there are three or more candidates he secures the highest number of votes, there would be a chance of his being elected on casting of lots in case of a tie even if he secures a smaller number than the highest. The interpretation that we propose to put on the proviso will leave no room for such anomaly. In our opinion, the proviso must be so construed, as to harmonize with the main provision of clause (b); such construction will also be consistent with the legal maxim "*vigilantibus non dormientibus jura subveniunt*" — Laws come to the assistance of the vigilant and not of those that are sleeping.

16. We are, therefore, of the opinion that even under the further or the second proviso to Section 27(5)(b) of the Act a candidate who is a party to a tie or

equality of votes cannot be declared to be elected if no declaration is sought in his favour in the petition. That being so, it is unnecessary for a Judge to cast lots between a candidate in whose favour a declaration is sought or who has been declared to be elected and a candidate in whose favour no declaration is sought. In this particular case, no useful purpose would have been served by the learned Judge casting lots between petitioner No. 2 and respondent No. 1 who secured equal number of votes, because no declaration was sought in favour of petitioner No. 2. In our opinion, the learned Judge was right in declaring the respondent No. 1 to be elected.

17. On behalf of the petitioner No. 1 Mr. Deshmukh invited us to scrutinise the result of the learned trial Judge scrutinizing the 17 disputed voting papers and to come to a conclusion different from the one to which the learned trial Judge had come. He contended that as a result of our scrutiny the petitioner No. 1 who gets 65 votes, that is one vote less than the petitioner No. 2 and the respondent No. 1 and three votes less than the respondent No. 2 would be found to secure the highest number of votes. Scrutiny of votes is, however, a question of fact and in a petition under Articles 226 and 227 of the Constitution of India, we would not be justified in sitting in appeal over the learned Judge designated to hear election petitions under Section 27 and to come to a different conclusion on a finding of fact. We have, therefore, declined to accede to this request on behalf of the petitioner No. 1.

18. In the result, the petition fails and is dismissed with costs.
KSB Petition dismissed.

AIR 1969 BOMBAY 437 (V 56 C 73)

ABHYANKAR AND VIMADALAL, JJ.

M/s. Camera House, Bombay, Applicants v. State of Maharashtra, Respondents.

Sales Tax Ref. Nos. 17, 18 and 19 of 1965, D/- 6-5-1968.

Sale of Goods Act (1930), S. 4 — Contract of sale and work and labour contract — Tests laid down — Transactions undertaken by photographer — AIR 1957 Madh Pra 76, Diss.

In the case of transactions to prepare enlargements of a certain size from negatives given by the customer only the contract for the supply of the enlarged photographs as reproduced on paper of the particular size mentioned therein, excluding the work of preparing the enlargements which is a contract for skill and labour, amounts to a sale. In case of developing the customer's film

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roll and taking out prints from the same only the contract for the supply of prints on paper of the particular size mentioned therein, excluding the work of developing the negative from the film roll of the customer which is a contract for skill and labour, amounts to a sale. In the case of taking of a photograph, and supplying the negative thereof with three prints of a certain size to the customer only the contract for the supply of prints of the particular size mentioned therein, excluding the contract for the taking of the photograph, as well as the contract for the developing of the negative which are contracts for skill and labour amounts to a sale (1965) 16 STC 441 (Mad) & AIR 1961 Pat 272 & (1965) 16 STC 1021 (1028) (Guj) & 53 Com WLR 69 Dist., AIR 1957 Madh Pra 76, Diss. from AIR 1958 SC 560, Ref. (Para 21)

Cases Referred: Chronological Paras

- (1965) AIR 1965 Guj 253=(1965) 16 STC 942, A A Jariwala and Brothers v State of Gujarat 12, 13
 (1965) 1965-16 STC 1021 (Guj), Chelaram Hasomal v State of Gujarat 2 7, 18
 (1965) 1965-16 STC 441=ILR (1965) 2 Mad 623 B. V Bhatia v State of Madras 2, 6
 (1961) AIR 1961 Pat 272 (V 48)=1961-12 STC 154, M. Ghosh v State of Bihar 2, 5
 (1959) AIR 1959 Mad 33 (V 46)=1958-9 STC 687, Sundaram Motors (Private) Ltd. v State of Madras 11, 12, 13
 (1958) AIR 1958 SC 560 (V 45)=1958-9 STC 353, State of Madras v Gannon Dunkerley & Co. (Madras) Ltd. 2, 11, 19
 (1957) AIR 1957 Madh Pra 76 (V 44)=1957-8 STC 370 D Masanda & Co v Commr. of Sales Tax 2, 4, 5
 (1955) 1955-6 STC 255 (Nag), Babulal v D P. Dube 4
 (1856) 156 ER 1123=108 RR 461, Clay v Yates 2, 14
 53 Com WLR 69, Federal Commissioner of Taxation v. Riley 2 8
 S P Mehta with M/s. Y. P. Trivedi, I. M. Munim and V.H. Patil, for Applicants; P. P. Khambatta, for Respondents

VIMADALAL J. :- These are three References under Section 61 of the Bombay Sales Tax Act, 1959, by the applicants who are a sole proprietary concern carrying on business as photographers and photographic dealers in Bombay, which were heard together, and may conveniently be disposed of by a common judgment. These References arise on three specimen bills which are typical of the three types of transactions entered into by the applicants, with their customers in the course of their business. The transaction which is the subject mat-

ter of 1st bill No 60293 dated 9th August 1960 is one to prepare enlargements of a certain size from negatives given by the customer. The second type of transaction which is to be found in specimen Bill No 95198 dated 18th August 1960 relates to developing the customer's film roll and taking out prints from the same. The third type of transaction which is to be found in specimen Bill No 16531 dated 23rd August 1960 relates to the taking of a photograph, and supplying the negative thereof with three prints of a certain size to the customer. On an application under Section 52 of the Bombay Sales Tax Act, 1959 by the Applicants, for the determination of the question as to whether any tax was attracted on the transactions which were the subject-matter of the said three bills, and, if so, at what rate, the Commissioner of Sales Tax in his Order dated 17th August 1961 took the view that the transactions embodied in all the said bills amount to sales except that part of the transactions which is the subject-matter of Bill No 95198 which related to the developing of the customer's film roll, which he held would not amount to a sale. The applicants appealed from the decision of the Commissioner of Sales Tax to the Sales Tax Tribunal at Bombay in respect of each of the three specimen bills. The tribunal by its Order dated 28th June 1963, confirmed the decision of the Commissioner of Sales Tax on all points, and dismissed those appeals on the ground that the gist of the business of a photographer is to practice the photographic process commercially in order to produce an article which would be brought and would yield profit, and that the essence of the contract, therefore, was not work and labour, but was sale of goods. The applicants then applied to the Sales Tax Tribunal for a Reference under Section 61 of the Bombay Sales Tax Act, 1959, and the Tribunal by its Order dated 15th January 1964 referred the following question for the determination of this Court which is identical in each of the three References in respect of the three specimen bills referred to above—

“Whether having regard to the facts and circumstances of the case, the transactions which were the subject matter of determination by the Commissioner amount to sales?”

These references were heard together by us and were argued with characteristic thoroughness by the learned counsel on either side

2. In Benjamin on Sale (8th Edition), the observations of Martin B in the English case of Clay v Yates (1856) 156 ER 1123 at p 1125=108 RR 461 at p 464 have been quoted (at p 160) in which contracts have been divided into three

broad classes; (1) contracts "for labour simply"; (2) contracts for work and materials; and (3) contracts for goods sold and delivered. In another passage in the same book (at p. 168), it has been stated that where the passing of property is merely ancillary to the contract for the performance of work, such a contract does not thereby become a contract of sale. In a classic passage in Halsbury's Laws of England (3rd Edition), Vol. 34, pp. 6-7, Paragraph 3, which has been quoted in most of the leading decisions on the subject, it has been laid down as follows:—

"A contract of sale of goods must be distinguished from a contract for work and labour. The distinction is often a fine one. A contract of sale is a contract whose main object is the transfer of the property in, and the delivery of the possession of, a chattel as a chattel to the buyer. Where the main object of work undertaken by the payee of the price is not the transfer of a chattel qua chattel, the contract is one for work and labour. The test is whether or not the work and labour bestowed end in anything that can properly become the subject of sale: neither the ownership of the materials, nor the value of the skill and labour as compared with the value of the materials, is conclusive, although such matters may be taken into consideration in determining, in the circumstances of a particular case, whether the contract is in substance one for work and labour or one for the sale of a chattel."

The leading case on the subject of contracts which involve both the transfer of property in some material, as well as the performance of work and labour, is the case of *State of Madras v. Gannon Dunkerley & Co. (Madras) Ltd.*, (1958) 9 STC 353=(AIR 1958 SC 560). The Respondents in that case were doing the business of construction of buildings, roads and other works, and one of the items to which the reference in the said case related was the value of the material used by the respondents in the execution of their contracts. The Madras General Sales Tax Act, 1939, contained certain provisions, whereby tax was imposed on the supply of materials in the execution of works contracts. The sole question which arose before the Supreme Court in that case was whether there was a transaction of sale in respect of those goods, and the power of the Madras Legislature to impose a tax on sales under Entry 48 in List II of Schedule VII of the Government of India Act, 1935 extended to imposing a tax on the value of the materials used in works. After an exclusive review of the relevant case law, the Supreme Court held (at pp. 377-78 of STC)=(at p. 573 of AIR):—

"It has been already stated that, both under the common law and the statute law relating to the sale of goods in England and in India, to constitute a transaction of sale there should be an agreement, express or implied, relating to goods to be completed by passing of title in those goods. It is of the essence of this concept that both the agreement and the sale should relate to the same subject-matter. Where the goods delivered under the contract are not the goods contracted for, the purchaser has got a right to reject them, or to accept them and claim damages for breach of warranty. Under the law, therefore, there cannot be an agreement relating to one kind of property and a sale as regards another. We are accordingly of opinion that on the true interpretation of the expression "sale of goods" there must be an agreement between the parties for the sale of the very goods in which eventually property passes. In a building contract, the agreement between the parties is that the contractor should construct a building according to the specifications contained in the agreement, and in consideration therefor receive payment as provided therein, and as will presently be shown there is in such an agreement neither a contract to sell the materials used in the construction, nor does property pass therein as movables. It is therefore impossible to maintain that there is implicit in a building contract a sale of materials as understood in law."

The Supreme Court held that the expression "sale of goods" in Entry 48 is a *nomen juris*, its essential ingredients being an agreement to sell movables for a price, and property passing therein pursuant to that agreement. The Supreme Court further held that, in a building contract which was, as in that case, one, entire and indivisible—and that was its norm.—there was no sale of goods, and it was not within the competence of the Provincial Legislature under Entry 48 to impose a tax on the supply of the materials used in such a contract, treating it as a sale. The Supreme Court, therefore, came to the conclusion that there was no sale, as such, of materials used in a building contract, and that the Provincial Legislature had no competence to impose a tax thereon under Entry 48. In arriving at that conclusion, the Supreme Court rested its decision also on the principle of accretion (at pp. 385-86 of STC)=(at p. 577 of AIR), holding that the property in the materials used in a building contract does not pass to the other party to the contract as movable property, but the construction embedded on the land becomes an accretion to it, and it vests in other party, not as a result of the contract, but as the owner of the land. The Supreme Court observ-

ed (at p 386 of STC)=(at p 577 of AIR) that the theory that a building contract can be broken up into its component parts, and as regards one of them it can be said that there was a sale must fail on the ground that there was no agreement to sell materials as such, and that property in them does not pass as movables. In order to avoid misconception, the Supreme Court has made it clear (at pp 387-88 of STC)=(at p 578 of AIR) that their conclusion in the said case had reference to works contracts which were "entire and indivisible", as in the case before them. The Supreme Court then proceeded to observe that contracts could, however, take several forms and further stated (at p 388 of STC)=(at p. 578 of AIR) as follows—

"It is possible that the parties might enter into distinct and separate contracts, one for the transfer of materials for money consideration and the other for payment of remuneration for services and for work done. In such a case, there are really two agreements, though there is a single instrument embodying them, and the power of the State to separate the agreement to sell from the agreement to do work and render service and to impose a tax thereon cannot be questioned, and will stand untouched by the present judgment"

In the case of transaction for work and labour done, and materials furnished, the first question that has, therefore, to be considered is the contract in question "Entire and indivisible", or does the transaction embody two distinct and separate contracts, one for the sale of goods as such, and the other for work and labour that is precisely what has not been considered at all in the cases reported in (1957) 8 STC 370 at p 375=(AIR 1957 Madh Pra 76 at p 78), (1961) 12 STC 151 at p 156=(AIR 1961 Pat 272 at p 273), (1965) 16 STC 441 at p 445 (Mad) (second point) and (1965) 16 STC 1021 at pp 1028-1030 (Guj), or in the Australian case reported in 53 Com WLR 69, which have been strongly relied upon by the taxing authorities in the present case, which I will presently discuss. In the first of those cases, severability was assumed whilst the learned Judges who decided each of the remaining cases appear to have assumed that the transactions which they were considering were entire and indivisible, which is the primary question that must be decided in all such cases. I am, therefore, unable to follow the decisions in those cases. It is only in the case of contracts that are "entire and indivisible" that the tests laid down in the passage from Halsbury quoted above and by the Supreme Court in Gannon Dunkerley & Co (Madras) Ltd.'s case, 1958-9 STC 353=(AIR 1958

SC 560) have to be applied for the purpose of determining the real nature of the transaction. In the case of transactions that are distinct and severable, on the other hand, as the Supreme Court itself has indicated at the end of its judgment (at p 388 of STC)=(at p. 578 of AIR) in Gannon Dunkerley's case, 1958-9 STC 353=(AIR 1958 SC 560) it is only the activity which results in a sale that can be taxed to sales tax.

3. It is the contention of Mr. Mehta on behalf of the applicants that, in the case of the transactions embodied in all the three specimen bills in the present case, the intention of the parties is not to effect a sale of goods, but to enter into a bargain for rendering service which involves the exercise of the artistic skill of the photographer concerned. In support of his contention that the assessee's work involves skill and labour, he has relied upon certain photographic publications which show the highly technical nature of the operations of a photographer in the matter of taking a photograph, developing the film and preparing the prints and/or enlargements. It is, on the other hand, contended by Mr. Khambatta on behalf of the Department that the essential feature of the business of a photographer is the production of goods for sale, and that, with the advance that has been made in the manufacture of cameras, and even in the matter of the subsequent process of developing, printing and enlarging in the studio, there is very little scope for the exercise by the photographer of skill of any nature, everything being regulated by mechanical gadgets in the camera itself, or by other scientific precision processes. In support of that contention, Mr. Khambatta has relied strongly on four reported decisions of various High Courts in the country, and also on a reported decision of the High Court of Australia, which, he has contended, are directly in point. I must, therefore, proceed to deal with each of those decisions.

4. The first is a decision of the Madhya Pradesh High Court in the case of D Masanda & Co v Commissioner of Sales Tax, 1957-8 STC 370 at p 375=(AIR 1957 Madh Pra 76 at p 78). The facts of that case were that, during the year 1952-53, the assessee imported photographic materials of the value of Rs 37,550/-, of which materials of the value of Rs 11,900/- were utilised by him in taking photographs and supplying copies thereof to the order of his customers on payment. Before the taxing authority, the assessee contended that he could not be assessed to sales tax on the value of the materials used by him in taking photographs, as there was no sale of those materials when, with the aid of those materials, he took photographs for

his customers and supplied to them copies of the photographs on payment. That contention was rejected by the taxing authorities, and the petitioner was assessed to sales tax on the value of the photographic materials imported by him and utilised by him in his business as a photographer. The assessment made by the Sales Tax Officer was upheld in revision by the Commissioner of Sales Tax and on a Reference to the High Court of Madhya Pradesh, that decision was confirmed. The question referred to the Madhya Pradesh High Court in that case actually was whether the photographic material consumed in photographic work could be treated as a sale, and the assessee could be said to be a dealer vis-à-vis such material. The High Court answered both parts of the question in the affirmative and there could really be no quarrel with that decision. No question arose in Masanda's case, 1957-8 STC 370=(AIR 1957 Madh Pra 76) of levying sales tax on the photographer's charges for taking the photographs, or on the charges for developing or for preparing the prints or enlargements of the photograph for his customers. Those are the questions that arise in the present case, and the decision in Masanda's case 1957-8 STC 370 = (AIR 1957 Madh Pra 76) cannot, therefore, be considered to be an authority in regard to the same. There are, no doubt, observations contained in the judgment in the said case (at p. 375 of STC)=(at p. 78 of AIR) to the effect that the essential feature of the applicant's business as a photographer was the production of goods for sale, but those observations go further than was necessary for the purpose of answering the question that was referred to the Madhya Pradesh High Court. Moreover, though the earlier decision of the same High Court in the case reported in 1955 6 STC 255 (Nag) which was followed in Masanda's case, 1957-8 STC 370=(AIR 1957 Madh Pra 76) had proceeded specifically on severability, and only the sale part of the transaction had been held liable to tax in that case, severability was assumed and the question of severability was not considered at all in Masanda's case, 1957-8 STC 370=(AIR 1957 Madh Pra 76).

5. The next in point of time is the decision of the Patna High Court in the case of M. Ghosh v. State of Bihar, 1961-12 STC 154 at p. 156=(AIR 1961 Pat 272 at p. 273). The facts of that case were that the petitioner carried on the business of a professional photographer, and was the proprietor of a shop and a photographic studio in Patna, and he was assessed to sales tax for the period from 1-1-1952 to 31-3-1955. The contention of the petitioner before the sales tax authority was that sales tax could not be law-

fully levied on finished articles like photographs, as the action of the petitioner in taking photographs of customers and developing and printing negatives was not tantamount to sale of goods within the meaning of the Bihar Sales Tax Act. Having failed at all stages of the proceedings before the Revenue authorities, the question as to whether, in the circumstances of the case, the petitioner was liable to pay sales tax with regard to the sale of photographs of customers taken by him for the purpose of supplying printed copies of photographs to them on payment was referred to the Patna High Court. The Reference was answered by the High Court against the assessee, and he was held liable to pay sales tax on the same. As was done in Masanda's case, 1957-8 STC 370=(AIR 1957 Madh Pra 76) a professional photographer was distinguished from a portrait painter in Ghosh's case, 1961-12 STC 154=(AIR 1961 Pat 272) and the distinction sought to be drawn in the latter case was that the petitioner was practising a photographic process commercially in order to produce an article which would be bought and produce a commercial profit (at p. 155 of STC)=(at p. 272 of AIR). I fail to see how that observation would be inapplicable to a commercial artist who paints the portraits of any customer who chooses to walk into his studio and delivers it to the customer for a certain amount. The Patna High Court took the view that the essence of the contract between the petitioner and the customer was the supply of finished goods, and there was not a mere agreement for the exercise of skill and labour for the production of the photographs, but, with respect to the Patna High Court, the question as to whether the transaction which a photographer enters into with a customer is severable or not has not even been touched in the judgment in the said case.

6. The third decision in chronological order which was relied upon by Mr. Khambatta was the decision of the Madras High Court in the case of B. V. Bhatia v. State of Madras, (1965) 16 STC 441 at p. 445 (Mad) (second point). The said case related to two distinct types of transactions, the first relating to sales of radios, and the second relating to, what has been called in the said case, "Photo House Studio receipts" amounting to Rs. 2,023.30 for the assessment year 1959-60. We are concerned in the present case only with the second type of transactions. As in the present case, it was contended on behalf of the assessee in Bhatia's case, (1965) 16 STC 441 at p. 445 (Mad) that the supply of photos and photo-copies by a professional photographer to his customer is really the execution of a work of art and that the

bargain by the photographer with his customers is really a bargain for work and labour, and not for the sale of specific goods or chattels. In rejecting that argument, it was observed in the judgment of the Madras High Court in Bhatia's case, (1965) 16 STC 441 at pp 447-48 (Mad) that when a customer goes into a photographer's studio and engages his services to take a picture, he is bargaining, not merely for the special skill which the photographer has, to produce a negative, but also to supply from that negative as many copies of the finished positive as the customer may require. In that connection, the Madras High Court relied (at p 449) on the fact that a professional commercial photographer does not surrender his negative, as showing that the bargain was for the supply of copies therefrom as finished goods and was, therefore, not a contract of labour. I fail to see how the fact as to whether a photographer surrenders the negative or retains it could make any difference in deciding upon the real nature of the transaction. Though the Madras High Court has in Bhatia's case, (1965) 16 STC 441 (Mad) discussed several authorities on the point, I do not find anything in the judgment of the Madras High Court in that case by way of reasoning to commend itself to me. Moreover, in the judgment in that case also the question as to whether the transaction was severable or not seems to have completely escaped the attention of the Madras High Court.

7. The next case to which I must refer is the decision of the Gujarat High Court in the case of Chelaram Hasomal v. State of Gujarat, (1965) 16 STC 1021 (at pp 1023-1930) (Gui) which, in my opinion, is clearly distinguishable on facts. The assessee in that case prepared photographs of gods, saints, public men, and even private individuals and transferred them by a certain process on enamelled copper plates. The question referred to the High Court, however, related only to enamelled photographs of individuals. In holding that that amounted to a contract of sale the Court no doubt proceeded on the analogy of a photograph, but in my opinion, the real nature of the transaction in question in that case was clearly distinguishable from the normal transaction of a photographer. Moreover, in Chelaram's case (1965) 16 STC 1021 (Gui) also, the question of severability was not considered at all in the judgment of the Gujarat High Court.

8. I must now proceed to consider the decision of the High Court of Australia in the case of the Federal Commissioner of Taxation v. Riley, (53 Com WLR 69). The assessee in that case had refused to

pay sales tax in respect of photographs, tinted or untinted, taken of, and supplied to, clients for reward in the course of his business as a photographer though certain general observations were made in regard to the nature of the business of a portrait photographer which have been relied on in the four cases of our High Courts which have been discussed above; the questions which were "reserved for the opinion of the Court" in that Australian case were, however, quite different. As stated in the majority judgment of the Court in the Australian case, "that the transaction is a sale is not, and doubtless could not be disputed. What is in question is whether photographs are goods manufactured in Australia" within the terms of the Sales Tax Assessment Act (No 1) 1930-1935. In holding that photographs are goods manufactured in Australia within the meaning of their Sales Tax enactment, it was observed as follows in the judgment of three of the four judges who constituted the majority:—

"In the present case, it is the element of 'manufacture' or 'production' which the tax payer says is not present. The argument in support of his contention is, in effect, that the photographer is employed to exercise his art to obtain a portrait possessing the qualities that are demanded by the taste it is his purpose to consult, and that the end of his labours is not the production of so many material objects regarded as vendible articles. The contention is open to the observation that it does not strictly adhere to the question in the special case, which assumes the sale of the photographs as goods, and inquires, are they produced or manufactured? . . . In any case, we think the contention cannot prevail. The end of the organised business of a portrait photographer is to produce as many copies of a picture as his customer will buy, and to sell them to him with a view to profit. It differs from many other productive arts in the fact that its products must be designed in each case for one individual, and in its attempt to secure some aesthetic value. But it is a process practised commercially to produce an article which will be bought. A tailor must attempt to fit his individual customer and the manufacturer of ornaments might claim that his designs had an aesthetic purpose."

Starke J who was the fourth judge constituting the majority however, confined his judgment strictly to the question as to whether photographs taken by a photographer and supplied to clients are goods manufactured in Australia, and based his decision only on the comprehensive terms of the Act in question. The fifth Judge Evatt J., in his dissenting

judgment, took the view that the service which the photographer performs for his clients is finally embodied in the photograph, and payment has to be made "for the actual chattel delivered as well as for the service rendered," that what the photographer did was "in the nature of an artistic service of a personal character," that the service was so confidential that, without the client's consent, the law prevents the further reproduction of the photograph, and that "the application of the words 'goods manufactured' to cases like the present is unreal and almost whimsical."

9. Neither the question of severability of the transactions into which a photographer enters, nor the question as to whether, if a transaction be held to be indivisible, it is in essence a "sale" arose for decision, or could be said to have been decided in that case. All that could be said is that certain general observations were made in regard to the nature of the business of photographer. As far as those observations are concerned, in my opinion, it is Evatt J. who has taken a correct view of the same. I, however, do not think the said Australian case can be regarded as authority in regard to either of the two points mentioned above which arise for decision in the present case, or can even be regarded as being of any assistance in deciding the same.

10. In my opinion, as already stated above, the primary question that arises for consideration in the case of transaction which is neither a pure contract of sale nor a pure works contract, but which is of a mixed nature, is whether the transaction is entire and indivisible, or whether it is severable into more than one distinct contract. As pointed out by me above, that question has not been considered at all in any of the four decisions of our High Courts discussed by me above, or in the Australian case cited therein. Under the circumstances, I am of opinion that, with respect to the learned Judges who decided those cases, the same do not afford any assistance in deciding the present case, and I am unable to accept the view expressed therein.

11. I must, therefore, proceed to discuss the principles that should be applied for the purpose of deciding the question of severability. In the case of Sundaram Motors (Private) Ltd. v. The State of Madras, (1958) 9 STC 687=(AIR 1959 Mad 33), the facts were that the assessee Company which carried on business in selling and distributing motor vehicles also dealt in motor parts and accessories, and maintained a workshop where reconditioning or repairs of motor vehicles were undertaken. The Court was, however, concerned in the said case mainly with transactions in the workshop depart-

ment of the Company in which the turnover would represent not only the labour charges as such, but the cost of spare parts or materials supplied or used in the effecting of the repairs. The Madras High Court in deciding that case, held that there was no evidence of any anterior agreement between the parties in regard to the transaction, and the only evidence available consisted of the account books of the assessee-company, as well as the bills issued by it to the customers. It was pointed out in the judgment in the said case that, in the accounts, the assessee had made a distinction between cases of sales as such and cases of charges for labour and work, but the entries in the books and the bills issued showed that there was no agreement or intention to sell moveables, namely, king pin bushes, as such, whilst charging for the repairs of the car. It was, therefore, held that the charges for the fabricated material should be treated as charges in respect of the works contract, and not independent sales of those materials, and that, subject to the liability of the petitioner in regard to parts supplied and in respect of which tax was levied on the customers, and the tax on such taxes collected, there was no other liability on the part of the assessee in regard to the workshop transactions. After referring to the decision of the Supreme Court in Gannon Dunkerley's case, (1958) 9 STC 353=(AIR 1958 SC 560) which had been given only a few months earlier, the Madras High Court observed (at p. 695 of STC)=(at p. 36 of AIR) that a mere passing of the property in the particular chattel was not decisive of the question whether the component parts of that chattel were sold or not. It further observed that if a particular motor part, for example, king pin bushes, is put in the car while reconditioning and repairing it, it is undoubted that title to that motor accessory passed when the repairers delivered the car to its owners. It was however, also observed that to constitute sale of that part, it is necessary that there should have been an agreement between the parties for the sale of that accessory. The Madras High Court then formulated the test to be applied in such cases as follows:—

"There is no doubt that the property in those materials would eventually pass to the customer, but the question, would be whether the agreement between the parties was that such parts should be treated as sold separatim or were they merely supplied in the course of carrying out a works contract of repair and charged as such.

Therefore whether in a particular case, there is a contract of sale of materials as distinct from a pure works contract would depend upon the agree-

ment between the parties and on proof of an intention to sell the materials as such." (at p 696 of STC)=(at p. 36 of AIR).

12 With regard to the question of severability, reference may also be made to the decision of the Gujarat High Court in the case of A. A. Jariwala and Brothers v State of Gujarat, (1965) 16 STC 942 at p 953=(AIR 1965 Guj 253 at p 257) in which the assessee used to get sari-pieces from their customers for getting embroidery work done on them according to the specific instructions of the customers. The assessee, in their turn, delivered the sari-pieces to embroidery workers who were to be paid piece-rates according to the work done by them, the Jari material being supplied by the assessee to these workers, and after the embroidery work was completed, the saris were returned to the customers. The cost of the Jari materials used in the embroidery work came to about 30 per cent of the total charges charged by the assessee to their customers for which one consolidated bill was sent by the assessee, which also showed the rates per sari. On an application by the assessee under Section 27 of the Bombay Sales Tax Act, 1953, the revenue authorities held that the contract in question was, firstly, a contract for the supply of materials for a price, and, secondly to get embroidery work done by workmen, and that the property in the materials passed to the customer before the materials were affixed to the saris. At the instance of the assessee, the following question was then referred to the Gujarat High Court :—

"Whether on the facts and in the circumstances of the case, the agreement with Messrs Pacific Traders (the customers of the assessee) was works contract, or was a composite agreement, one for the sale of jari materials and another for doing work."

The Gujarat High Court answered that question in favour of the assessee holding that the agreement was a contract of work, and not a composite one which included a sale of Jari Materials. After an exhaustive review of the authorities on the subject including Sundaram Motors' case, (1958) 9 STC 687=(AIR 1959 Mad 33), which I have discussed above (at pp 950-51 of STC) = (at p 256-257 of AIR), Shelat, C. J (as he then was) summed up the legal position (at p 953 of STC)=(At p. 257 of AIR) in the following terms:—

"Thus the principles that emerge from these decisions, are, (1) that the question whether a contract in question is for work and labour or is a composite one, depends upon the intention of the parties and whether there is an agreement, express or implied, of sale of materials used

In producing the articles in question (2) that mere passing of property in the materials used is not enough unless the passing of such property takes place as a result of an agreement for sale."

It was observed (at p. 956 of STC)=(at p 258 of AIR) that the burden of proving that it was a composite contract was upon the Revenue, and that the contract in the said case was one and indivisible, and was not severable into two contracts, one for service and the other for sale of Jari materials. The learned Chief Justice came to that conclusion on a consideration of the *modus operandi* followed between the assessee and their customers, and the intention of the parties in regard to the question of severability or otherwise as appearing therefrom. It was held in that case (at p 957 of STC) = (at p 258 of AIR) that, taken as a whole, the contract in question was essentially one for work and labour and the supply of Jari materials in the execution of the embroidery work was merely ancillary. I respectfully agree with the principles enunciated by the learned Chief Justice in regard to the same. On the facts of that case, there can be no quarrel with the conclusion arrived at by the Gujarat High Court that the contract in question in that case was one and indivisible, and was essentially one of service and work.

13. The tests laid down by the Madras High Court in the Sundaram Motor's case, 1958 9 STC 687=(AIR 1959 Mad 33) and by the Gujarat High Court in Jariwala's case, (1965) 16 STC 942=(AIR 1965 Guj 253) for the purpose of determining the severability or otherwise of a transaction which involves work and labour as well as the supply of materials, therefore, are whether there was an agreement, express or implied, between the parties that the materials should be treated as sold separatim, and whether the intention to sell the materials, as such, has been proved.

14. Applying these tests to the transactions which are the subject-matter of each of the specimen bills in the present case in respect of the transaction embodied therein, in my opinion, the parties intended to enter into more than one contract, viz, for the sale of materials as well as for work and labour to be done, and those contracts are distinct and easily severable though they form part of one transaction under each of the said three bills. It is not possible to say that any of those transactions embodies a pure contract for the sale of goods, or a pure contract for work and labour to be done. Each of these three transactions is in the nature of a transaction relating to work and materials, such as would fall within the second of the three broad

categories into which they have been classified in the passage from the English case of *Clay v. Yates*, (1856) 156 ER 1123 quoted in Benjamin on Sale at page 160, to which I have referred earlier in this judgment.

15. It would be convenient at this stage to consider separately each of the three types of transactions which fall for consideration in the present case. Turning to the first type of transaction, which is for the preparation of enlargements from an already developed negative given by a customer, and which is to be found in Bill No. 60293 in the present case, there is no doubt whatsoever that what the customer, as well as the photographer bargain for, is for two separate contracts: (1) for work on the part of the photographer in subjecting the negative supplied by the customer to proper processes requiring considerable technical skill so that the enlargement is not disproportionate or distorted or inartistic in any manner; and (2) for sale of the enlarged photograph as reproduced on paper of a particular quality and size. In such a transaction, there is an implied agreement between the parties that the enlarged photograph, as reproduced on paper of that quality and size, should be sold separatim and a clear intention to sell it as such. The fact that these two activities are distinct and severable is apparent, not only from the nature of the transaction, but also from the fact that the payment in respect of each of these activities is clearly ascertainable. Each photographer has his own rates for the reproduction of a photograph of a particular size, whether it be an enlargement or a mere print, on paper of a particular quality, and there would therefore be no difficulty in separating the two contracts, though they form part of one transaction, as embodied in the said bill No. 60293.

16. Turning to the second type of transaction which is to be found in Bill No. 95198, and which involves developing the customer's film roll and taking out prints from it, for the same reasons as in the case of the first type of transaction, this is also a transaction in which two separate contracts are implied one for developing the film roll furnished by the customer, which the Commissioner of Sales Tax as well as the Sales Tax Tribunal have held to be not in the nature of a sale of goods but in the nature of a contract for work and labour, and the other for taking out prints therefrom on paper of a particular quality and size. What is called the "negative is nothing but the film roll supplied by the customer himself after it has been subjected to certain technical process which are known as "developing" process. The first part of the transaction has, therefore, rightly been held by the Commissioner as well as

the Tribunal not to be a contract of sale. There is however, a clear intention to sell the prints as such, or as many copies of the prints as the customer may require, and an implied agreement that they should be sold separatim. These two contracts are distinct and severable parts of the transactions embodied in Bill No. 95198, and the charges thereof are also clearly ascertainable, and are actually stated separately in the Bill in question.

17. Turning to the third type of transaction which is the subject matter of Bill No. 16531 and is of the most comprehensive nature, involving as it does the taking of the photograph in the studio, the developing of the film, and the furnishing of three prints thereof, there can be no doubt that the intention of the parties in respect of this transaction also was to enter into three distinct contracts. It is impossible to say that the first part of the transaction, viz., the taking of a photograph, is even as a matter of plain language, a contract for sale. It is clearly a contract for the use of the artistic skill and labour of the photographer who takes the photograph. There can be no doubt that considerable technical skill is required in taking a good photograph, and I have no hesitation in rejecting the contention of Mr. Khambatta that, with modern technique, the taking of photographs is almost mechanical. A person who wants his photograph taken does not walk into any shop, but discriminates between a good photographer and a bad photographer, and also takes into account the charges for the same which vary considerably according to the skill and reputation of each individual photographer. The second part of this transaction is the developing of the film into a negative which has been held by the Commissioner of Sales Tax and by the Sales Tax Tribunal not to amount to a sale in regard to the transaction embodied in Bill No. 95198. The Commissioner of Sales Tax as well as the Sales Tax Tribunal have, however, apparently come to the conclusion that the transaction comprised in Bill No. 16531 is not severable, and have held the whole transaction embodied in the said Bill No. 16531 to be a contract for sale of the photographs to the Customer. I fail to see why the lower authorities have taken that view, in view of the fact that, not only are the three activities involved in the transaction which is the subject matter of the said Bill No. 16531 distinct and severable from their very nature, but the charges in respect of the same are clearly ascertainable. Every photographer has his own charges for subjecting films, whether taken by himself or supplied by the customer, to the process of developing

into, what is called a negative, as well as for making out prints on paper of a particular quality and size. In this connection, reference may be made to Bill No. 95198 in the present case itself, in which the charges for developing and printing are stated separately. If the developing and printing charges are deducted from the amount mentioned in Bill No. 16531 what is left will be the charges of the photographer for the skill and labour of taking the photograph in question. Though, as stated in the passage from Halsbury quoted by me above, the value of the skill and labour as compared with the value of the materials is not conclusive the same can be taken into consideration. A reference to Bill No. 95198 would show that developing and printing charges would be a negligible part of the amount of Rs. 4 which has been charged in Bill No. 16531. By far the major part of it, therefore, relates to the photographer's skill and labour and had I come to the conclusion that the transaction comprised in Bill No. 16531 was "entire and indivisible", I would have held it to be in essence, a works contract, and not a contract of sale. In my opinion the dominant intention of the parties in regard to this type of transaction is not to buy or sell the negative, or the prints. That is apparent from the fact that, even as a matter of plain language, no person who walks into a photographic studio to have a photograph taken of himself says "I am going to buy my photograph". What the parties really intend to do would be correctly expressed by the customer's saying to the photographer, "I want to have a photograph taken and to buy 3 prints of it which you must give me along with the negative". In such a case, what the parties, therefore intend to do is to enter into three separate contracts which are distinct and severable, though they form part of one transaction. The first is a contract for the use of the labour and the artistic skill of the photographer in taking good photograph in the appropriate pose, the second is a contract to use the work and labour of the photographer in developing the same into a negative and the third is a contract to sell the prints thereof as taken out on paper of a particular quality and size. There is, in my opinion, an implied agreement between the parties in such a case that the prints should be sold separatim and a clear intention to sell the prints as such or as many copies of the prints as the customer may require. The State would, therefore, be entitled to levy Sales Tax only on the last of the three severable contracts embodied in Bill No. 16531.

18. On behalf of the assessee, reliance was also placed on the provisions of the Indian Copyright Act, 1957, for

the purpose of showing that it is impossible in law that there could be any sale of a customer's photograph, either to the customer himself or to anybody else. It is contended that, in view of the fact that, under Section 17 of the Copyright Act, the copyright in a photograph vests in the customer whose photograph it is, there can be no sale of the photographs to the customer who is already the owner of that photograph under the relevant provisions of the Copyright Act. It is further contended that there could be no sale of the photograph of the customer to anybody else, in view of the fact that the customer, whose photograph it is, is the sole owner of the copyright therein. In view of the conclusion at which I have arrived on the question of severability, it is not necessary for me to consider the argument advanced on behalf of the assessee in the present case based on the provisions of the Copyright Act. Suffice it to say that I agree with the view taken by Shelat, C.J. (as he then was) in Chelaram's case, (1965) 16 STC 1021 (Guj) cited above, in which that very contention was rejected by the learned Chief Justice (at p. 1030) on the ground that the restrictions contained in the Copyright Act had no bearing on the question as to whether a particular transaction was taxable to Sales Tax as a sale of goods.

19. In the result, I have come to the conclusion that the parties to the transactions which are in the subject-matter of the said Bills Nos. 60293, 95198 and 16531 intended to enter into, and have, in fact, entered into, distinct and separate contracts as stated above, though the same form part of the single transaction that is embodied in each of the said three bills. In the case of each of the said three bills, therefore, as the Supreme Court has observed in Gannon Dunkerley and Co. (Madras) Ltd's case, (1958) 9 STC 353=(AIR 1958 SC 560) though there is a single instrument, there is more than one agreement embodied therein which can be, and should be, separated, and only such part of each of the said transactions as amounts to a sale of goods is liable to sales tax under the Act.

20. I, therefore, answer the question that has been referred to this Court in each of the three References as follows:

21. Each of the transactions which is the subject-matter of determination by the Commissioner of Sales Tax embodies more than one contract, and only the following are liable to sales tax:

(1) In the case of transaction embodied in Bill No. 60293, only the contract for the supply of the enlarged photographs as reproduced on paper of the particular size mentioned therein, excluding the work of preparing the enlargements which is a contract for skill and labour, amounts to a sale.

(2) In the case of the transaction embodied in Bill No. 95198 only the contract for the supply of prints on paper of the particular size mentioned therein, excluding the work of developing the negative from the film roll of the customer which is a contract for skill and labour, amounts to a sale.

(3) In the case of the transaction embodied in Bill No. 16531 only the contract for the supply of prints of the particular size mentioned therein, excluding the contract for the taking of the photograph, as well as the contract for the developing of the negative which are contracts for skill and labour, amounts to a sale.

22. As in the view which I have taken above, the applicants have substantially succeeded in these References, I would order that the Department must pay the applicant's costs of the References fixed at Rs. 250/- in one set for all the three References, since they were heard together.

GGM/D.V.C.

Reference answered accordingly.

AIR 1969 BOMBAY 447 (V 56 C 74)

K. K. DESAI AND NAIN, JJ.

Smt. Tarabai Vishwanath Sabnis, Appellant v. National and Grindlays Bank Ltd. and others, Respondents.

Appeal No. 55 of 1968, Suit No. 422 of 1964 D/- 16-10-1968.

Civil P. C. (1908), O. 21, Rr. 97 and 103 — Procedure prescribed by O. 21, Rr. 97 to 102 is summary and is not intended for decisions after hearing oral evidence — Conclusion arrived at is subject to result of suit under O. 21, R. 103 — Findings made by single judge of High Court on chamber summons in application for possession under O. 21, Rr. 97 to 102 — Appeal under Cl. 15 Letters Patent — Division Bench would not interfere with those findings — Proper remedy is to file regular suit under O. 21, R. 103 — Whether order of single Judge amounts to judgment (Quaere) — (Letters Patent (Bom) Cl. 15). (Para 5)

S. N. Naik with K. H. Bhabha, for Appellant; M. R. Mody with Paralkar, for Respondent No. 1.

K. K. DESAI, J. :— This is an appeal on behalf of the original Opponent No. 1 in the chamber summons dated May 31, 1967 whereby the 1st respondents—original plaintiffs sought directions for delivery of physical Khas possession of a certain portion of land bearing new S. No. 217 of village Kurar by removal, inter alia, of the appellant and two other Opponents viz., Gajrabai Lalu and Rama Lalu. The substance of the case of the plaintiffs was that decree for delivery of possession

of the whole of the land bearing new S. No. 217 was passed in favour of the plaintiffs. For execution of that decree for possession, along with the plaintiffs' representatives, the Sheriff was to proceed on May 8, 1967. On May 7, 1967, the defendant in the suit removed the entire wire fencing round about the land. Three hutments on the land were within the above wire fencing enclosing S. No. 217. As the barbed wire fencing was removed by the defendant and as the marks thereof had been obliterated, on May 8, 1967, when the Sheriff proceeded to the locality for taking possession, an attempt was made by the appellant on behalf of the Government to make a claim that one of the three huts lying on S. No. 217 was on the adjoining land bearing new S. No. 218 belonging to the Government. In this third hut opponents Nos. 2 and 3 Gajrabai Lalu and Rama Lalu were found. The Sheriff, made a report dated May 8, 1967, which is annexed as Ex. "A" to the affidavit of Shringarpure in rejoinder. As regards this third hut, the Sheriff stated that Gajrabai Lalu and her son Rama Lalu were staying in the hut. The occupants of the other two huts delivered possession but the appellant Tarabai came and claimed the land and fencing of small round piece of land in occupation of Gajrabai as belonging to the Government. The physical possession of this part of the land was, therefore, not taken. The plaintiffs thereupon took out the above chamber summons dated May 31, 1967, for the reliefs already described above.

2. By her affidavit in reply, the appellant stated that she was the Principal of Physical Training Institute and was residing at Kandivli. The Government was the owner of land bearing new S. No. 218, Malad, and the Government was running an Institute for physical training on the land. There were several buildings on the land. As regards this third hut and the small part of the land for which the summons was taken out, she stated that this part of the land was given by the Government to the contractor who had put up buildings on S. No. 218 for cultivation of vegetables and the contractor had built a small hut on the portion of the land. When the Sheriff had come for execution on May 8, 1967, she had claimed that the hut was in the boundary of the Government land. She repeated that the hut was much inside the Government property. In affidavit in rejoinder all these facts were denied on behalf of the Plaintiffs.

3. Mody, J. by his order dated July 31, 1968, held that there was nothing on the record to show that the appellant (opponent) was in physical possession of the shed. The possession was that of the opponents Nos. 2 and 3 viz. Gajrabai and

her son Rama Lal. The opponent No. 1 had only arrived at the scene after the Sheriff had contacted her and then alleged that this hut which was occupied by Gajrabai and Rama Lal was situate on Government land. On the record before the learned Judge it was not possible to reach the conclusion that the appellant was even constructively in possession of the hut and a small part of the land in question. That was so because opponents Nos 2 and 3 Gajrabai and Rama were in fact in possession and because, according to the appellant herself, she did not claim to be in possession except on behalf of the Government. The learned Judge formed the view that as the appellant went to the land at the time when the decree was being executed against the person in possession of the shed, the appellant was not in possession. For these reasons, the learned Judge thought that it was not necessary to investigate the claim of the Government and/or the appellant to the land in question and made the summons absolute in terms of prayers (a) and (b) with costs.

4. At the commencement of the hearing of this appeal on behalf of the plaintiffs Mr Mody submitted that the order made by the learned Judge was not a judgment within the meaning of Clause 15 of the Letters Patent and appeal did not lie against the same. Mr. Naik for the appellant controverted that submission and made certain arguments in that connection. On the merits of the case he submitted that the fact that the land S. No. 218 was of the ownership of the Government was admitted on the record. The claim made by the appellant that the Government had put their contractor in possession of part of the land bearing S No 218 to cultivate vegetables should have been accepted by the learned Judge. He should have accepted that the third hut in respect whereof the present chamber summons was taken out was on the land bearing S No 218. In that connection, he relied upon some of the statements made in paragraphs 2 and 5 of the affidavit of Shringarpure in rejoinder. He submitted that the appellant had made a bona fide claim in respect of the third hut and that the land was part of S No 218 and the summons should have been dismissed.

5 Now, in connection with all these arguments, it first requires to be noticed that we are not prepared to interfere with findings made and orders passed on applications for delivery of possession which are made and heard under the provisions of Order 21, Rules 97 to 102 of the Code of Civil Procedure. In this connection it always requires to be emphasised that the procedure prescribed under

these rules is a summary procedure and not intended for decisions to be made by hearing oral evidence tendered on behalf of the parties. Rule 103, therefore, provides that the conclusions arrived at and the orders made under the above rules will always be subject to the result of a suit which either party against whom the orders are made would be entitled to file. In our view, having regard to the provisions in Rule 103, it would not be right for a Division Bench of this Court to investigate into findings made by a single Judge of this Court on chamber summons in applications for possession under Rules 97 to 102 of Order 21 of the Code of Civil Procedure. The conclusions arrived at by the learned Judge were not intended to be final and could be treated by the appellant at their own option as tentative and could be challenged in a substantive suit. It is, therefore, curious that in a matter of this kind an appeal has been filed on behalf of the appellant.

6. Having regard to the facts which we find from the affidavits on the record in this appeal, we do not propose to decide the question whether the learned Judge's order can be described as an appealable judgment within the meaning of that phrase in Clause 15 of the Letters Patent.

7. The plaintiffs' case was that the hut in question was within the wire fencing which enclosed the land S No 217 belonging to the plaintiffs. That fencing had been removed by the defendant in the suit on May 7, 1967. If this was a true fact the allegation of the appellant that the hut and the land belonged to the Government may not be correct. She has made an extraordinary case that a contractor had been permitted to put up a hut on the land belonging to the Government and to cultivate the land for the purpose of growing vegetables. The claim, prima facie, appears to be curious and, therefore, such as might have been rejected by the learned single Judge, (sic) to the procedure prescribed is summary, it was permissible on these facts for the learned single Judge to hold that the claim made by the appellant for continuing in possession was not a claim made in good faith and that accordingly the plaintiffs were entitled to the reliefs claimed in the chamber summons. These being the facts, we see no reason to set aside the order made by the learned Judges.

8. The appeal is dismissed with costs. Liberty to the attorneys of the Respondent 1 to withdraw the amount deposited for costs to the extent necessary.

KSB

Appeal dismissed.

file suits. The pending suits, says the petitioner's Counsel, would be taken up on appeal: from the suits that may be filed there would be appeals; and it is exactly to prevent such a situation that the Court assists the share-holders in expressing their wishes at a meeting called by the Court.

69. I am not saying that this point is altogether without substance; but one should also consider that suits and appeals could be filed as a matter of right whether there was any foundation for them or not; but when pending suits or appeals and the possibility of further suits and appeals form the basis of an application under S. 186, the Court, to my mind, has a duty to see if there is a *prima facie* case. In the present application I can see that there are disputes which are not perhaps frivolous regarding the positions of B. K. Roy, Anil Thakur, Sukumar Roy and Sookamal Kanti Ghose vis-a-vis the Board of Directors of the Company; but I have not found a *prima facie* case against H. R. Bhesania, the Chairman of the Board of Directors, F. R. Bhesania, F. M. Bhesania and Dali Ruttonjee that they have ceased to be directors. I do not want to repeat what I have said earlier on this point. This Company requires a minimum of two Directors only to constitute a Board. And there are at least 4 Directors against whom, in my opinion, no *prima facie* case exists at this moment. If I could come to the conclusion on the facts stated before me that there were doubts as to whether the Bhesanias also were still the directors of the Company, I might have been inclined to exercise my powers under Section 186; but no materials have been placed before me to reach that conclusion except that certain persons are contending that they have ceased to be directors. Contentions alone would not do if the facts stated by Dali Ruttonjee in paragraph 5(k) of his affidavit-in-opposition, go practically unchallenged.

70. In concluding my views on the facts of this case, I intend to reiterate that from the relevant paragraphs in the petition and the various affidavits in these proceedings, it seems to me that the Mallya group is determined to throw out the Bhesania group who took the initiative in bringing this company into existence without any positive complaint against them or without giving them an opportunity to answer the charges, if any, against them by a brute majority of votes in the general meeting. The Court has a discretion under Section 186 and that discretion, in my opinion, should not be used in favour of the petitioner with these facts in the background.

71. Numerous decisions were cited at the Bar. I need not refer to all of them. I would only discuss the cases decided by our Court and an English case in which

the facts leading to impracticability of calling a general meeting were considered.

72. In re Lothian Jute Mills Co. Ltd., (1951) 55 Cal WN 646 Sinha, J., as he then was, had to consider the provisions of Section 79 (3) of the Companies Act, 1913, which were the same as in Section 186 of the new Act. There were disputes between two rival groups of directors. His Lordship has laid down certain general principles to be observed in applying Section 79(3). These principles are as follows:

1. The Court would not ordinarily interfere in the domestic management of the Company which must be conducted in accordance with the powers contained in the regulations of the Company.

2. But where the meeting can be called only by the directors and there are serious doubts and controversy as to who are the directors and where there is possibility that one or other or both the meetings called by the quarrelling groups of directors may be invalid, the shareholders should not be exposed to the uncertainties flowing from the situation and the consequent litigation and it should be held that a position has arisen which makes it 'impracticable' for the meeting being called in accordance with the articles.

3. The Court should exercise its powers where it cannot say with reasonable approach to certainty, or even *prima facie* that the meeting called in exercise of the powers contained in the regulations will be valid.

73. This is the first case of this Court cited before me. Sinha, J., on the facts of the case upon considering the disputes raised by the rival groups did exercise his powers under Section 79(3) "in order to resolve the conflict and uncertainty" which had arisen. With respect I agree with the broad principles enunciated by the learned Judge; but by applying those principles to the instant case, I am finding it difficult to invoke my powers under Section 186. I cannot with reasonable approach to certainty or even *prima facie*, say that a meeting called in accordance with the articles of this Company, will not be valid. There is no challenge here to the appointment of directors *ab initio*. So far as the Bhesanias are concerned, the allegation is that by reason of some specific act after a valid appointment they have ceased to be directors. Such an allegation has to be examined to see if there is a *prima facie* case. The Bhesania group's contention before me is, that money was received for the specific purpose of payment of excise duty: it was received entirely for the benefit of the Company; it would be realised by the Company out of the sale proceeds; and it was not repayable by any of the directors at all. As a matter of fact until now no suit has been filed for the recovery of any alleged loan. It is also stated that the money did not belong to the Company at all; it was

paid in cash by some one else as the Company had no money. On these facts I cannot prima facie hold that the four Bhesanias have ceased to be directors, and then draw the conclusion that it is 'impracticable' to call a general meeting in the ordinary way.

74. The next case to which my attention was invited, was the case of Malhati Tea Syndicate Ltd reported in (1951) 55 Cal WN 653. Here also there were disputes as to whether there was a valid Board of Directors. At page 655 Banerjee J observes "It is difficult for me on this application and it would be inexpedient having regard to the pending suits, to decide which of the directors have been validly appointed. I am not satisfied on the facts of this case that there is a Board of Directors who can call a meeting in the manner in which a meeting of the Company may be called. Meetings held otherwise than under direction of the Court under Section 79 in the circumstances of this case, would lead to interminable troubles and prejudice the interest of the Company."

75. On the same grounds which I have advanced in discussing the Lothian Jute Mills Co Ltd's case the judgment of Banerjee J is also distinguishable.

76. We next come to the case of the Indian Shipping Mills Ltd v. M S J Bahadur Rana AIR 1953 Cal 355. This is a judgment of the Appellate Court by Harries, C J sitting with Banerjee, J. The question arose as to whether it was impracticable to hold an extraordinary general meeting. The Trial Court made an order calling a meeting under Section 79 (3) of the 1913 Act. One A C Roy Chowdhury had been elected Chairman of the Board of Directors but disputes arose and eventually the other directors challenged his position on the Board, and he was requested "to vacate from the Board of Directors". Roy Chowdhury was thereafter excluded from the Board and another shareholder was co-opted in his stead and a new Chairman was appointed. The contesting respondents contended that the entire proceedings excluding Roy Chowdhury and appointing a new Chairman were illegal and of no effect. The position of Roy Chowdhury also became the subject-matter of two suits in which the contestants aforesaid tried to assert their respective positions. In one of the suits there was a prayer for a declaration that an extraordinary general meeting which had been called on September, 9 1950 was improperly convened, and further that any directors appointed at that meeting should be declared to have been invalidly appointed. It appears that a requisition was served on the directors to call an extraordinary general meeting but they did not comply with the requisition and when the requisitionists

themselves proceeded to call the meeting, the suit was filed to defeat it.

77. The facts of this case clearly point to the impracticability of calling a general meeting in the usual way and the Appellate Court affirmed the decision of the Trial Court calling a meeting under Section 79 (3). Harries, C. J. observes in paragraph 18 at page 356 "The learned Judge rightly refused to decide the matters which are in issue in the suit and I do not think it will be right for us to express any opinion upon these matters. However it is clear that there is serious dispute between the parties as to whether Mr. Roy Chowdhury was qualified to act as a director and whether or not he was wrongly excluded from the Board. If it transpired in the suit that he was wrongly excluded from the Board difficulties might arise concerning any meeting which the requisitionists might call under Section 78 (3). In fact it seems fairly clear that if such a meeting was called it would be the cause of considerable litigation". In paragraph 19 at page 357 Harries, C. J. says "If the meeting was called, difficulties would undoubtedly arise as to the conduct of the meeting. In an extraordinary general meeting the parties might elect their own Chairman, but the probabilities are that objection would at once be taken to Mr Roy Chowdhury either acting as Chairman or even voting or being concurred in the proceedings at all. It seems to me that if the requisitionists were allowed to conduct this meeting and less difficulties would arise and therefore I think the learned Judge was right in holding that it was impracticable to hold such a meeting."

78. Harries, C. J. supports the meaning of the word 'impracticable' given by Banerjee J in the case of the Malhati Tea Syndicate Ltd, (1951) 55 Cal WN 653 *ibid*. Banerjee, J adopted the meaning which the Judicial Committee gave to the word 'impracticable' in *Commissioner Lucknow Division v. Deputy Commissioner of Partabgarh*, reported in 41 Cal WN 1072 = (AIR 1937 PC 240). According to the Privy Council 'impracticable' means impracticable from a reasonable point of view, and Banerjee J has added in the case of the Malhati Tea Syndicate Ltd (1951) 55 Cal WN 653 that "the Court takes a commonsense view of the matter and acts as a prudent person of business."

79. I have discussed this judgment of the Appellate Court slightly in details with a view to point out the meaning that should be given to the word 'impracticable' in Section 186 of the Companies Act 1956. The Court in every case has to look at the facts from a reasonable commonsense point of view and act as a prudent person of business to decide whether it has become 'impracticable' to call a general meeting. That is one of the reasons why I

have been saying that a *prima facie* case against the Bhesanias should have been established in the instant case to enable the Court to decide upon the impracticability of convening a general meeting in the ordinary manner.

80. I would now come to a case recently decided in England. It is the case of *El Sombrero Ltd.* reported in (1958) 3 All ER 1. The provisions of Section 135 (1) of the English Companies Act, 1948 are similar to those of Section 186 of our Act. The applicant in this case held 90 per cent. of the shares of Private Company incorporated in March, 1956. There were two Directors and each of them held 5 per cent. of the shares. The quorum for general meetings was two members present in person or by proxy, and, if within half an hour from the time appointed for a meeting a quorum was not present, the meeting, if convened on the requisition of members, was dissolved. No general meeting of the Company had ever been held. On March 11, 1958, the applicant requisitioned an extraordinary general meeting, for the purpose of passing resolutions removing the two directors and appointing two other persons as directors. The existing directors failed to comply with the requisition. The applicant himself convened an extraordinary general meeting for April 21, 1958. The directors deliberately did not attend the meeting either in person or by proxy, and, as a quorum was not present, the meeting was dissolved. On April 29, 1958, the applicant served a special notice, under Section 142 of the Act of 1948, of his intention to move the same resolutions, under Section 142 and Section 184, at the next extraordinary general meeting of the Company. On the same day he took out an originating summons asking for a meeting to be called by the Court, under S. 135 (1), for the purpose of passing the resolutions, and for a direction that one member of the Company should be deemed to constitute a quorum at such meeting. The directors opposed the application. Wynn-Parry, J., has held: (i) as a practical matter the desired meeting of the Company could not be conducted in accordance with the articles of association and the Court had jurisdiction under Section 135 (1) of the Companies Act, 1948, to order a meeting to be held notwithstanding opposition by the share-holders other than the applicant and (ii) an order for meeting to be held and that one member present should constitute a quorum would be made because (a) to refuse the application would be to deprive the applicant of his statutory right under Section 184 to remove the directors by means of an ordinary resolution, and (b) the respondent-directors had failed to perform their statutory duty to call an annual general meeting for the reason

that, if they had convened a general meeting they would have ceased to be directors.

81. It is apparent that the facts of the case before Wynn-Parry, J., were much stronger than the facts here. In the English case the facts established that there was an impracticability to which the directors themselves had contributed. In our case it cannot be said that the directors have failed to call any annual general meeting. In our case there has been no requisition as yet which the directors have not complied with and it is also not yet in evidence that the Bhesania group has deliberately refrained from attending any extraordinary meeting so that the quorum may not be present. I do not think that the decision of Wynn-Parry, J. can be applied to the facts of the present case.

82. Reliance was also placed on Stroud's Judicial Dictionary, Third Edition, Vol. 2, at page 1377. It says: "The words 'impracticable to conduct a meeting' in Section 115 (2) of the Companies Act, 1929 — see now Companies Act, 1948, Section 135 covers the case where it is impracticable owing to the terms of the articles and the state of share-holding in the company to get a quorum present: *Re Edinburgh Workmen's Housing Improvement Co.*, 1935 SC 56." Learned Counsel for the petitioner has urged that having regard to the state of the share-holding in this Company it is impracticable to get a quorum. I have already said that on the facts of the case the proposition at present appears to be hypothetical. In the case of *El Sombrero Ltd.*, (1958) 3 All ER 1 as we have seen, the dissenting group deliberately chose not to attend the meeting to frustrate the purpose of the meeting due to lack of quorum. We do not yet know what the Bhesania group is going to do if an extraordinary general meeting is requisitioned. Until that is known I do not see how the Court in the exercise of its judicial discretion, can call a meeting under Section 186.

83. I would now come to the case of *Bengal and Assam Investors Ltd. v. J. K. Eastern Industries Private Ltd.*, reported in AIR 1956 Cal 658. P. B. Mukharji, J. refused to call a general meeting in this case under Section 186. The facts, *inter alia*, were that a notice had already been issued calling an extraordinary general meeting of the company. The learned Judge in paragraph 5 at page 660 observes: "The resolutions that are intended to be passed at the meeting demanded by the requisitionists are set out in the notice itself." The learned Judge thought that there was, therefore, no impracticability in the matter of calling the meeting. The ground on which the assistance of the Court was sought, was that one K. L. Jatia, the Chairman of the Board of Directors, might not act impartially because his removal

was sought in one of the proposed resolutions for the extraordinary meeting. P. B. Mukharji, J. in paragraph 13 at page 661 says: "I am satisfied that K L Jatia cannot decide on the resolutions proposed in that meeting because the resolutions will have to be voted by the share-holders. It is the share-holders who will be in control of the meeting."

"If the applicant has on its side 55 per cent of the votes of the share holders, I do not see why they should be at all frightened. The Chairman's power is very limited. He has a vote as a share holder and director. That gives him no special position to control the meeting. He has, in the event of an equality of votes between to rival groups, a casting vote. But on the applicant's own showing there is no question of equality of votes in this case because the applicant's group is much larger than the respondent's group."

84. It is no doubt true, as the petitioner's Counsel has contended that the facts in this case were entirely different from the facts we have to deal with. And this case does not give us much assistance in deciding whether this application should be refused; but P. B. Mukharji, J. in paragraphs 17 and 18 of his judgment has discussed certain general principles that are to be applied to S 186 of the Companies Act. The petitioner's Counsel says that these observations are in the nature of obiter, but, to my mind, they are useful observations and some of them lay down the basic principles that are to be followed by Courts while considering an application under Section 186. P. B. Mukharji, J. has expressed his concurrence with the meaning given to the word 'impracticable' by Banerjee, J. in the case of *Maharati Tea Syndicate Ltd.* (1951) 55 Cal WN 653, *ibid.* (Banerjee, J.'s view as we have already seen, has also been accepted by the Appellate Court); and has developed the points still further in this case of *Bengal and Assam Investors Ltd.*, AIR 1956 Cal 658.

85. Upon considering the relevant authorities on this subject and examining the language of the Statute the main principles involved in trying an application under Section 186, are to my mind, as follows:—

1. The Court would not ordinarily interfere with the domestic management of a company which should be conducted in accordance with its articles.

2. The discretion granted under S 186 should be used sparingly and with caution so that the Court does not become either a share holder or a director of the company trying to participate in the inter-necine squabbles of the company.

3. The word 'impracticable' means impracticable from a reasonable point of view.

4. The Court should take a commonsense view of the matter and must act as a

prudent man of business.

5. A prudent man of business has not a sensitive, officious view of intervention in case of every rivalry between two groups of directors. Prudence demands that the Court ordinarily keep itself aloof from participating in quarrels of rival groups of directors or share-holders.

6. But where the meeting can be called only by the directors and there are serious doubts and controversy as to who are the directors or where there is a possibility that one or other or both the meetings called by the rival groups of directors may be invalid, the Court ought not to expose the share holders to uncertainties and should hold that a position has arisen which makes it 'impracticable' to convene a meeting in any manner in which meeting of the Company may be called.

7. The Court should exercise its powers under Section 186, when upon considering all the facts and circumstances of a case, it can say with a reasonable approach to certainty or even *prima facie* that a meeting called in the manner in which meetings are ordinarily called under the Act or under the articles, would be invalid.

8. Before the Court exercises its discretion under Section 186 the Court must be satisfied, when a director or a member moves an application, that it has been made *bona fide* in the larger interests of the Company for removing a deadlock otherwise irremovable.

86. When I apply the principles enunciated above to the facts of this case it seems to me that this is not a case which falls for the Court's interference under Section 186 of the Companies Act, 1956.

87. Numerous other points have been urged before me. Mr. S. C. Sen, learned Counsel for one of the contesting respondents, has also dealt with the history of Company Jurisprudence in relation to the provisions of Section 186, but having regard to the conclusions I have already reached, I do not think it necessary to consider any other point raised in this application.

88. The result is that this application is dismissed. The petitioner will pay to the respondents one set of costs certified for Counsel.

VGW/D V.C.

Application dismissed.

AIR 1969 CALCUTTA 564 (V 56 C 97)

P. CHATTERJEE, J.

24 Paraganas Zilla Parishad, Petitioner v. M/s. Mercantile Engineering Co and another, Opposite Parties

C R. No 146 of 1965, D/- 25 4-1969

(A) Bengal Local Self-Government Act (3 of 1885), S. 146 — Notice under — When not necessary — Expression "any

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act done by a person under the authority of the Act" — District Engineer sending his road-roller for repair, is not something which is done or contemplated under the Act — He sends it for repairs in ordinary course of his duty and not because the authority under the Act directs him to do so — Notice under Section 146 is, therefore, not necessary before filing a suit for recovery of price for such work — If S. 146 does not apply third part of that section also does not apply. (Para 3)

(B) Limitation Act (1908), Arts. 56 and 120 — Boiler along with road-roller sent for repairs — Work cannot be deemed to have been done until repairs are tested by boiler inspector and accepted — Boiler not tested — Art. 56 held did not apply for suit to recover price for such work — Where, however, it was because of the defendant District Board that the boiler inspector could not inspect it, plaintiff was entitled to payment for work done by him — There being no specific provision in Limitation Act for such matters, case would be governed by Art. 120 of the Limitation Act of 1908.

(Paras 5, 6, 7)

R. N. Mitra and Ranen Mitra, for Petitioner; Mahendra Nath Mitra, for Opposite Parties Nos. 1 and 2.

ORDER:— This is a petition under Section 115 of the Code of Civil Procedure against the judgment and decree passed by the court of appeal below in a suit for money where no appeal lies.

2. The defendant is the appellant. The plaintiff repaired certain boilers and tendered a bill on 5th July 1957. On 7th August 1958 notice under Section 80 of the Code of Civil Procedure was served. On 10th June 1961 the suit was filed.

3. The first point is that no notice under Section 146 of the Bengal Local Self-Government Act was served and so the suit is not maintainable. But S. 146 refers to a suit which relates to "any act done by a person under the authority of the Bengal Local Self-Government Act." But if a District Engineer sends his road roller for repair that is not something which is done under this Act. In the ordinary course of his duty he sends it for repairs and not because the authority under the Local Self-Government Act directs him to send the same for repair. There is no provision in the Act itself as far as I am aware which authorises the district engineer to send it for repair. We cannot say that this act of sending the road roller for repair was an act contemplated under the provisions of this statute. Hence, the first objection is overruled.

4. The second objection is that a notice should have been served and a suit instituted as under the third part of Section 146 of the Act. If Section 146 does not apply third part also does not apply.

5. In the third point there is some substance. The boiler was sent for repairs. The work was done and a bill was sent. It was served. But ultimately as the road roller includes the boiler it had to be tested by the boiler inspector. Hence the work could not have been deemed to have been done until the repair is accepted by the district engineer and the fitness of the boiler tested by the inspector of the boilers.

6. The result, therefore, is Art. 56, of the Indian Limitation Act 1908 would not apply.

7. The next point urged is that in that case the suit is premature. The answer is it is the District Board which has not allowed the boiler inspector to inspect. In every letter they have said it is not ready for inspection. If it was really repaired I do not find any reason why it should not have been considered to be ready for inspection. But whatever it may be, because of the fault of the District Board, the defendant, the boiler inspector could not inspect it. I cannot, therefore, say that the work was done. Because doing of the work means completion of the work to the satisfaction of the person to whom the work is done. But that satisfaction could not have been there, except when a fitness is granted by the boiler inspector. Therefore, I cannot say Art. 56 would apply. But still the plaintiff has done the work as the court below found and as the letter of the district engineer shows. Therefore, he is entitled to payment. As there is no specific article to such matters it should be governed by the general Article 120 and the suit is maintainable within six years and, therefore, I cannot say that the suit is barred by limitation.

8. The order of cost passed by the court below is set aside. Each party will bear its own cost.

9. The Rule is discharged.

HGP/D.V.C

Rule discharged.

AIR 1969 CALCUTTA 565 (V 56 C 98)

S. N. BAGCHI, J.

Bar, Das, Dey & Co., Appellants v. Sri Sri Ishwar Tarakeshwar Sib Thakur Jiu, Shebait Mohant Srimat Dandiswami Hrishikesh, Ashram, Respondent.

A. F. A. D. No. 718 of 1962, D/- 14-3-1969.

(A) Hindu Law — Religious endowment — Shebait — Document purporting to be by deity represented by Shebait — Not executed by shebait in such capacity or as representing the deity — Admission of execution by shebait not as Shebait of the deity but by one holding power of attorney from him — Held, that the document would not bind

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the delty but the shebait in his individual capacity. AIR 1943 Cal 203, Foll.

(Paras 8, 9)

(B) T. P. Act (1882), Ss. 106, 107 — Defendant occupying land for extracting sand under oral agreement for a certain period on payment of certain amount as rent annually — Execution of an agreement during continuance of the tenancy to the effect that defendant was inducted into land as tenant for first time under it — Occupation of defendant of land, admitted to be from before the agreement came into existence — Held, that what was created in favour of defendant was not a lease under Section 107 but only a monthly lease i.e. monthly tenancy under Section 106 — Defendant could not be held to have been brought into occupation for the first time under subsequent agreement. AIR 1952 SC 23, Rel on

(Para 10)

(C) Tenancy Laws — West Bengal Estates Acquisition Act [1 of 1954], Ss. 6(1)(h) and (i), 27, 28, 29 — Expression "directly worked by him" in Section 28 — Means directly worked by intermediary himself — Provisions of S. 28 are contrary to provisions of S. 6(1)(h) and (i) and would prevail over them — (Words and phrases — "directly worked by him" in S. 28).

The provisions of Section 6, sub-section (1), clauses (h) and (i) are to be understood with reference to the provisions of Sections 27 and 28 of the Act. As the provisions in Section 28 in regard to a mine directly worked by an intermediary are contrary to the provisions of Section 6 sub-section (1) clauses (h) and (i) of the Act the provisions of Section 28 would prevail over the provisions of Section 6 sub-section (1), clauses (h) and (i) of the Act. (Para 15)

The word "directly" used before the word "worked" followed by the words "by him" in Section 28 leaves no room for holding that if the intermediary had worked the mine either through a lessee or a licensee, it would be the intermediary's directly working the mine. That the possession of the mines remained with the intermediary would not alter the meaning of the expression "directly worked by him" meaning directly worked by the intermediary. If the intermediary by making installations in the mine engaged labourers and worked the mine, he could be then considered to have had worked the mine directly. Accordingly, when the intermediary interest is vested in the State of West Bengal, the intermediary not having been then directly working the mine, the provisions of Section 28 would come into operation in respect of the mine and the intermediary has no right to recover mine from the lessee who had been directly working the mine and who could therefore, be placed within the terms of Section 29.

(Paras 16, 17, 19, 21)

(D) Evidence Act (1872), Section 115 — Estoppel — There can be no estoppel against law — No amount of admission

contrary to law could create such estoppel. (Para 20)

Cases Referred: Chronological Paras
(1952) AIR 1952 SC 23 (V 39) = 1952
SCR 269 Ram Kumar Das v Jagdish
Chandra Deo 10
(1943) AIR 1943 Cal 203 (V 30) = 47
Cal WN 288, Binku Behari Mondal
v Binku Behari Hazra 9
(1871) 6 QB 56 = 40 LJMC 35, Roads
v Overseers of Trumpington 20

Ranjit Kumar Banerjee Subhas Chandra Bhattacharyya and Prasanta Kumar Bando-padhyay, for Appellants, Bijay Bhose, Dilip Kumar Banerjee and Balin Kumar Basu, for Respondent

JUDGMENT: This Second Appeal is at the instance of the defendants in Title Suit No 37 of 1960 of the Court of the Second Munsif, Chandernagore. The plaintiff proceeded with the following case. The plaintiff is Sri Sri Iswar Tarakeswar Sib Thakur Jiu respectively (sic represented?) by Shebait Mohant Srimat Dandiswami Hirshikesh Asram. The defendants are Bar, Das, Dey & Co proprietors of the same being Gou Chandra Bar, Batakrishna Dev and Bijay Basanta Das. The defendants are alleged to have executed an agreement in favour of the plaintiff to take out sand up to 1365 B S from plot Nos 589, 797, 530, 563/1106 comprising 8.86 acres equal to 27 bighas or land situate in Mouza Bilgari recorded in Khatain Nos 27, 23 and 24. The right to take the sand from the aforesaid land under the agreement was to be effective up to 1365 B S on payment of the plaintiff Rs 66 per annum said to be the license fees. The defendants shall have no other concern with the land which shall always remain the property of the plaintiff. So soon as the plaintiff would claim any right the defendants would immediately withdraw themselves from the act of taking sands after 1365 B. S. The license fees for the period 1362 to 1365 B. S remained unpaid at Rs 66 per annum amounting in total to Rs. 330. The plaintiff served a notice on the defendants withdrawing the said defendant's license by revoking the license, and the license expired with the expiry of the notice. The defendants did not vacate the land. Hence the suit for recovery of the land and for arrears of license fees.

2. The defendants resisted the suit by a written statement. The defendants asserted that in view of the provisions of the West Bengal Estates Acquisition Act the plaintiff's interest as intermediary in the land had vested in the State of West Bengal wherefor the plaintiff lost any right to sue against the defendants. The defendants are tenants in respect of the land in dispute under the State of West Bengal that has already realised rent in respect of the disputed land from the defendants. It is further contended in the written statement that the interest of the defendants in the

land in dispute has been correctly recorded in the finally published revisional record of rights. From 1347 Baisakh, the defendants came into occupation of the disputed land upon an oral settlement as tenants under the plaintiff at an annual rental of Rs. 54. On 10-7-41, there was confirmatory lease in respect of the defendants' tenancy in the land in dispute. Since Baisakh 1347 B. S., the defendants have been in occupation of the disputed land as tenants, and as such, have acquired a non-ejectable right therein. It is further asserted in the written statement that upon 1361 B. S. the defendants possessed the disputed land as tenants under the plaintiff, and that from 1362 B. S. the defendants had been possessing the disputed land as tenants under the State of West Bengal. The defendants contended in the written statement that when the plaintiff threatened to enhance the rent of the tenancy and coerced the defendants to execute a document said to be an agreement, the defendants did execute in 1350 B. S. one agreement under undue influence and coercion. The defendants disputed the sufficiency of the notice determining the alleged licence in respect of the land in dispute.

3. Six issues were framed by the learned Munsif upon the pleadings. The learned Munsif in his judgment found that the intermediary interest of the plaintiff in the land in suit vested in the State of West Bengal from 1st Baisakh 1362 B. S., and that the plaintiff was not entitled to retain possession of the disputed land under the provisions of Section 6(1) clauses (h) and (i) of the West Bengal Estates Acquisition Act. The learned Munsif found that in the disputed land the defendants have acquired a tenancy right. The learned Munsif found also that the plaintiff had no right, title and interest in the disputed land, and as such, had no right to get arrears of the licence fees from 1362 to 1365 B. S. Accordingly, the learned Munsif dismissed the plaintiff's suit with costs. The plaintiff went in appeal before the learned District Judge at Hooghly. The learned Judge found that a deed of lease was executed vide, Ext. A, but he considered this Ext. A through utter confusion of law only as a license for extracting sand from suit land being a unilateral document, and not a valid lease. The learned Judge proceeded however to interpret Ext. A upon a mistaken view of law as being a lease in respect of the disputed land for the period of 9 years from 1347 B. S. to 1355 B. S. creating a liability in the defendants to pay annual rent of Rs. 54 to the plaintiff. The learned Judge found that the option of renewal of the lease (Ext. A) was not exercised by the defendants on the expiry of the lease and held that after the expiry of the term of the lease it stood determined under Section 111 clause (a) of

the Transfer of Property Act. Then the learned Judge proceeded to interpret Ext. 1 dated 27-4-50 registered on 8-8-50. This document, according to the learned Judge, was an agreement whereby the right to extract sand from the suit land for another period of 9 years from 1357 B. S. to 1365 B. S. was created with the defendant's liability to pay Rs. 67 as licence fees under Ext. 1. Then the learned Judge held that the document (Ext. 1) was a licence not a lease, and that the plaintiff realised licence fees of Rs. 66 though granting receipts in the form of rent receipt (Ext. 'B' series). The learned Judge relying on Ext. 1 and 'B' series came to the conclusion that the presumption arising out of the revisional survey khaltians, Exts. F and Fi had been rebutted by Ext. 1 which is binding upon the parties. The learned Judge further found that the plaintiff held the suit land as intermediary within the meaning of Section 2 Cl. (i) of the Estates Acquisition Act. He held that under S. 6 Cl. (i) of the Estates Acquisition Act debuttar of the deity being an endowment, both charitable and religious, would be entitled to retain in khas, in spite of the vesting of the intermediary interest in the disputed land in the State of West Bengal. Further the learned Judge found that the plaintiff's interest in the suit land had not been vested in the State wherefor the plaintiff was not required to submit 'B' Form. The learned Judge then held that he is entitled to get the land in khas upon evicting the defendants therefrom and also granted a decree for arrears of licence fees. Ultimately the learned Judge decreed the suit after setting aside the judgment and decree passed by the learned Munsif and allowed the appeal.

4. The defendants have now come up in appeal before this Court which was resisted by the plaintiff.

5. For the defendants-appellants Mr. Ranjit Kumar Banerjee, learned Advocate, appeared, and for the respondent Mr. Dilip Kumar Banerjee, learned Advocate, gave reply.

6. First, I am to observe that neither of the Courts below found it to be their duty to look into the plaint. The plaint schedule speaks of khatian Nos. 22, 23, 24 and plots Nos. 589, 797, 330, 563 and 1109. The total area of the plots, according to the plaint schedule, page 3, is 8.86 acres equal to 27 bighas. The revisional khatian that was finally published & marked & exhibited in the lower Court, as Exts. F and Fi had not been looked into by the plaintiff's legal advisers. The khatian Nos. are 807 & 808 not khatian Nos. 22, 23, 24 relate to the suit property. In khatian No. 807 (Ext. F) in the first column under the heading "superior interest" there are three groups, 22 Darpattani, 23 Darpattani, 24 Darpattani — Dandi Swami Hrishikesh Asram. These three numbers

caused a confusion in him who had drafted the plaint. The plot No. 589 area 3.84 acre is a balukhad and plot No 597 is a danga. Plot No. 563 is 1.07 acres but in khatian No. 808 the entire plot is not there. The entire plot is 6.36 acres but in khatian 808 plot No. 563 being one 2 as 13 gds 3 karas 1 karanti of sixteen annas only covers 1.07 acres. Plot No. 607/1109 is a balukhad. It is a part of the total area, being 2.63 acres. The plot containing the part of the entire plot, is 14 as 10 gds 3 karas 1 karanti of sixteen annas covering an area of 2.39 acre. (Ext. F1) So the remaining portion of the two plots, 563 and 607/1109 belongs to some other person who is not a party, as the plaint shows, in the suit. In the plaint schedule two plots are there—dag No. 563, 1.07 acre in area and dag No. 1109, 1.39 acres in area. But there is no plot in khatian No 808 bearing plot No 1109. Plot No 670/1109, as I have already pointed out, is a part of the entire plot 2.63 acres. There is no plot No 797 either in khatian No. 807 or in khatian No. 808.

7. Mr. Banerjee for the respondent submitted that in view of these errors clarification was necessary. I think that he had the idea that the suit should be remanded for "clarification". I pointed out to him that clarification is there in the record itself, and that is the reason why I have analysed the khatian vis-a-vis the plaint schedule. Mr Banerjee for the respondent further submitted that there is no khatians Nos. 22, 23 and 24 but the khatians are 807 and 808 (Exts. F and F1). I pointed out by my analysis the error in the drafting of the plaint. It referred to khatian Nos. 22, 23 and 24, an error of the draftsman, who should mention khatian Nos. 807 and 808 but mistakenly mentioned the superior Darpatni Interests as were recorded in the relevant Darpatni Khatian of 22, 23 and 24 under the pattanidar. The suit properly covers an interest under the Darpatanidar, and that interest has been recorded in khatian Nos 807 and 808. For the error in the number in the plots and their areas vis-a-vis left out portions of the plots as described in the plaint schedule, Mr Banerjee had no point to reply. I have pointed out that if the Courts below would have looked into the khatians (Exts F and F1) and would have compared the plaint schedule with such khatians they would not have proceeded with the suit and the appeal respectively, and would have called upon the plaintiff to justify the claim as laid in the plaint, when in the plaint, the presumption of correctness of the revisional record of rights (Exts. F and F1) had not been challenged a whit. The defendants relied on the presumption of correctness of the record-of-rights. The plaintiffs in the plaint did not challenge the presumption of correctness of the record-of-rights. The learned Judge in the Court of appeal below

found that the Ext 1 overthrew the presumption of correctness of the record-of-rights without looking and analysing what the record-of-rights say and how it tallied with the plaintiffs' claim as laid in the plaint, describing erroneously in the plaint schedule the land said to be in dispute. The learned Judge did not notice that in Khatian No 807 there are two plots (Ext. F) plots 589 and 597 and in the plaint schedule there is only plot 589, but not plot 597. Therefore, the learned Judge's finding that Ext. 1 rebutted the presumption of correctness of the record-of-rights (Ext. F) had no legs to stand upon. Then the learned Judge did not also look to Khatian No 808. Khatian No 808 consists of two plots — plot 563 and 607/1109. In the plaint schedule I find there is plot 563, but there is no plot, being number 607/1109. If the learned Judge would have compared the plaint schedule with the Khatian Ext F-1, he would not have said that Ext 1 rebutted the presumption of correctness of the said record-of-rights. Therefore, the learned Judge's finding on that point cannot also stand, in the face of the plaint schedule and the two khatians. Accordingly, when there is no case in the plaint challenging the correctness of the record-of-rights, containing the plots as held by the defendants, said to be dakhalkar as recorded in those khatians in respect of the lands claimed by the defendants as appertaining to their tenancy under the plaintiff, it shall be presumed, as the contrary has neither been pleaded, nor proved in regard to the plots, as recorded in those khatians with all their incidence, that the lands have been correctly recorded. Therefore, the finding of the learned Judge that Ext 1 overthrew the presumption of correctness of the record-of-rights pertaining to the land in actual physical occupation of the defendants-appellants cannot stand, and I, therefore, disagree with that finding.

8. The learned Judge found Ext. A to be an agreement creating a license. It is to be observed that the plaintiff blacked out this story of agreement in the plaint. The defendants pleaded that from 1347 Baisak, they had entered into the land now in their actual physical occupation upon an oral agreement to pay rent to the plaintiff at Rs 54 per annum. The defendants asserted that while they were in occupation under that oral agreement, a document of lease was created on 10-7-1941, being a conformatory lease as it were. The defendants further contended that during the continuance of their occupation of the land to which they were inducted in terms of the oral settlement as well as of the confirmatory lease Ext. K, the plaintiff, by coercion, induced the defendants to execute the other document (Ext. 1). Now, let us see in the light of the documents themselves Ext. 1 is the certified copy. In this agreement

there are two parties. It reads in the preamble as follows:

“श्री. श्री. ईश्वर तारकनाथ ... प्रथम परख ...
दोल्लि दाता । वर, दास, दे अण्ड को. द्वितीय परख
गिह्ति ।”

The recitals would show that on 27-4-1950 corresponding to 14th Baisak, 1357 B. S. a right was created as it were for the first time between the parties. The recipient of the document, Ext. 1 was permitting as it were the other party to the document that means the defendants' right to extract sand from 27 bighas of land within plots 589, 597, 563 and 1109 of Khatians 22, 23 and 24 of mouza Baligari. This document, as the endorsement of the Sub-Registrar shows, was executed by one Hermbalal Sanyal of Tarakeswar, a service holder and an agent of Dandiswami Ashram under the power of attorney. On the top of the document in the right hand side the executant is Dandiswami Jagannath Ashram. The execution was not admitted by Dandiswami Jagannath Ashram, but was admitted by one power of attorney-holder of Dandiswami Jagannath Ashram. The cause title of the document, Ext. 1 would not show that it was the deity through Shri Dandiswami, or the deity represented by Dandiswami was executing the document (Ext. 1). The executant of the document was not Shiv Thakur represented by Dandiswami but by Dandiswami himself. Admission of execution was not by Dandiswami as the shebait of the deity but by one holding power of attorney from Dandiswami. A licence requires no such document as Ext. 1. But, for and on behalf of the deity the document (Ext. 1) was not executed by its shebait. Ext. A, however, which was within the knowledge of the plaintiff's shebait was not mentioned in the plaint. From the plaint, it would appear (vide paragraphs 2 and 3) that the property described in the plaint schedule managed by the shebait Dandiswami is covered by an agreement (Ext. 1) which was executed by the defendants for extracting sand up to the end of Chaitra, 1365 B. S. In their written statements the defendants referred to Ext. A and the circumstances under which it came into existence. In Ext. A, there are two parties as mentioned in the preamble. The executant of Ext. A is Dandiswami Jagannath Ashram and the recipient of Ext. A is Bar. Das Dey & Co., i.e. the defendants. Ext. A as the preamble shows is an agreement. It is dated 26th Ashar, 1348 B. S. corresponding to 10th July, 1947. But the terms in Ext. A at page 2, amongst other things, recite:

“वर्तमान सन १३४७ सालेर वैशाख मास होई ते
आगाभी सन १३५५ सालेर चैत्र मास पञ्च पूर्ण नै
वकर मेया दे जमा करीया, दिया . . .”

9. So, before the execution of the document Ext. A on 26th Ashar, 1348 B. S., the

properties described in schedule of Ext. A had already been in occupation of the defendants. Therefore, the defendants' contention that before 1347 B. S. they had come into occupation of the disputed land on an oral agreement between the plaintiff-deity and themselves creating a liability to pay a rent of Rs. 54 per annum is amply supported by the recitals in the document, Ext. A. No explanation was given as to why the time of commencement was fixed from Baisakh 1347 B. S. to Chaitra 1355 B. S. when the document itself came into existence in Ashar 1348 B. S. There cannot be any third case. If I am to accept the plaintiff's case under Ext. 1, then for the first time the defendants were inducted into the land in dispute as a licensee at work under Ext. 1 on and from 14th Baisak 1357 B. S. = 27-4-50. But Ext. A in its recitals shows that the defendants came into occupation in Baisak 1347 B. S., and supports the defendants' contention that they had come into occupation of the disputed land not as trespassers but as tenants under the plaintiff on an oral agreement from Baisak 1347 B. S., being liable to pay Rs. 54 as rent per annum. Ext. A again was executed by Dandiswami Ashram not by the deity-plaintiff through Dandiswami Ashram, or being represented by Dandiswami Ashram. The law is well established by a Bench decision of this Court in the case of Banku Behari Mondal v. Banku Behari Hazra, 47 Cal WN 288 = (AIR 1943 Cal 203). The execution of the two documents (Exts. 1 and A) in the manner as has been done in the present case would not bind the deity but the Dandiswami in his individual capacity. Therefore, neither by Ext. A nor by Ext. 1 the deity bound himself to be under any obligation. So, we cannot look into the terms of either of Ext. A or of Ext. 1.

10. Ext. A was a unilateral document. Therefore, it is not a lease under Section 107 of the Transfer of Property Act, but it is a monthly lease i.e. monthly tenancy, as it were, as such a tenancy under Section 106, but not under Section 107 of the Transfer of Property Act AIR 1952 SC 23, Ram Kumar Das v. Jagdish Chandra Deo. Ext. 1, though a bilateral document, was not executed by and on behalf of the deity, and is not binding on the deity. Be that as it may, Ext. 1 came into existence during the “continuance” of the tenancy created under the oral agreement, which was confirmed by Dandiswami, although not by the deity. Therefore, the position is this that the defendants claim that they are holding the land in dispute from 1347 B. S. not adversely against the deity but as tenants. The deity did not accept such position when the plaint was filed. The deity came with the story as if for the first time the deity inducted the defendants into the disputed land under Ext. 1. But that fact cannot be accepted in the face of Ext. A which at least contains an admission by the Shebait of the deity to this extent that the defendants

had been in occupation of the disputed land in 1347 B S i.e. from before Ext A had come into existence. This position is unassailable. Moreover, as the plaintiff's shiehai knew this fact, the suppression of such a material fact in the plaint clearly tells against the plaintiff and this Court is not in a position to accept that under Ext. 1 for the first time the defendants were brought into occupation of the land in dispute.

11. Mr. R Banerjee the learned Advocate for the appellant submitted that his clients would go so far as to accept this position in respect of the land in their occupation that they were licensees under the plaintiff. But he contended that even then Chapter IV of the Estates Acquisition Act, particularly Section 28 would stand against the plaintiff's claim for khas possession of the mine in the sand-deposit. Mr R Banerjee, the learned Advocate for the appellants, further submitted that both the Courts below overlooked Chapter IV of the Estates Acquisition Act and that the Court of appeal erroneously held that Section 6(1) clauses (h) and (i) of the Estates Acquisition Act entitled the plaintiff to get the reliefs prayed for. Mr Banerjee's argument raises several important questions both of law and fact.

12. Now let me examine the settlement khatian (Ext F). Plot 589 is a balukhad, plot 597 is a danga and plot 563 is a danga. Plot 607/1109 is a balukhad. According to the plaintiff and the defendants all these four plots are balukhad meaning deposits of sand in the subsoil. Chapter IV of the Estates Acquisition Act heads with these words "Mines and Minerals". Section 27 reads as follows:

"27.—Provisions of Chapter IV to override other provisions of the Act. The provisions of this Chapter shall have effect notwithstanding anything to the contrary elsewhere in this Act."

13. Section 28 reads as follows:—

"28.—Right of intermediaries directly working mines. So much of the land in a notified area held by an intermediary immediately before the date of vesting (including sub-soil rights therein but excluding rights in hals and bazars not in the khas possession of the intermediary and lands comprising forest if any) as was comprised in or as appertained to any mine which was being directly worked by him immediately before such date shall with effect from such date be deemed to have been leased by the State Government to such intermediary. The terms and conditions of such lease shall be as agreed upon between him and the State Government or in default of agreement as may be settled by the Mines Tribunal."

Provided that all such terms and conditions shall be consistent with the provisions of any Central Act for the time being in force relating to the grant of mining leases."

14. Section 29 sub-section (1) clause (ii) reads as follows:

"(ii) In other cases, — that if the holder of the lease has developed or done any prospecting work in respect of any part of the land included in the lease but has in the opinion of the State Government, failed to do any prospecting or development work within three years from the date of vesting in respect of the remaining part of the land included in the lease, the State Government shall be entitled to resume the whole or any portion of such remaining part of the land together with the minerals lying thereunder, after giving three months' notice in writing, but in so resuming the State Government shall have regard to the reasons for such failure and by the requirements as appear to it to be reasonable for the future development of the mining concern of the lease."

Section 27 lays down that provision of Chapter IV of the Estates Acquisition Act shall have effect notwithstanding anything to the contrary elsewhere in this Act. Now Mr Banerjee, for the respondent submitted that as nothing in the provisions of Chapter IV were contrary to the provisions of Section 6(1) clauses (h) and (i) of the Act the provisions of Section 6 Clauses (h) and (i) would prevail. Mr. Banerjee, learned advocate for the appellants on the other hand, contended that the contention of Mr. Banerjee, learned advocate for the respondent, was not sound. The expression 'anything to the contrary elsewhere in this Act' in Section 27 shall have to be read as an explanation to Sections 28, 29 of Chapter IV. Section 28 amongst other words says "So much of the land in a notified area held by an intermediary immediately before the date of vesting . . . as was comprised in or as appertained to any mine which was being directly worked by him immediately before such date be deemed to have been leased by the State Government to such intermediary." For the definition of the word "Mine" we are to look into the Mine Act of 1952 since that expression has not been defined in the Estates Acquisition Act and for definition of the word "mineral" in Chapter IV of the Estates Acquisition Act we are to look into the definition of mineral in the Mines and Minerals (Regulation and Development) Act 1957 and Mines Act of 1952. The Mine in clause J of Section 2 of the Mines Act 1952 is defined as follows:

"Mine means any excavation where any operation for the purpose of searching for or obtaining mineral has been or is being carried on and includes . . ."
Mineral has been defined by the Mines and Minerals (Regulation and Development) Act, 1957 in Section 3 Clause (a). It includes all minerals except mineral oils. In Clause (e) of Section 3 "minor minerals" have been defined as building stones, gravel,

ordinary clay, ordinary sand and other than sand used for prescribed purposes and any other mineral According to both the parties 27 bighas of land said to be in dispute formed a subsoil deposit of sand. Therefore, the disputed subsoil deposit of sand is a mine and sand is mineral.

15. The provisions of Section 6, sub-section (1), clauses (h) and (i) of the Estates Acquisition Act are to be understood with reference to the provisions of Sections 27 and 28 of the Act. In Section 28, the two expressions "mine" and directly worked by "him" are of much importance. As the provisions in Sec. 28 of the Estates Acquisition Act in regard to a mine directly worked by an intermediary are contrary to the provisions of Section 6, sub-section (1), clauses (h) and (i) of the Act, the provisions of Section 28 would prevail over the provisions of Section 6, sub-section (1), clauses (h) and (i) of the Act. Therefore, in regard to the present case, the provisions of Sections 27 and 28 of the Estates Acquisition Act would get better of the provisions of Section 6, sub-section (1), clauses (h) and (i) of the Act.

16. The next question is whether on the date of vesting, that means on the 15th April, 1955, the mine which according to both parties is a "ballykhad" was being worked directly by the plaintiff as a mine by extracting sand, — a mineral, — therefrom. It is clear from the evidence that the mine in the disputed land has been worked by extracting sand therefrom from Baisakh, 1347 B.S. by the defendants, and the plaintiff did not, during the period from Baisakh, 1347 B. S. to the date of vesting of the plaintiff's intermediary interest therein, and after, worked the mine directly. Mr. Banerjee, the learned Advocate for the respondent submitted that the defendants did not work the mine directly by extracting sand from the mine, but they worked the mine as licensees of the plaintiff. Mr. Ranjit Banerjee, the learned Advocate for the appellant, submitted that the expressions in Section 28 are "directly worked" and "by him", and that the two expressions clearly indicated that the intermediary was required to work the mine himself but not through any other agency of whatsoever description it might be, such as a licensee or a lessee. Mr. Ranjit Banerjee rightly submitted that the word "directly" used before the word "worked" followed by the words "by him" left no room for holding that if the intermediary had worked the mine either through a lessee or a licensee, it would be the intermediary's directly working the mine. If the intermediary by making installations in the mine engaged labourers and worked the mine, he could be then considered to have had worked the mine directly. I accept Mr. Ranjit Banerjee's contention to be correct.

17. From Baisakh 1347 B. S. the mine in the disputed land has been worked by extracting sand therefrom by the defendants. It is immaterial whether they are licensees or lessees. Mr. D. Banerjee, the learned Advocate for the respondent, submitted that the possession of the mines remained with the plaintiff while the working was done through the defendants as licensees. But that argument would not alter the meaning of the expression "directly worked by him" meaning directly worked by the intermediary in the manner I have already expressed hereinbefore in this judgment. I am not required to determine what exactly is the status of the defendants in law vis-a-vis the plaintiff in respect of the mine in the land in dispute. The defendants may be lessees or licensees in respect of the mine in the disputed land. What I find is that from Baisakh 1347 B. S. the mine in the disputed land has been worked not directly by the intermediary but through another agency i.e. the defendants. Accordingly, when the plaintiff's intermediary interest in the disputed land which is a mine vested in the State of West Bengal, the plaintiff had not been then directly working the mine in the disputed land. Therefore, the provisions of Section 28 of the Estates Acquisition Act would come into operation in respect of the mine in the disputed land.

18. It was argued by Mr. D. Banerjee, the learned Advocate for the respondent that the defendants were not lessees and that the plaintiff being an intermediary, should be considered to be the lessee of the mine directly under the State Government. Here again, the two expressions "directly worked" and "by him" with the reference to the date of vesting of the intermediary interest of the plaintiff in the mine would stare at the face of the plaintiff. If the mine was directly being worked by the plaintiff at the date of vesting of his intermediary interest, Mr. D. Banerjee's contention could have prevailed.

19. Mr. D. Banerjee, the learned Advocate for the respondent, submitted that though the learned Munsif held that the defendants were lessees, the learned Judge in the Court below held that the defendants were licensees, and that as such, the defendants should be held as licensees and not as lessees and that they would not, therefore come within Section 29 of the Estates Acquisition Act. I could not accept Mr. D. Banerjee's contention as sound. The plaintiff suppressed a very material fact being that from Baisakh 1347 B. S. the mine in the disputed land had been worked not directly by the plaintiff but by the defendants. The defendants came into occupation of the mine from Baisakh 1347 B. S. as has been admitted by Dandiswami. As the position is this that since Baisakh, 1347 B. S., the defendants have been working the mine in the disputed

land but not the plaintiff, a tenancy in favour of the defendants, not under a document of lease as under Section 107 of the Transfer of Property Act, but under an oral agreement came into existence, confirmed by Ext. A. So, from Baisakh, 1347 B. S. under Ext. A, the defendants have become monthly tenants in respect of the land in dispute which is a mine, and as such lessees of the mine but not licensees. The defendants' tenancy in the disputed land which is a mine is one under Section 106 of the Transfer of Property Act, but not under Section 107 of the Act, vide Ext. A. Both the documents, Exts. 1 and A being not a lease as under Section 107 of the Transfer of Property Act, gave rise to a monthly tenancy since Baisakh 1347. B. S. in respect of the disputed land which is a mine, created by an oral agreement and so admitted by Ext. A. In the finally published record of rights the defendants have been recorded as Dakhalkar in respect of the disputed land which is a mine. So, from Baisakh 1347, B. S., the defendants have been in occupation of the disputed land which is a mine by extracting sand therefrom on payment of Rs 54/- as rent p a to the plaintiff. After intermediary estate of the plaintiff vested in the State of West Bengal, the defendants have been recorded as Dakhalkar of the mine and the State has accepted this much that the defendants had been working the mine but not the plaintiff on the date of vesting of the plaintiff's intermediary interest in the mine in the State of West Bengal. Accordingly, the plaintiff had not, at the date of vesting of his intermediary interest in the mine, worked the mine directly. As lessees at least of the character of a monthly tenant as under Section 106 of the Transfer of Property Act, the defendants have been working the mine and as such have been in exclusive possession of the mine from before and at the date of vesting of the intermediary interest of the plaintiff in the State. So, the defendants may well be placed within the terms of the Sec. 29 of the Estates Acquisition Act.

20. In *Roads v. Overseers of Trumington*, reported in (1871) 6 QB 56, the question was whether excavation of a mine and the occupation for the purpose of excavation of a mine carried with it the idea of exclusive occupation of the mine when grantor of the right had also reserved to himself the right to enter into the mine if and when necessary. It was held that the agreement created the right of exclusive possession of the land even though grantor of the right reserved to himself the right to enter into the land if and when necessary. The revisional record of rights finally published Exts. F and F-1 and the oral agreement under which the defendants had been brought into occupa-

tion of the mine as well as the evidence adduced by the parties amply lead to one and only one conclusion that during the period from 1347 B. S. till to day the defendants have been in exclusive occupation of the mines by extracting sand and there is no evidence that during the period the plaintiff ever entered into the land. Therefore, the defendants have been in exclusive occupation of the mine by extracting sand therefrom from 1347 B. S. and have been recorded as "Dakhalkar" in the finally published record of rights. The plaintiff never directly worked the mine and had never been in exclusive possession of the mine at any time after Baisakh 1347 B. S. till date. Therefore, apart from the question whether the defendants are lessees or licensees, though I hold them to be lessees, under Section 106 of the Transfer of Property Act being monthly tenants, they have been in exclusive occupation of the mine directly working the mine and the plaintiff-respondent had never been in exclusive occupation of the mine directly working it during the period from Baisakh 1347 B. S. to 1st Baisakh, 1362 B. S. when his intermediary interest vested in the State of West Bengal. Accordingly Section 28, of Chapter IV of Estates Acquisition Act, would stand in the way of the plaintiff-respondent's getting the mine as a lessee directly holding it under the State of West Bengal. The defendants have paid rent for the mine to the State of West Bengal. Therefore, the State of West Bengal has accepted the defendants as "lessees of the mine" within the meaning of Section 29 of the Estates Acquisition Act. Mr. D. Banerjee contended by rent decrees and by Ext. 1 the defendants were estopped from challenging the plaintiff's right to occupy the mine in khas. There can be no estoppel against law. If by law, the mine did vest in the State of West Bengal and if the mine was not in fact directly worked by the plaintiff no amount of admission in Ext. 1 or in Ext. A contrary to law nor sufferance of rent decrees would create any estoppel against law. Therefore Mr. D. Banerjee's contention as above also fails.

21. Finally I hold that the plaintiff had no right to institute the suit as framed. Therefore, the learned District Judge erred both in fact and in law in granting a decree to the plaintiff-respondent. The suit could hardly be maintained as framed.

22. Accordingly, the appeal must be allowed and it is hereby allowed. The judgment and decree passed by the learned District Judge be and the same are hereby set aside. The plaintiff's suit be and the same is hereby dismissed on contest. Since those who are responsible for the carriage of the suit and the appeal before the Courts below had themselves erred in law, the duty should not be made responsible for cost since it is a perpetual minor

who had rested its confidence in its guardian shebait as it were whose legal advisers did not perform their lawful duties in the manner they should have done. Therefore, there would be no order for costs either in the suit or in the Court of Appeal below or in this Court to the appellant.

23. Leave to appeal under Clause 15 of the Letters Patent is prayed for by Mr. D. K. Banerjee, and is refused.

YPB/D.V.C.

Appeal allowed.

AIR 1969 CALCUTTA 573 (V 56 C 99)

P. N. MOOKERJEE AND S. K.

CHAKRAVARTI, JJ.

Sunil Kumar Chowdhary and another, Appellants v. Sm. Satirani Chowdhary and another, Respondents.

A. F. O. D. No. 598 of 1966 and A. F. O. O. No. 663 of 1967 D/- 12-3-1969.

(A) Hindu Marriage Act (1955), S. 10 — Desertion — Meaning of — Factum of separation and intention to bring cohabitation permanently to an end — Two essential conditions to prove desertion — (Words and Phrases — Desertion).

In essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other, without the other's consent and without reasonable cause, it is a total repudiation of the obligations of marriage. In a case of desertion there must be two conditions — namely, (i) factum of separation and (ii), the intention to bring cohabitation permanently to an end. (Para 7)

(On facts it was held that the husband had failed to prove desertion by the wife so that he was not entitled to a decree for judicial separation.) (Para 8)

(B) Guardians and Wards Act (1890), Ss. 17, 19 and 25 — Hindu Minority and Guardianship Act (1956), S. 13 — Hindu minor boy aged more than five years in custody of mother — Claim by father for custody — S. 19 of former Act to be read as subject to S. 13 of latter Act — Welfare of minor should be prime and sole consideration — Change in law so far as Hindus are concerned pointed out.

Per Chakravarti, J.:— Though under Section 19 of the Guardians and Wards Act, if the father is not unfit to be the guardian of the person of a minor aged more than 5, the father should be the guardian, (Vide (1961) 65 Cal WN 1138) still under Section 13 of the Hindu Minority and Guardianship Act, the prime and sole consideration will be the welfare of the minor. Section 19 of the Guardians and Wards Act will have, therefore, to be read subject to Section 13 of the Hindu

Minority and Guardianship Act, so far as Hindus are concerned.

(Para 10)

Per Mookerjee, J.:— Section 13 of the Hindu Minority and Guardianship Act has brought about a material change, so far as Hindus are concerned. It makes it quite clear that, in all cases, irrespective of the status of the person, claiming the guardianship, the welfare of the minor would be the paramount consideration.

Under Section 19 Guardians and Wards Act so far as the father is concerned his claim for guardianship in the case of a boy of more than 5 years of age would be the paramount consideration. In regard to other persons, claiming guardianship Section 17 of the said Act puts the welfare of the minor in the forefront and makes it the paramount consideration. Although the welfare of the minor may not be the paramount consideration under Section 19, while it is of paramount consideration under Section 17, even in cases, coming under Section 19, the said aspect is not altogether without significance. It will be one of the considerations or one of the facts, to be considered in the matter of the claim of guardianship, even of the father, and as one of such considerations, it may, in the ultimate result outweigh the otherwise paramount claim of the father.

(Para 13)

The father applied under Section 25, Guardians and Wards Act for the custody of his minor boy of 5 years from the custody of the mother whom he had driven out of the house 4 years back without caring to know how they were living or making any serious efforts to bring them back.

Held that in the circumstances of the case it would be to the welfare of the minor to remain with his mother and it would be against his welfare to turn him over to his father. The application should be dismissed as not being bona fide since no attempt had been made under S. 26 Hindu Marriage Act to obtain the custody of the child during the pendency of suit for judicial separation and the application was filed only after the suit had been dismissed with costs. (Para 10)

Cases Referred: Chronological Paras (1961) 65 Cal WN 1138 = ILR

(1961) 2 Cal 406, Bimala Bala

Dasi v. Bhagirathi Shahu 13, 15

In A. F. O. D. No. 598/66:—

Rabiranjana Das Gupta and Ganganendra Krishna Deb, for Appellant; Ranjit Kumar Banerjee and Sakinath Mukherjee, for Respondent.

In A. F. O. O. No. 663/67:—

Ranjit Kumar Banerjee and Sakinath Mukherjee, for Appellant; Rabiranjana Das Gupta and Ganganendra Krishna Deb, for Respondent.

S. K. CHAKRAVARTI, J.:— These are two appeals, one by the husband against

an order of the learned Additional District Judge, Alipore by which he dismissed the petitioner appellant's application for judicial separation from his wife the respondent and the other by the wife against an order passed by the learned District Judge, Howrah by which he allowed the application of the husband for custody of the child of the marriage

2. The parties are Hindus and were married on April 22 1960 according to Hindu religious rites and a male child was born on February 9 1961 They lived together till the 1st of March 1962 since when they have been living apart.

3. The petitioner husband's case is that his wife the respondent was haughty and temperamental as her parents were wealthy and she wanted him to live in her father's house at Salkia and as the petitioner refused to do it, she ultimately left his house on the 1st of March 1962 without any cause whatsoever His further case is to the effect that in spite of repeated requests she has not returned to him and has completely deserted him He, therefore filed an application praying for judicial separation

4. The respondent categorically denied all these allegations Her case is that she does not belong to a wealthy family and never expected her husband to live with her at her father's place On the other hand the petitioner wanted money from her father and as her father could not procure the same and offered him only half of that amount he grew angry and began to practise cruelty upon her and drove her away sometime in September 1961 12 days thereafter her father in law died and she was called an evil woman and was held responsible by the members of her husband's family for the death of the father in law In spite of that, on hearing the sad news she came over to her husband's place with her father but she was given a cold reception and was driven away on the next day She however, along with her father came to attend the Sradh ceremony and after the Sradh was over, there was some sort of reconciliation effected between them and she came over to live with her husband at his place of work at Naihati. The petitioner, however, on some excuse took away her ornaments and have refused to return the same to her She was then given medicines brought by her husband for an illness not known to herself, and when she met the Doctor, namely Dr Bejoy Bose, who gave the prescription, he told her not to take the medicines and thereafter the respondent discontinued taking medicines The petitioner there upon became displeased and began to press upon her to quit his residence and began to ill-treat her and even stopped her food On 26-2-1962 the petitioner wrote

a letter to the respondent's father to come positively on 1st of March 1962 for some urgent consultation When the father came, the petitioner abused and insulted him, and drove the respondent away She denies that any attempt was made by her husband to take her back She, however, reiterated that she had been and is always willing to go back to her husband, provided he gives some sort of guarantee that he will not ill-treat her

5. The learned Additional District Judge on the evidence accepted the respondent's case in toto and held that there has not been any desertion by the wife of the husband He further came to the conclusion that it was rather the petitioner who was responsible for the separation and that he made no attempt to bring her back He therefore dismissed the application

6. In this appeal by the husband It is contended that the learned Additional District Judge erred in holding as above

7. It is well settled now that in essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other, without the other's consent and without reasonable cause, and that it is a total repudiation of the obligations of marriage In a case of desertion there must be two conditions, — namely, (i) factum of separation and (ii) the intention to bring cohabitation permanently to an end

8. Now, so far as the present case is concerned it is an admitted position that at least since the 1st of March 1962 the petitioner and the respondent have been living apart. It is now to be seen as to whether the respondent intentionally abandoned the husband without any reasonable cause with the intention of bringing cohabitation permanently to an end Both sides have adduced evidence in this case We ourselves have been led through the entire evidence, both oral and documentary, and on a careful analysis of the same, we are not in a position to find that the learned Additional District Judge has erred in the conclusions he had arrived at As a matter of fact the evidence is quite clear to show that the only conclusions possible therefrom are those which have been arrived at by the learned Additional District Judge (After discussion of the evidence his Lordship concluded) Thus on a consideration of all the facts and circumstances, we agree with the findings of the learned Additional District Judge to the effect that there has not been any desertion by the wife of the husband and that if the wife has been living separately, she has been compelled to do so, on account of the conduct of the husband. The suit, therefore has been rightly dismissed by the learned Additional District Judge, and F A 598 of 1966 must, therefore, be

dismissed with costs, hearing fee being assessed at five gold mohurs.

9. Now with regard to F. M. A. 663 of 1967. This appeal is by the wife, as we have stated already. The husband Sunil Kumar Chowdhury was the petitioner before the learned District Judge Howrah and this petition was under Section 25 of the Guardians and Wards Act, 1890, by which he prayed for the custody of the child born of the wedlock. His case was that the boy who was born on the 9th of February 1961 was taken away by his wife on 1-3-62 from his place at Naihati and the boy is living with his mother (the respondent) at her father's house and he is not being given proper education commensurate with his age and family reputation and he is being pampered in such a way that there is every likelihood of his being spoilt. As the wife has not returned the child to him in spite of demands, he filed this application. The application was contested by the present appellant (respondent), the mother of the child, and she controverted all the allegations made by the husband. The learned District Judge held that ours is a patriarchal society and the father being the head of the family, more consideration is to be given to his wishes and he would be more able and better fitted to control, regulate and train the children in accordance with the rules of discipline, etiquette and morality by reason of his age, experience and firmness. He accordingly held that the child should be returned to the father, and as the child did not know the father at all, he directed that during the Puja holidays and Christmas holidays and Summer Vacation the boy should be sent to his father for spending some of his holidays with his father and his environments, and that after the completion of one year from that date the petitioner shall have the custody of the minor boy.

10. The application is under Section 25 of the Guardians & Wards Act. The child is aged more than 5 now. Though under Section 19 of the Guardians & Wards Act, if the father is not unfit to be guardian of the person of a minor aged more than 5, the father should be the guardian, (Vide 65 C. W. N. 1138) still under Section 13 of the Hindu Minority and Guardianship Act, the prime and sole consideration will be the welfare of the minor. Section 19 of the Guardians and Wards Act will have, therefore, to be read subject to Section 13 of the Hindu Minority and Guardianship Act, so far as Hindus are concerned. We, therefore, have to consider whether in the facts and circumstances of this case, it would be to the welfare of the child, to take him away from his mother, and make him over to his father who is a total stranger to him. The boy is reading in the Don Bosco School at Lilooah and has got good grades

in the School. It is well known that this School, run by the missionaries, is a very good one. There is nothing to show that the teaching he is getting there, is contrary to the teachings of the Hindu Shastras, or that he is being pampered or being taught to live in a foreign way. It is well-known that in such institutions, it is very difficult to get admission for boys, and if a boy can get an admission in such an institution, he is a very lucky one. The petitioner has been living alone in his quarters at Naihati. He has been living away from the son barely after the son has reached the age of one. If the learned District Judge has commented on the fact that the boy does not know the father at all, it is necessary that such a young boy should be under the care and control of a female relation. Sensing this, the petitioner had suggested that he would bring his mother down from Bishnupur to his house at Naihati to look after the boy. The mother is, admittedly, an aged person, and there is nothing to show that she would agree to come to Naihati to look after this young boy. The petitioner has further suggested that he would have the boy educated at the Ramkrishna Mission institution either at Narendrapur or at Rahara. It would not be possible for the petitioner to send the boy daily to such institutions from Naihati, and the boy will have to be kept in the boarding provided for boys of such institutions. On the other hand, at the Don Bosco School he attends daily from his residence. It is absurd to suggest, that in the circumstances, it will be to the welfare of the boy to be uprooted from his mother's house, and planted either at Naihati or at Narendrapur or at Rahara where he would not have the loving care of either of his parents or near relations. There is absolutely no reason to hold that the boy is being pampered or is being brought up in a different way. The father of the boy's mother has even provided for a private tutor for this boy. If the father is so very averse to having his son educated in an institution run by non-Indian missionaries, it cannot be understood as to how he himself is so very anxious to go over to England and have his training there. It is also interesting to observe that the father's sudden attraction for his son or realisation of his own responsibilities as a father and a Hindu, has grown up, not when he filed the suit for judicial separation from his wife, but only after this Court had imposed on him the penalty of paying costs of the litigation borne by his wife, and the alimony to be paid by him to his wife. If his intention had been a bona fide one, it was within his competence to ask for the custody of his child under Section 26 of the Hindu Marriage Act. He did not choose to do so, and there is no satisfac-

tory explanation for the same. In the circumstances, we hold that it would be to the welfare of the child to remain with his mother, and it would be against his welfare, to turn him over to his father. Moreover, our findings in the other appeal would show that the present petitioner would be totally unfit to be in control or charge of the minor son, when he could go so far as to drive them out from his own house, without taking any care to know as to how they were living or making any serious attempts to bring them back.

11. In the result, this appeal has to be allowed and is allowed with costs, hearing-fee being assessed at five gold mohurs; the order passed by the learned District Judge, Howrah in Misc Case No 42 of 1966 is set aside and the application of the petitioner under Section 25 of the Guardians and Wards Act, 1890 is dismissed.

12. The above order for costs has been made after taking into consideration the litigation costs paid to the appellant by the Respondent under the orders of this Court.

13. P. N. MOOKERJEE, J.:— I agree with my Lord in his conclusion and also with his reasonings but I would like to add few words as, on an analogous matter, I delivered a judgment, sitting with my learned brother Niyogi, J., as he then was, under Sections 17 and 19 of the Guardians and Wards Act. Section 13 of the Hindu Minority and Guardianship Act has brought about a material change, so far as Hindus are concerned. As held in the said decision which is reported in *Bumala Bala Das v Bhagirathu Shahu*, 65 Cal WN 1138, so far as the father is concerned, he has a paramount claim of guardianship in the case of a boy of similar age to the boy, with whom we are concerned in this appeal and, under the said Act, in view of Sec. 19, the father's claim would be the paramount consideration. In regard to other persons, claiming guardianship, Section 17 of the said Act puts the welfare of the minor in the forefront and makes it the paramount consideration. In the aforesaid decision, I have pointed out that, although the welfare of the minor may not be the paramount consideration under Section 19, while it is of paramount consideration under Section 17, even in cases, coming under Section 19, the said aspect is not altogether without significance. It will be one of the considerations or one of the facts, to be considered in the matter of the claim of guardianship, even of the father, and as one of such considerations, it may, in the ultimate result, outweigh the otherwise paramount claim of the father, as will appear from the said decision. Under the present law, namely, the Hindu Minority and Guardianship Act however, so far as

this matter is concerned, Section 13 of the said Act makes it quite clear that, in all cases, irrespective of the status of the person, claiming the guardianship, the welfare of the minor would be the paramount consideration. In view of this distinction, in particular, there can be no question that the father, in the instant case, would not be entitled to the guardianship of the minor boy concerned. Even apart from that, having regard to the facts and circumstances before us and the findings, already made by My Lord, with which I entirely agree, there can be no doubt whatsoever that it will hardly be in the interest or for the welfare of the minor boy concerned to place him in the father's custody.

14. Indeed, by his act of driving out the minor boy along with the mother, he must be held to have lost or forfeited his claim to guardianship and custody of him, even if his claim to such guardianship and custody was otherwise paramount. I, therefore, respectfully agree with my Lord that this appeal should be allowed, the order of the learned District Judge should be set aside and the respondent father's application for guardianship and custody of the minor boy concerned should be dismissed with costs, as ordered by my Lord.

15. I may just add by way of explanation and clarification, that in the decision, 65 Cal WN 1138, the Hindu Minority and Guardianship Act did not arise for consideration, as, even though the said Act had been passed during the pendency of the said proceedings, it having the consequence of affecting substantive rights, and there being nothing in the statute concerned to indicate that it would have retrospective effect or would apply to pending proceedings, the same could not apply to the said proceedings, and, accordingly no reference is to be found in the said decision to the said new statute or to its Section 13.

K.S.B

Judgment accordingly

AIR 1969 CALCUTTA 576 (V 56 C 100)

D BASU, J.

Ram Narayan Pramanick, Petitioner v. Union of India and others, Respondents
C R No. 877 (W) of 1964, D/- 7-6-1969

(A) Constitution of India, Arts. 16 (4) and 335 — Reservation of seats for the scheduled castes candidates for recruitment — For promotion to higher grade merit alone considered — No violation of Constitution.

The special provision in Article 16 (4) has to be read with the provision in Article 335 so that no reservation or special

GM/GM/C703/69/D

provision in favour of members of the Scheduled Castes can be carried to the length of impairing the efficiency of the administration. The Government does not violate the Constitution in providing that merit would be the only consideration for promotion to the higher grade even though there was reservation for Scheduled Castes for recruitment to the lower posts. AIR 1962 SC 36 and AIR 1964 SC 179, Rel. on. (Para 6)

(B) Constitution of India, Art. 226 — Parties — Petition challenging order of Government revising list of candidates for promotion — Petition without impleading other employees who would be affected if the list is disturbed is not maintainable. (Para 8)

Cases Referred : Chronological Paras
(1964) AIR 1964 SC 179 (V 51) =
1965-2 Lab LJ 560, Devandasan v. Union of India 6
(1962) AIR 1962 SC 36 (V 49) =
(1962) 2 SCR 586, General Manager v. Rangachari 5, 6

Arun Prokas Chatterjee, for Petitioner;
Ajay Kumar Bose, for Respondent.

ORDER:— The petitioner is admittedly a member of a Scheduled Caste and was appointed, as such, as a typist, on April 24, 1956, against the quota reserved for Scheduled Castes and was confirmed, in Grade III, on the same basis on March 21, 1957 (scale of Rs. 110/- = 180/-).

2. The petitioner's grievance is that though in the Seniority List prepared by the Respondent Eastern Ry., in 1961 (Ann. A, p. 12 to the Petition), the Petitioner was given the 75th place, this was revised by the impugned order of 1963 (Annexure A, p. 13), by which the Petitioner was reduced, by giving him the serial number 194-A. As a result of this reduction in the seniority list, the Petitioner alleges, he has lost a chance of being promoted to the higher scale of Rs. 130/- — 300/- (vide Annexure G), which he would have had if his 75th position had been retained.

3. Petitioner's case has been argued on the following points:—

(a) That the Circular No. 4960 (Ann. F) on the basis of which the reduction in seniority has been ordered, does not apply to the non-selection post of a typist;

(b) That it cannot be given retrospective effect;

(c) That it offends Art. 16 of the Constitution.

(a) The first contention of the Petitioner is not correct because para (ii) of the letter at Annexure F of August 2, 1962 lays down the principle to be followed in the matter of 'promotion to higher non-selection grades.'

(b) The seniority of the petitioner for the purpose of promotion to the next non-selection grade has been revised by the application of the principle laid down in para. (ii)

of Annexure F. The contention of the Petitioner is that it could not be given retrospective effect. But the concluding para of Annexure F makes it clear that while confirmations made prior to the issue of this circular should not be disturbed, the seniority position of existing staff should be 'recast' 'in the light of the instructions' contained in this circular. If so, Respondents have not given any retrospective effect not contemplated by the circular.

(c) The strongest ground urged by Mr. Chatterjee on behalf of the Petitioner is that of violation of the guarantee under Article 16 of the Constitution.

4. Owing to the provision for reservation of certain posts for members of the Scheduled Castes, the Petitioner got his confirmation earlier than other non-Scheduled caste persons recruited prior to him. This seniority according to the date of confirmation has been denied by the revision of the seniority list complained of by the Petitioner. The Circular in question, with the connected documents, provides that there would be no reservation for Scheduled Castes for promotion to the next grade and that the seniority for such promotion will be computed not from the respective dates of confirmation, but according to the seniority position on merit as determined by the Public Service Commission or on the results of the Training tests. The Petitioner does not claim any seniority by virtue of these latter tests but contends that his seniority by virtue of earlier confirmation cannot be destroyed, without offending the guarantee under Article 16 (1) of the Constitution.

5. The argument of Mr. Chatterjee is that since the equality of opportunity for 'appointment' in Article 16 (1) has been held to include 'promotion', General Manager v. Rangachari, AIR 1962 SC 36, once confirmed, the Petitioner's right to be promoted to the higher grade must be determined not on merit, but on the basis of the confirmation, and no discrimination can be practised against a person such as the Petitioner who has been confirmed earlier.

6. This argument, however, overlooks the fact that it has been held not only in Rangachari's case, AIR 1962 SC 36 but also in Devandasan v. Union of India, AIR 1964 SC 179 at p. 188 that the special provision in Article 16 (4) must be read with the provision in Article 335, so that no reservation or special provision in favour of members of the Scheduled Castes can be carried to the length of impairing the 'efficiency of the administration'. The Respondents have not, therefore violated the Constitution in providing that merit shall be the only consideration for promotion to the higher grade even though there was reservation for Scheduled castes for recruitment to the lower posts.

7. Apart from that, it should be pointed out the circular at Annexure F does not really intend to take away what had been conferred upon the Petitioner. It appears that as early as April 6, 1962, the Board had clarified what it had meant in its earlier letter of 1960. Prior to this, there had been misunderstanding on the part of the General Manager in following the implications of the earlier letter of the Board and that is why the position of 75 had been assigned to the Petitioner according to the date of his confirmation. Since this was due to a misapprehension of the administrative circular, it did not create any legal right in favour of the Petitioner of which he can complain when it is sought to be revised. No discrimination has been made against the Petitioner merely because of his membership of a Scheduled Caste.

8. It has also been rightly pointed out on behalf of the Respondents that the Petitioner cannot maintain this Petition without impleading other employees who would be affected if the revised list at Annexure A is disturbed.

9. From all standpoints thus this Petition must fail. The Rule is discharged, but without any order as to costs.

MVJ/DVC

Petition dismissed.

AIR 1969 CALCUTTA 578 (V 56 C 101)

A N RAY AND S K MUKHERJEA JJ

Calcutta National Bank Ltd (In Liquidation) Appellant v Rangaroon Tea Co Ltd and others Respondents

Extra Ord. Suit No 2 of 1951; A F. O D No 222 of 1966 D/- 13-6-1968

(A) Defence of India Rules (1939), Rule 94-A (1) — Word 'charge' in Rule 94-A (1) — Would used in generic sense — It embraces mortgages within meaning of words "instrument creating a charge on the assets of Company"

A mortgage is within the ambit of Rule 94A(1) of the Rules

The word charge in the Rule is used in generic sense of incumbrance and it embraces mortgages within the meaning of the words "instruments creating charge on the assets of the Company". In the case of a charge as well as in case of mortgage two elements are common. First that there is loan and secondly that there is security for repayment of loan. The only difference between a charge and a mortgage is that in case of mortgage there is transfer of interest but in case of charge there is no transfer of interest. So it cannot be said that a mortgage, which has all the attributes of a charge and has in addition the character of transfer of interest in land is outside the purview of Rule 94A(1). The

meanings ascribed to mortgage and charge under Sections 58 and 100 of Transfer of Property Act indicate that an instrument creating a mortgage upon assets of the company is an instrument falling within the mischief of Rule 94A(1). (Paras 32, 34)

Per S K Mukherjea; J :

It is true that the Rule does not speak of mortgage but only of charge. It cannot be disputed that every mortgage creates a charge and, in its generic sense a mortgage must, and it does include a charge. A statute must be given the meaning that its language permits so as to carry out and not to defeat its object. It will be unreasonable to construe the expression 'charge' in a restricted sense, as confined to a transaction not amounting to mortgage as contemplated under Section 100 of T. P. Act and not in its wider and generic sense. To do so will be to hold that under Rule 94A although a company cannot lawfully create a charge by an instrument on its assets except with the consent of the Central Government it can create a mortgage by an instrument in the absence of such consent. Such construction is not tenable. Having regard to the object of the Rule and the principle that every mortgage necessarily creates a charge it must be held that the expression 'charge' in Rule 94-A includes a mortgage. It is more than likely that Rule 94-A made no mention of mortgage because the framers of the Rule thought that as a mortgage necessarily creates a charge it is not necessary to make specific reference to mortgage in the definition. (Para 46)

It cannot be said that the word "issue" in the Rule is not used in the sense of 'executed' or 'created' in relation to mortgage or hypothecations and that mortgages and hypothecations are not hit by the Rule. It is true that in popular parlance or in commercial language one does not speak of issuing of mortgage, but then one does not speak of issuing a charge either; and yet the rule contemplates issue of instruments creating a charge or lien. It is clear that in Rule 94A the expression issue has been given an extended and wider signification. The rule contemplates issue of mortgages. In the context of legislative enactments or statutory orders, it is permissible to speak of issue of mortgages. Case law discussed. (Paras 52, 53, 54)

(B) Defence of India Rules (1939), Rule 94A — Instrument creating charge — Interpretation of — Rule including within its ambit diverse things — No genus is discernible — Principle of ejusdem generis cannot be applied, AIR 1957 Trav-Co 6, Dissented from. (Paras 29, 31)

(C) Transfer of Property Act (1882), S. 58 — Equitable mortgage — Registration — Mortgagor depositing title deeds with mortgagee — Subsequent agreement between mortgagor and mortgagee — Agreement forming integral part of transaction —

Agreement is instrument creating charge — Needs registration — Time factor of making agreement is immaterial.

The question as to whether the deposit of title deeds is made by a memorandum as an instrument creating an interest in immovable property would depend on the fact as to whether the parties intended to reduce their bargain regarding the deposit in the form of document. The time factor of making the instrument would not be decisive whether it is made prior or subsequent to the deposit of title deeds. The document may be handed over to the creditor along with the title deeds and yet may not be registrable or it may be delivered at later date and nevertheless be registrable. Therefore, if the deposit of title deeds and documents form integral part of the transaction, the instrument then would be creating charge and would require registration.

An agreement was entered into between the mortgagor a company; and a mortgagee bank reciting that the mortgagor has already deposited with the bank the title deeds of properties free from all encumbrances, with intent to create a security on the same, by way of mortgage by deposit of title deeds in favour of the mortgagee-bank for due repayment of the sum which the bank has lent and advanced to the mortgagor. The terms and conditions on which the loan was advanced were also set out in the memorandum of agreement in great details. Even the right of mortgagee instituting a suit against the mortgagor was also reserved. Thus the parties themselves considered and made the memorandum in writing the only repository and the appropriate evidence of their agreement. In the circumstances, it could be said that the mortgage was created not merely by deposit of title deeds but also by the instrument described as memorandum of agreement. Case law discussed. (Paras 23, 25)

(D) Defence of India Rules (1939), Rule 94A, sub-rules (2), (7), (10) — Mortgage by deposit of title deeds — Mortgage created in contravention of Rule 94A(2) — Transaction is illegal — Mortgagee cannot recover money from mortgagor.

Where a mortgage created by a company by depositing title deeds of a estate with a bank has been created in contravention of Rule 94-A (2), then it cannot be said that though the transaction fell within the mischief of Rule 94-A as an illegal transaction the bank will yet be entitled to recovery of money. No suit can be brought to enforce an illegal contract and the Court will not recognise any action founded upon it. The illegality inherent in the transaction prevents the bank from relying on it either for the enforcement of rights under the instrument or for the recovery of consideration money for the transaction. (Para 35)

Per S. K. Mukherjea, J. :—

By the combined operation of Sub-rules (7) and (10) not only the transaction be held illegal but the consideration given by the bank must also be held to be an illegal consideration and is irrecoverable as the entire transaction is tainted with illegality. (Para 55)

(E) Defence of India Rules (1939), Rule 94-A (9) — Notification No. D. 4114-E. C. I. 144 issued under—Exemption under notification — Claim for exemption — That transaction has been entered in ordinary course of normal business and it is strictly and solely for the purpose of that business, must be established. (Para 37)

(F) Companies Act (1913), Section 109 — Non-registration of mortgage under — Effect of — Mortgage will be void against liquidator and creditors even if mortgage is valid mortgage. (Para 38)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 430 (V 52) = 1964-6 SCR 724, K. J. Nathan v. S. V. Mamthi Rao 27
- (1957) AIR 1957 Trav-Co 6 (V 44) = ILR (1956) Trav-Co 1181, Ittiavira Thomas v. Joseph Tile Works Ltd. 27, 35, 51, 54
- (1950) AIR 1950 SC 272 (V 37) = 1950 SCR 548, Rachpal Maharaj v. Bhagwandas 23, 24, 44
- (1943) 1943 AC 166, Bolton Insurance Case 30
- (1939) AIR 1939 PC 167 (V 26) = 66 Ind App 184, Hari Shankar Paul v. Kedar Nath 23, 24
- (1934) AIR 1934 Bom 189 (V 21) = 36 Bom LR 277, Chhaganlal Sakham v. Chunilal Jagmal 32, 33
- (1931) AIR 1931 PC 36 (V 18) = 58 Ind App 68, Sundarachariar v. Narayan Ayyar 23
- (1923) AIR 1923 PC 50 (V 10) = 50 Ind App 77, Subramonian v. Lutchman 23
- (1922) AIR 1922 Pat 529 (V 9) = ILR 1 Pat 387, Shiva Prasad Singh v. Beni Madhab 27, 32
- (1920) 1920-3 KB 321 = 89 LJKB 1110, S. S. Magnhild v. Mc Intyre Brothers and Co. 28
- (1919) AIR 1919 Mad 528 (V 6) = 36 Mad LJ 618, Srinivasa Raghava Iyengar v. Renganatha Iyengar 32
- (1915) 1915 AC 106 = 84 LJPC 33, Farmers' Mart. Ltd. v. Milne 35
- (1908) 1908-2 KB 385 = 77 LJKB 778, Tillmanns v. S. S. Knutsford Ltd. 28
- (1906) ILR 33 Cal 985 = 4 Cal LJ 919, Rayzuddin Sheikh v. Kali Nath 32
- (1895) 1895-1 QB 749 = 64 LJQB 457, Anderson v. Anderson 28
- (1892) 1892-2 QB 724 = 61 LJQB 738, Scott v. Brown Docering Mcnab and Co. 35
- (1873) 11 Beng LR 405 = 20 Suth WR 150, Kedarnath Dutt v. Shamall Khettry 22, 23, 44

(1835) 111 ER 413 = 3 Ad and El 265.
 Doe v Shelton 14
 (1775) 1 Cowp 341 = 98 ER 1120.
 Holman v. Johnson 35

A. N. RAY, J.: This appeal is from the judgment of S P Mitra J. dated 17th August, 1966

2. The plaintiff is the appellant. The plaintiff instituted this suit against the respondent company Rangaroon Tea Company Ltd and Ranjit Bose. During the pendency of the suit Ranjit Bose died and his widow and minor son were impleaded as parties to the suit.

3. The plaintiff's case in short is that on 30th August 1944 the plaintiff lent and advanced to Ranjit Bose a sum of Rs. 2,75,000 with interest thereon at the rate 6 per cent per annum which was subsequently increased to 6 per cent (sic) per annum with effect from 1947. To secure the repayment of the said loan the plaintiff alleged that the said Ranjit Bose deposited with the plaintiff the documents of title relating to the properties known as Rangaroon Tea Estate belonging to Ranjit Bose and situated in the district of Darjeeling. In paragraph 3 of the plaint it was alleged that on 30th August 1944 a registered memorandum of agreement was entered into between the plaintiff and Ranjit Bose at Calcutta evidencing the deposit of title deeds. As further security for the said advance Ranjit Bose charged and hypothecated by way of first charge in favour of the plaintiff the plants, machinery, furniture and other movable assets appertaining to the said Rangaroon Tea Estate. On 30th August 1944 Ranjit Bose, it is alleged, executed in favour of the plaintiff a deed of hypothecation on tea crops of Rangaroon Tea Estate to secure a cash credit account not exceeding Rs 20,000. In para 6 of the plaint it is alleged that on 20th December 1944 by a deed of transfer executed by Ranjit Bose in favour of Rangaroon Tea Estate to which the plaintiff was a party Ranjit Bose relinquished all right, title and interest in Rangaroon Tea Estate in favour of Rangaroon Tea Company Ltd and transferred and assigned the Rangaroon Tea Estate, the movable properties and tea crops to Rangaroon Tea Company Ltd. subject to the aforesaid mortgage by deposit of title deeds, hypothecation of movables and tea crops in favour of the plaintiff. The plaintiff alleged that a sum of Rs. 1,70,365/12/- was due up to 30th January 1950. The plaintiff claimed preliminary mortgage decree in form 5-A of appendix D of the Code of Civil Procedure and other reliefs. In the schedule of the plaint the description of the property in respect of which the preliminary mortgage decree was asked for was set out.

4. Written statements were filed by Rangaroon Tea Company Ltd and Ranjit Bose. Additional written statement was filed by the heirs of Ranjit Bose.

5. The issues raised at the trial will indicate the defences broadly stated. The defences were whether there was a mortgage of the tea estate by Ranjit Bose in favour of the plaintiff and whether there was relinquishment of right, title and interest of the tea estate by Ranjit Bose. Another question was whether the property in suit was purchased by Rangaroon Tea Company Ltd in the name of Ranjit Bose. The third question was whether Rangaroon Tea Company Ltd created a mortgage on the properties in favour of the plaintiff or Rangaroon Tea Company Ltd acquired the properties subject to mortgage in favour of the plaintiff created by Ranjit Bose. The fourth question was whether the object or consideration of the documents dated 30th August 1944 and 30th December 1944 was forbidden by law. Another question was whether the mortgage was void or illegal by reason of the provisions of the Defence of India Rules. There was a question as to whether the mortgage was void by reason of non-registration under the provisions of section 109 of the Indian Companies Act.

6. The learned Judge came to the following conclusions. First, the property in suit was purchased by Rangaroon Tea Company Ltd in the name of Ranjit Bose and further that the mortgage was created by Rangaroon Tea Company Ltd in the name of Ranjit Bose and the plaintiff bank was all along aware of the transactions effected. Secondly, Rule 94A of the Defence of India Rules was mandatory and the mortgage in the present case was void or illegal by reason of the provisions of the Defence of India Rules. Thirdly, the plaintiff could not enforce the illegal contract and the Court would not recognize any cause of action founded upon it. Fourthly the plaintiff's plea that the transaction was covered by the exemption order under the Defence of India Rules was not sustainable. Fifthly the mortgage was void by reason of want of registration under Section 109 of the Companies Act. The learned Judge was pleased to dismiss the suit with costs.

7. I shall first deal with the question as to whether the mortgage transaction was of Ranjit Bose or of Rangaroon Tea Company Ltd. This question is covered by issues Nos. 1A and B and 2A and B. Counsel on behalf of the appellant contended that the transaction was of Ranjit Bose for six reasons. First, that the conveyance exhibit B (page 203), secondly, the receipts, exhibit D (pages 227-228), thirdly, the hypothecation agreement, exhibit C (pages 12, 20), fourthly, the certificate of incorporation, exhibit I (page 253), fifthly the memorandum of deposit, exhibit A (page 6) and sixthly, the oral evidence of Kanak Nath Bhattacharjee and in particular questions 5, 150, 159, 202 and 330 would indicate that the transaction was of Ranjit Bose. Exhibit B is the conveyance dated 30th August 1944 between Robert Stanley Seymour Treanor and Ran-

jit Bose. The receipts, Exhibit D are signed by R. S. Treanor and are both dated 30th August 1944. One of the receipts acknowledges the receipt of Rs. 32,282-2-6 from Ranjit Bose and the other receipt is for the sum of Rs. 2,50,000 received from Ranjit Bose. It may be stated here that both the sums were paid by cheques drawn by M/s. Dutt and Sen in favour of Treanor. The hypothecation agreement, exhibit C is dated 30th August 1944 and made between Ranjit Bose described as a borrower and the appellant described as a bank. The certificate of incorporation is dated 18th May 1944. The reason why reliance was placed on the certificate of incorporation was that the conveyance referred to the agreement dated 30th January 1944 between Treanor on the one hand and Ranjit Bose on the other for purchase of Rangaroon Tea Estate and it was said that in view of the incorporation of the company in the month of May 1944 there could not be an agreement between the company and Treanor for purchase of the Tea Estate prior to its incorporation. The memorandum of deposit, Ex. A was relied on to show that it was a memorandum between Ranjit Bose described as the mortgagor on the one hand and the appellant Calcutta National Bank Ltd. described as the mortgagee on the other. The oral evidence of Kanak Nath Bhattacharjee was that M/s. Dutt and Sen were the solicitors of Calcutta National Bank and the loan was taken by Ranjit Bose.

8. It appears that the total price that was paid for Rangaroon Tea Estate was the sum of Rs. 4,32,282-2as-6p. It is an admitted feature that the appellant Calcutta National Bank advanced Rs. 2,75,000. Exhibit B at page 203 to which reference has been made shows that the Rangaroon Tea Estate was purchased at the price of Rs. 1,50,000. The conveyance was in respect of land and immovable property. It should be stated here that out of the sum of Rs. 1,50,000, Rupees 20,001 was received as earnest money which was paid in the month of February 1944. Exhibit D at page 228 is the receipt dated 30th August 1944 for the sum of Rs. 2,50,000 representing the price of machinery, furniture, live & dead stock and other movable assets of the Rangaroon Tea Estate. The other receipt also marked as exhibit D dated 30th August 1944 at page 227 for the sum of Rs. 32,282-2as-6p. represents the price of all stocks of tea and stores at the estate. The natural question which arises is that if the bank had advanced Rupees 2,75,000 where did the balance come from? This was put to Nirmal Kumar Pal in questions 53 to 56 and some of the questions were of the court. The witness stated that the total amount that was received from the persons who purchased the shares was about Rs. 2,00,000 and the deficit amount was taken from the bank. In other words, the total price paid for the purchase of

Rangaroon Tea Estate was met by the advance of Rs. 2,75,000 from the bank and the other sums of moneys raised by issue of shares or representing share capital. This indicates that the portion of the purchase price was admittedly paid by the tea company out of its share capital and the balance came from the advances from the appellant bank.

9. At this stage reference may be made to exhibit 15B which contains entries in the cash book of Rangaroon Tea Company Ltd. These entries are under the date 28/30th August 1944. A sum of Rs. 1,45,191-10as-6p. appears to be paid to M/s. Dutt & Sen on account of consideration money for Rangaroon Tea Estate. The other entry headed 'mortgage account' indicates that a sum of Rs. 2,75,000 was received from the Calcutta National Bank against the mortgage of Rangaroon Tea Estate. The third entry for the sum of Rs. 3,89,999-3as-6p. represents the amount paid through M/s. Dutt and Sen, Solicitors to R. S. S. Treanor in payment of the balance price of Rangaroon Tea Estate including interest of Rs. 10,000. The other entries are amounts paid to M/s. Dutt and Sen representing their costs and charges in connection with the conveyance and stamp for the deed of conveyance. These entries indicate that the Rangaroon Tea Company Ltd. paid moneys representing consideration money for the purchase of Rangaroon Tea Estate. These entries further indicate that Rangaroon Tea Company Ltd. paid to M/s. Dutt and Sen costs and charges for conveyance and stamps for the conveyance. These entries also indicate that the amounts mentioned in the entries were paid through M/s. Dutt and Sen to Treanor in payment of the balance price of Rangaroon Tea Estate. It is the oral evidence of Kanak Nath Bhattacharjee that M/s. Dutt and Sen acted as solicitors for the bank. These entries are also in the handwriting of Ranjit Bose.

10. The next document which merits consideration is exhibit 14 being the voucher dated 9th October 1944. This document is also in the handwriting of Ranjit Bose. This voucher represents payment of Rs. 239-11-6 to Ranjit Bose for expenses incurred for visiting the garden on 31st August 1944 with M/s. M. Biswas and N. Bose for taking formal delivery of possession of the properties. Exhibit 15 (a) which is an entry in the cash book of Rangaroon Tea Company Ltd. and bears date 9th Oct. 1944 shows payment of Rs. 239-11as-6p. to Ranjit Bose for travelling expenses for visiting garden as per voucher. These exhibits numbered 14, 15 (a) and 15(b) which are all in Ranjit Bose's handwriting are documents of great importance to show the real character of the transaction.

11. To my mind it appears that these aforementioned documents completely repel the case that the purchase of the Rangaroon

Tea Estate was made by Ranjit Bose. These documents have unmistakable and unimpeachable evidence that the purchase of Rangaroon Tea Estate was made by Rangaroon Tea Company Ltd.

12. Payment of Rs 20,000 as earnest money which was made by Ranjit Bose as mentioned in exhibit B was refunded to Hindusthan Planters of which Ranjit Bose was the managing partner. Exhibit 4(b) which is an entry under the date 20th June 1944 shows allotment of shares to Hindusthan planters for the sum of Rs 20,000. Nirmal Kumar Pal in his oral evidence (qq 11, 148 and 152) said that the sum of Rs 20,000 which was advanced to Treanor before the formation of the company was returned to Hindusthan Planters by allotment of shares. This evidence again indicates that the consideration money was paid by Rangaroon Tea Company Ltd.

13. An important document is exhibit 3 being the letter dated 3rd August 1944 written by M/s Dutt and Sen who acted as solicitors for the appellant bank and also as solicitors for Rangaroon Tea Company Limited. It may be stated here that this letter was brought in aid by both parties in support of their rival contentions. The contention on behalf of the appellant was that the letter would indicate that the transaction was really of Ranjit Bose. The contention on behalf of the respondent on the other hand was that the letter revealed the real nature of the transaction that it was the mortgage of Rangaroon Tea Estate by Rangaroon Tea Company Limited. The solicitors stated that the mortgage to be effected by the company would require the previous sanction of the examiner of capital issues, and the solicitors understood that the Rangaroon Tea Company Ltd did not want to spend. Therefore, M/s Dutt and Sen as solicitors for both the appellant bank and Rangaroon Tea Company Ltd advised that the conveyance might be taken in the name of Ranjit Bose and that the latter should execute a mortgage in favour of the bank and thereafter the estate would be transferred by Ranjit Bose as the trustee of the company. This letter, in my opinion, shows that the real transaction was that Rangaroon Tea Company Ltd was the purchaser and the mortgagor.

14. Counsel for the appellant placed emphasis on the document dated 30th December 1944 being exhibit E. The contentions on behalf of the appellant were that exhibit E would indicate that the transaction was of Ranjit Bose's because the property had been purchased by Ranjit Bose. There are some recitals in exhibit E which was made between Ranjit Bose of the first part, Rangaroon Tea Company Ltd of the second part and Calcutta National Bank Ltd of the third part. Calcutta National Bank Ltd. the appellant did not sign

exhibit E. It was signed by Ranjit Bose and Rangaroon Tea Company Ltd. It was also registered in book No 1. In exhibit E Ranjit Bose is described as transferor and Rangaroon Tea Company Ltd is described as transferee. One of the recitals is that the transferee company being short of funds negotiated with Calcutta National Bank Ltd for advance of Rs 2,75,000. The second recital is that by a resolution dated 3rd August 1944 the transferor was authorized to act as trustee of the transferee in the matter of purchase. It was contended on behalf of the appellant that since the appellant bank was not a party to the deed the appellant was not bound by it. Reliance was placed on Norton on Deeds, second edition at pages 213 and 214 and the decision in Doe v Shelton reported in (1835) 111 ER 413 and the observations at page 420 of the report in support of the contention that the recital would be binding if it was a statement of party to the deed. In Norton on Deeds it is said that it is a question of the construction of the whole deed, whether any of the recitals is to be taken as that of all parties or of some or one of them only, and the estoppel limited accordingly. In other words, when a recital is intended to be the statement of one party only the estoppel is confined to that party and the intention is to be gathered from the instrument. In (1835) 111 ER 413 there is an observation that the deed in that case which recited the bankruptcy was not executed by the defendant and there was consequently no direct estoppel. In (1835) 111 ER 413 the question for consideration was whether the statement in a former deed would bind a party recognizing and adopting the former deed by executing the second deed.

15. There are some significant features in exhibit E dated 30th December 1944. In the first place this is described as a deed of relinquishment and not of transfer. This feature of relinquishment is consistent with the entries in the books of account and also other features attending the transaction of purchase. Secondly, the recital that Ranjit Bose was to act as trustee in the matter of the purchase for and on behalf of the company and to acquire the same for and on behalf of the company and also for the mortgage will show that the transaction was of Rangaroon Tea Company Ltd. Thirdly, the deed states that the transferee company called upon the transferor to transfer the Rangaroon Tea Estates including all movable and immovable estates subject to the mortgage and there is another recital that in the transaction of the mortgage the transferor acted for the company. This document exhibit E is in my opinion binding on the appellant bank for these reasons. First, this deed is accepted by the plaintiff and the object with which it was tendered as an exhibit was for imposing liability on Rangaroon Tea Company Limited. Secondly, Ranjit Bose is described in the cause title

of the plaintiff as a trustee under the deed dated 30th December 1944. Particularly in paragraph 6 of the plaintiff there is reference to this deed and the appellant bank the plaintiff in this suit is described as a party to the deed. It should be stated here that counsel appearing for the appellant submitted that it was a mistake and it should be read that the plaintiff was not a party to the deed. The plaintiff was not amended. The learned Judge at the time of hearing of the suit called upon the parties to explain this feature of the case. The learned Judge in his judgment rightly came to the conclusion that paragraph 6 as it stood indicated beyond any measure of doubt that the appellant was bound by the deed. Fourthly, the appellant acted upon exhibit A and transferred the loan account. Kanak Nath Bhattacharjee, a witness on behalf of the appellant, stated in q. 81 that when Ranjit Bose made a transfer deed in the name of Rangaroon Tea Company Limited and the deed was sent to the appellant, the name of Ranjit Bose was struck off and the name of Rangaroon Tea Company Limited was substituted. Again, in questions 161 to 165 and 267 to 276 the same witness stated that the document dated 30th December 1944 was sent to the appellant bank and when it was put to the witness that the bank acted on the basis of the document the witness answered that there was nothing in writing to show that. But the evidence establishes the fact that the appellant bank acted upon the deed exhibit E. Finally, the witness stated that the name of Rangaroon Tea Company Limited was substituted. Counsel for the respondent rightly contended that if the appellant bank had any grievance regarding the recitals the bank should have sued for setting aside the deed. On the contrary, the appellant bank relied on the deed.

16. The most important documents are exhibits F/1, G/1 and H/1. Exhibit F/1 is the loan register. Exhibit G/1 is the loan ledger and exhibit H/1 is also the loan ledger subsequent to exhibit G/1. While discussing exhibit F/1, reference may also be made to exhibit 2/b which was tendered by the respondent. Exhibit 2/b is at page 126 of the loan register and exhibit F/1 is at page 127 of the same book. Exhibit F/1 shows the account in the name of Ranjit Bose. The particulars there are loans against mortgage Rangaroon Tea Estate and hypothecation of all movables and the loan is described as loan No. 1519. It should be stated that in the particulars at page 127, Exhibit F/1 the writing as it stood was loan against mortgage Rangaroon Tea Company Ltd. The words 'company limited' were struck out and the word 'estate' was written thereafter. The date '30th August' appears to be re-written. The importance of exhibit 2/b at page 126 is based on the suggestion which was made that the entry at page 126 was in the name of Rangaroon Tea Company Ltd. in respect of the same

loan No. 1519. To the naked eyes loan No. 1519 is apparent in exhibit 2/b. Loan No. 1519 is also stated in exhibit F/1. It was rightly contended by counsel for the respondent that exhibit F/1 was brought into existence to make out the case that the transaction was of Ranjit Bose and not of Rangaroon Tea Company Limited. The learned Judge referred to the exhibits aforementioned and rightly came to the conclusion that the documents prior to 30th August 1944 were in the name of the company and at the earliest possible opportunity on 30th December 1944 when exhibit E was received the entries were made in the name of Ranjit Bose and described it as an example of how a transaction was entered into before a company was floated. This feature of the case again indicates that the transaction was really of Rangaroon Tea Company Limited and Ranjit Bose acted in the matter of arrangement of the advance and other allied work. Exhibit G/1 which is the loan ledger was in the name of Rangaroon Tea Company Ltd. and the address was Block E, 3 Clive Buildings, 8 Clive Street, Calcutta, the loan was described as loan No 1519. On top of Rangaroon Tea Company Ltd., which is in symmetry with the printed word 'account' appears in writing the words 'Mr. Ranjit Bose' and then that name is struck out and there is a signature made by the witness Kanak Nath Bhattacharjee. The words 'C. O.' appears to be written as a prefix to Rangaroon Tea Company Ltd. and again the words 'C. O.' are struck out. Exhibit H/1 which is the loan ledger shows the account in the name of Rangaroon Tea Company Ltd. These documents when studied at close quarters will indicate that the learned Judge came to the correct conclusion that the account was in the name of Rangaroon Tea Company Ltd. There appears the strongest evidence of mutilation in exhibit 2/b at page 126 of the loan register and the creation of exhibit F/1. If Ranjit Bose was the party then one would expect the address of Ranjit Bose to be entered in the account. The significant absence of the address, counsel for the respondent rightly contended, leads to the inescapable conclusion that the insertion of the entry of the name of Ranjit Bose was for the purpose of giving semblance to the case of the appellant bank.

17. Annexure 'D' to the plaintiff which was also tendered and marked as exhibit 16 in my opinion completely nullifies the case of the appellant bank. Annexure D as it stood prior to amendment showed the name of Rangaroon Tea Company Ltd. and the address 285/F Bowbazar Street. By amendment the words "A/c Mr. Ranjit Bose" and "Particular loan against mortgage Rangaroon Tea Estate and hypothecation of all movables" and the address Block E, 3 Clive Buildings, 8 Clive Street, Calcutta were introduced but the most important feature of exhibit 16 is that the certificate given by the

Manager of the appellant bank is that the entries are true copy of the entries made in the loan account of Rangaroon Tea Company Ltd of 285/F Bowbazar Street, Calcutta, with Calcutta National Bank Ltd kept in the usual and ordinary course of business and that the ledger is in the custody of the bank. After such a certificate there cannot be any vestige of truth in the alleged version of the appellant bank. The learned Judge referred to exhibit 16 and rightly expressed the opinion that it was necessary for the court to know from which of the books of the bank the statement was copied and that the book was not shown to the learned Judge. Any bank worth its name when certifying any account to be the true copy of the entries made in the account must disclose the original when there is controversy and dispute about the account and establish the case. The non-production of such an account in the original leads to the irresistible conclusion that exhibit 16 is unworthy of credence and should be rejected as baseless. The learned Judge rightly commented on this feature of the case and I have no doubt in my mind that the absence of any explanation as to how and from which book exhibit 16 came to be copied and the fact that exhibit 16 does not tally with exhibit F/1 leave no doubt in my mind that the account described as in the name of Ranjit Bose is utterly unbelievable.

18. Exhibit 16 was the subject of cross-examination of Kanak Nath Bhattacharjee and in questions 170 to 185 the witness was asked to find out the book of which exhibit 16 was a copy and the witness said that exhibit 16 was a copy of exhibit F/1. It has only to be stated to be rejected. The witness was asked by the court to find out the heading of Rangaroon Tea Company Ltd. in any of the books. But the witness referred to exhibit H/1. The witness was asked as to why it was written "loan against mortgage Rangaroon Tea Company Limited" and the witness said that it was written by mistake and a limited company could not be kept by way of security and therefore the security was Tea Estate. In question 212 it was suggested to Kanak Nath Bhattacharjee that the heading had been deliberately tampered subsequently to make it appear that the account was of Ranjit Bose. The witness denied the suggestion but I have no hesitation in accepting the suggestion to be proved beyond any measure of doubt by intrinsic evidence contained in exhibits F/1 and 2/b and the other documents to which I have made reference.

19. There are two letters at pages 277 and 291 of the paper book marked exhibits 5 and 11 respectively which will throw light on this question. Exhibit 5 is dated 13 January 1948 and is addressed by the appellant bank to Rangaroon Tea

Company Limited informing the "interest due on your loan account dated 30-8-44 for Rs 2,75,000/-" Exhibit 11 at page 291 is dated 18 November 1948 and is written by the appellant Calcutta National Bank Ltd to Rangaroon Tea Company Ltd. and headed "loan against deposit of title deeds of Rangaroon Tea Estate and Hypothecation deed of movable assets of the Company". In exhibit 11 the appellant bank wrote to Rangaroon Tea Company Ltd "We are sorry to point out that you have not arranged to liquidate your loan taken from us on 30th August 1944". These letters as also exhibit 6 dated 30th March 1949 written by Calcutta National Bank Ltd to Rangaroon Tea Company Ltd whereby the appellant bank called upon Rangaroon Tea Company Ltd to repay "your liabilities to the Bank" leave no doubt whatever that the transaction of loan was between the appellant bank on the one hand and the respondent Rangaroon Tea Company Ltd on the other. I am therefore of opinion that the learned judge for the reasons given in the judgment came to the correct conclusion that the company purchased the Tea Estate and that the loan was taken by Rangaroon Tea Company Ltd and the mortgage was also made by Rangaroon Tea Company Ltd.

20. A short question which arose was as to the date of possession. It was contended on behalf of the appellant that Ranjit Bose took possession on 1st February 1944. The oral evidence of Nirmal Kumar Pal was that Ranjit Bose had been going to Darjeeling from time to time before 30th August 1944. When the attention of Nirmal Kumar Pal was drawn to exhibit 14 which is the voucher dated 9th October 1944 Nirmal Kumar Pal said that Ranjit Bose went to the gardens after the incorporation and the expenses were paid by the tea company. Exhibit 3 which is dated 3rd August 1944 being a letter of M/s Dutt and Sen indicates that there was great urgency in regard to the transaction. It is true that Kanak Nath Bhattacharjee in his oral evidence said that Ranjit Bose came to the appellant bank in the months of March and April 1944 and that evidence was adduced for the purpose of introducing possession. In my opinion counsel for the respondent rightly contended that it was unbelievable that Treanor would part with possession in the month of February 1944 before he was paid the purchase price. The document, namely, exhibit B dated 30th August 1944 being the conveyance indicates by intrinsic evidence that the vendor Treanor was seised and possessed of the Tea Estate. The consideration was for the purchase of land and movables. I am unable to accept the contention that Ranjit Bose was put in possession in the month of February 1944.

21. Counsel on behalf of the appellant contended that if the transaction was not

of Ranjit Bose's but of Rangaroon Tea Company Ltd. the transaction would not be within the mischief of Rule 94-A of the Defence of India Act for two broad reasons. First, that mortgage would not be within the mischief of Rule 94-A and secondly, there was no instrument creating charge within the meaning of Rule 94-A. The relevant provisions of Rule 94-A for appreciating the rival contentions in the present appeal are as follows:

(1) For the purpose of this Rule —

(a) securities shall mean the following instruments issued or to be issued by or for the benefit of a company, viz. (i) shares, stocks and bonds, (ii) debentures, (iii) other instruments creating a charge or lien on the assets of the company, and (iv) instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party or entered into jointly with a third party;

(b) a person shall be deemed to make an issue of capital who issues any securities whether for cash or otherwise.

(2) (a) No company, whether incorporated in British India or not, shall except with the consent of the Central Government—

(i) make an issue of capital in British India;

(ii) make in British India any public offer of securities for sale;

(iii) renew or postpone the date of maturity or repayment of any security maturing for payment in British India.

(10) If any person contravenes the provisions of this rule he shall be punishable with imprisonment for a term which may extend to five years or with fine or with both."

22. It was first contended that the provisions contained in Rule 94-A were not mandatory and the arguments which were made in the trial court were again advanced. The learned judge, in my opinion, correctly came to the conclusion that the provisions contained in Rule 94-A were mandatory. The most important question is whether there is an instrument creating a charge in the present case. The contention on behalf of the appellant was that there was an equitable mortgage for deposit of title deeds and the instruments which came into existence were subsequent to the creation of equitable mortgage and therefore were not instruments creating a charge. The decision in *Kedarnath Dutt v. Shamlall Khettry*, reported in (1873) 11 Beng LR 405 deals with the question as to the creation of equitable mortgage by an instrument. In that decision the test with regard to writings was laid down as follows: "If this memorandum was of such a nature that it could be treated as the contract for the mortgage, and what the

parties considered to be the only repository and appropriate evidence of their agreement, it would be the instrument by which the equitable mortgage was created." In *Kedarnath Dutt's case*, (1873) 11 Beng LR 405 the instrument was as follows: "For the repayment of the loan of Rs. 1,200 and the interest due thereon of the within note of hand, I hereby deposit to the plaintiff as a collateral security by way of equitable mortgage, title-deeds of my property." It was held that the mortgage was complete without the memorandum and the memorandum was not in writing which the parties had made as the evidence of their contract but only a writing which was evidence to the fact from which the contract was to be inferred.

23. This question again came up for decision before the Judicial Committee on three occasions. These are the decisions in *Subramonian v. Lutchman*, reported in 50 Ind App 77 = (AIR 1923 PC 50), *Sundarachariar v. Narayan Ayyar*, reported in 58 Ind App 68 = (AIR 1931 PC 36) and the case of *Sir Hari Sankar Paul v. Kedar Nath Saha*, reported in 66 Ind App 184 = (AIR 1939 PC 167). The test laid down in (1873) 11 Beng LR 405 was referred to in those cases. Lord Carson in 50 Ind App 77 = (AIR 1923 PC 50) said that "if the memorandum in question was a bargain between the parties, and that without its production in evidence the plaintiff could establish no claim, it would require registration." Lord Tomlin in *Sundarachariar's case*, 58 Ind App 68 = (AIR 1931 PC 36) also referred to the same test as to whether the memorandum embodied all the particulars of transaction of which the deposit formed part. In 66 Ind App 184 = (AIR 1939 PC 167) the document along with the title deeds was delivered at a later date and yet it was held to be registrable, the entire law is now summed up in the Supreme Court decision in *Rachpal Mahraj v. Bhagwandas Daruka*, reported in 1950 SCR 548 = (AIR 1950 SC 272). The Supreme Court said that the question as to whether the deposit of title deeds is made by a memorandum as an instrument creating an interest in immoveable property would depend on the fact as to whether the parties intended to reduce their bargain regarding the deposit in the form of a document. The Supreme Court said that the time factor would not be decisive and the document might be handed over to the creditor along with the title deeds and yet might not be registrable or it might be delivered at a later date and nevertheless be registrable. The Supreme Court said "the crucial question is: did the parties intend to reduce their bargain regarding the deposit of title deeds to the form of a document. If so, the document requires registration." In other words, if the deposit of title deeds and the documents form integral parts of the transac-

tion the instrument then would be creating charge and it would require registration.

24. In the present appeal there is no aspect of registration under the Indian Registration Act. But these decisions are of importance to show as to whether charge was created by any instrument in the present case or not. In the case before the Supreme Court, 1950 SCR 548 = (AIR 1950 SC 272) the memorandum was as follows: "We write to put on record that to secure the repayment of the money already due to you from us on account of the business transactions between yourselves and ourselves and the money that may hereafter become due on account of such transactions we have this day deposited with you the following title deeds in Calcutta at your place of business at No 7 Sambhu Mallick Lane relating to our properties at Samastipur with intent to create an equitable mortgage on the said properties to secure all moneys including interest that may be found due and payable by us to you on account of the said transactions." The Supreme Court referred to the decision in 66 Ind App 184 = (AIR 1939 PC 167) where the essential terms of the transaction stated as "hereby agreed" and reference to the moneys as "hereby secured" were held by Lord Macmillan to amount to the parties professing to create a mortgage by deposit of title deeds contemporaneously entering into a contractual agreement in writing making the same an integral part of the transaction and itself an operative instrument and not merely evidential.

25. In the present case exhibit A dated 30th August 1944 would show in the recitals that the mortgagor has deposited with the mortgagee the title deeds and thereafter these words occur "now it is hereby agreed and declared by and between the mortgagor and the mortgagee." There are three important clauses. The first clause relates to the amount and obligation to repay with interest and the dates of repayment. The second clause states that so long as the principal sum remains due and outstanding the mortgagor shall pay to the mortgagee interest at the rate of 6 per cent per annum on the 15th day of each month. The third clause is that the mortgagor has already deposited with the mortgagee the title deeds relating to the land garden and premises known as Rangaroon Tea Estate with intent to create a security thereon by way of mortgage by deposit of title deeds for the due repayment of the principal sum and all interests and all costs of realization. In the same memorandum it is thereafter stated as follows: "the mortgagor doth hereby covenant with the mortgagee." Five covenants are thereafter set out. In those covenants it is stated that the mortgagor shall during the subsistence of this security duly pay all government

revenue, cesses, taxes, rates. It is further stated that if the mortgagor fails to carry out covenants or if it appears to the mortgagee that the value of the security created as aforesaid has depreciated the entire amount then shall at once become due and payable. It is also stated that for the realisation of its dues the mortgagee will be entitled to appoint a nominee to be receiver. These features in the light of the observations of the various decisions indicate that the parties in the present case entered into the transaction of mortgage by the instrument in writing which created the mortgage and that the written instrument was an integral part of the transaction and was itself the repository of the agreement and an operative instrument of the bargain regarding the deposit.

26. Reference may be made to exhibit B which is the deed of hypothecation. That is the hypothecation of movables dated 30th August 1944. This deed is necessary to be considered in relation to another contention that if the mortgage is unenforceable by reason of non-compliance with the provisions contained in Rule 94-A whether the appellant plaintiff can realise the sums claimed in the plaint. I shall deal with that question later on.

27. The next question is that if there is an instrument of mortgage whether a mortgage would be an instrument creating a charge. Counsel on behalf of the appellant contended that there was a distinction between mortgage and charge and relied on the decision in *K J Nathan v S V Maruthi Rao*, reported in AIR 1965 SC 430 and in *Shiva Prasad Singh v Beni Madhab*, reported in AIR 1922 Pat 529. In the Patna case it was said that a charge only gave right to payment out of a particular fund or property without transferring that fund or property and a mortgage was in essence a transfer of an interest in specific immovable property. Relying on that definition counsel for the appellant contended that since the Defence of India Act referred to charge a mortgage would not be within the mischief of the provisions. Reliance was placed on *Craies on Statutes* 6th edition at pages 168 to 174 in support of the proposition that ordinary meaning should be given to the word 'mortgage'. It was also said that the legislature should be presumed to know of the distinction between 'mortgage' and 'charge' and therefore since the word used was 'charge' mortgage should not fall within the scope and intent of Rule 94-A. In support of that contention reference was made to certain other provisions of Defence of India Rules namely Rules 90 and 94 in support of two propositions that Rule 94 spoke of mortgages and R 90 referred to several expressions and those expressions were said to mean matters stated in those rules. It was therefore contended that when Rule 94-A said that

securities should mean the instruments mentioned there the meaning was exhaustive and no higher content should be given to the word 'charge'. Reliance was placed on the decision in *Ittiavira Thomas v. Joseph Tile Works Ltd.*, reported in AIR 1957 Trav-Co 6 for two reasons first that the words 'instruments creating charge' were to be used *ejusdem generis* and secondly that the securities in order to come within the mischief of Rule 94-A would have to be issued and not executed. In the *Travancore Cochin* case it was said that since shares, stocks, bonds and debentures under the Companies Act were issued and the word 'issue' was used in relation to shares in various sections and in S. 109 of the Companies Act the word used was 'created' and not the word 'issued', "instruments executing or creating charge" in the Defence of India Rules would not be within the meaning of securities issued by or for the benefit of the company. The other finding in the *Travancore Cochin* case is that the rule of interpretation is that the general word which follows particular and specific words of the same nature takes its meaning from that and is presumed to be restricted to the genus in those words.

28. In the case of *Anderson v. Anderson*, reported in 1895-1 Q B 749 a voluntary settlement came up for consideration as to whether the deed of settlement would include the horses, carriages, harness and stable furniture which were in the stable in the coach house at the time of the settlor's death. By a settlement made by a husband upon the wife a leasehold message described in schedule was assigned to the trustees in these words "all the house-hold furniture, plate, linen, glass and tenant's fixtures, wines, china spirits and other consumable stores and other goods, chattels and effects in or upon or belonging to" the leasehold message. In the Schedule the leasehold premises were described as a piece of ground "with the message tenement or dwelling house, back buildings, coach-houses, stable buildings and all other erections thereupon." The question was whether the general words 'other goods, chattels and effects' there would pass to the trustees carriages, horses, harness and stable furniture in or upon the coach house and stable building. The question was answered in the affirmative. Lord Esher M. R. said "Nothing can well be plainer than that to shew that *prima facie* general words are to be taken in their larger sense, unless you can find that in the particular case the true construction of the instrument requires you to conclude that they are intended to be used in a sense limited to things *ejusdem generis* with those which have been specifically mentioned before." Rigby L. J. said: "The main principle upon which you must proceed is, to give to all

the words their common meaning: you are not justified in taking away from them their common meaning, unless you can find something reasonably plain upon the face of the document itself to show that they are not used with that meaning and the mere fact that general words follow specific words is certainly not enough." In *S. S. Magnhild v. McIntyre Brothers and Co.*, reported in 1920-3 KB 321 the question for consideration was the meaning of the words "or other accident". McCaigie J. said relying on the observation of Vaughan Williams L. J. in *Tillmanns v. S. S. Knutsford*, 1908-2 KB 385, that if a common genus was not to be found the necessary consequence would be that the words 'or any other cause' could not be limited by the doctrine of *ejusdem generis*. In *Tillmanns*' case, 1908-2 KB 385, Farwell L. J. said that "unless you can find a category there is no room for the application of the *ejusdem generis*." Kennedy L. J. said in *Tillmanns*' case, 1908-2 KB 385 that "the genus must first be found, and then you must find whether the words that follow are applicable to the species enumerated belonging to the one genus."

29. In the present case, the words in R. 94-A are to be found in sub-rule (1) in four separately numbered categories: shares, stocks, bonds in the first category, debentures in the second category, instruments creating charge or lien on the assets of the company in the third category and instrument acknowledging loan or indebtedness of the company and guaranteed by a third party or entered into jointly with the third party in the fourth category. Counsel for the respondent, in my view, rightly contended that there was no occasion for application of the doctrine of *ejusdem generis*. First, there is no genus and there is no category. The words 'shares, stocks, bonds, debentures, instruments creating a charge and instruments acknowledging loan to or indebtedness of the company do not form a genus. Secondly, shares, stocks and bonds do not create a charge. Thirdly, debentures may not create a charge there could be secured and unsecured debentures. Fourthly, Rule 94-A was introduced in 1943. Categories 3 and 4 in Rule 94-A (1) were introduced in the month of June 1944. Counsel for the respondent, in my view, rightly contended that when all the four categories were not enumerated at the inception the intention was to introduce something new. Finally, the fourth category namely instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party entered into jointly with a third party shows that the third category representing instruments creating charge or lien on the assets of the company should not and could not be read *ejusdem generis*.

30. Reliance was placed by counsel for the respondent on the Bolton Insurance case reported in 1913 AC 166 where Lord Wright said that the ejusdem generis rule is merely a rule of construction not a rule of law and it presupposes a genus. The word workman was there defined in the statute to mean "any person who has entered into or works under a contract with an employer, whether the contract be by way of manual labour, clerical work or otherwise, be expressed or implied, oral or in writing" etcetra. Lord Wright further said that in that case the only genus was a contract with an employer and the contract would constitute the person a workman male or female. Clerical work was added later. Therefore, the words 'or otherwise' were held by Lord Wright to be intended to embrace the entire range of wage earning or salaried employment.

31. In the present case counsel for the respondent, in my view, rightly contended that there was no common feature in the four categories enumerated in sub-rule 1 of Rule 94-A. Counsel for the respondent rightly submitted that ordinary meaning should be given to the words 'instruments creating charge' and hypothecation or mortgage instruments creating charge or lien on the assets of the company would be within the scope of Rule 94-A (1). For these reasons I am unable to accept the contention of counsel for the appellant that the words 'instruments creating charge' would not embrace hypothecation or mortgage instruments. With respect, I am unable to agree with the view expressed in the Travancore Cochin decision-

32. The contention on behalf of the appellant that mortgage was something different to charge and since the word used in Rule 94-A (1) was only charge, the mortgage would be exempted from the operation of the rule is also, in my view, unacceptable. The word 'charge' here is used in the generic sense of incumbrance. Counsel for the respondent referred to the meaning of charge in the Shorter Oxford Dictionary, Wharton's Legal Lexicon, Osborn's Legal Dictionary and Jowett's Legal Dictionary to show that the primary meaning would be a liability to pay money laid upon any estate or upon an obligation imposed upon property or when applied to property it would be security for payment of debt or performance of an obligation. In other words, it would be a formal security for payment of debt or performance of obligation and payment would be out of the specific funds or out of realisation of proceeds of property. Counsel for the respondent contended that in a charge the right to sell the property was contractual and could be defeated by a bona fide purchaser for value without notice. Whereas, in the case of a mortgage the right to sell would consist of in-

terest in the property being transferred to mortgagee and as such it was a right in rem and for properties valued at Rs. 100/- or more there was no distinction because of compulsory registration. In my opinion, this distinction correctly sums up the legal position. In the case of a charge as well as in the case of a mortgage two elements are common. First, that there is a loan and secondly that there is a security for the repayment of the loan. The only difference between a charge and mortgage is that in the case of mortgage there is transfer of interest but in the case of a charge there is no transfer of interest. That is how in the Patna decision reported in AIR 1922 Pat 529 a mortgage was described as a jus in rem and the charge was described as a jus ad rem. Counsel for the respondent relied on the decisions in Srinivasa Raghava Iyenger v. K. R. Renganatha Iyengar, reported in AIR 1919 Mad 528 and in Chhaganlal Sakham v. Chunilal Jagmal, reported in AIR 1934 Bom 189. In the Madras case there was a promissory note and thereafter a security bond was given on the same day. The security bond amounted to a charge on immovable property according to one party and it amounted to a mortgage according to another party. The distinction between a mortgage and a charge was referred to. At page 530 of the report Sadasiva Aiyar J. said that every mortgage document created also a charge but conversely a charge might not amount to a mortgage in all cases. Where the charge is created over specific immovable property though it might not be a simple mortgage it was held to be a mortgage though of an anomalous kind mentioned in Section 98 of the 1882 Act. In the Madras case reference was made to the Bench decision of this Court in Royzuddin Sheikh v. Kali Nath Mookerjee reported in (1906) ILR 33 Cal 985 and it was said that the Calcutta view of the effect of the document creating a charge on specific immovable property was too narrow and even where there was no covenant to pay the document creating such a charge was a mortgage and not a mere charge liable to be defeated by a subsequent mortgage deed or sale deed.

33. The decision in AIR 1934 Bom 189 was also relied on by counsel for the respondent on the observation appearing at 190 of the report that every mortgage includes a charge and it would be a difficult question to find out if a charge amounted to a mortgage. No court will favour an endeavour to give to an identical transaction another name with the object of bringing about the particular legal results in question without observing the formalities specified by the law. If the transaction was exactly of the nature contemplated by law which the law described or otherwise referred to as mortgage, if, it has the same incidents, so that it cannot

be distinguished from a mortgage, then the transaction cannot be treated as otherwise than a mortgage merely by calling it a charge.

34. In the light of these decisions it will appear that the meanings ascribed to mortgage and charge under Ss. 58 and 100 of the Transfer of Property Act indicate that an instrument creating a mortgage upon assets of the company is an instrument falling within the mischief of Rule 94-A (1) of the Defence of India Rules. It cannot, in my opinion, be said that a mortgage which has all the attributes of a charge and has in addition the character of transfer of interest in land is outside the purview of Rule 94-A (1). Counsel for the respondent rightly contended that the attribute of the element of security gave the real clue to the meaning of the charge. The word 'charge' here is used in the generic sense and it embraces mortgages within the meaning of the words "instruments creating a charge on the assets of Company."

35. Counsel for the appellant contended that if the transaction fell within the mischief of Rule 94-A as an illegal transaction the plaintiff appellant would yet be entitled to recovery of money. In aid of that argument it was also contended that at the trial an amendment was asked for the recovery of Rs. 1,75,000/- and that amendment should have been allowed. The learned judge came to the conclusion that as no suit could be brought to enforce any illegal contract the courts would not recognise any action founded upon it. Reliance was placed upon Anson on Principles of the English Law of Contract 21st Edition at page 313 and the decision in *Holman v. Johnson*, (1775) 1 Cowp 341. In my opinion the learned judge came to the correct conclusion. In the present case there is an additional feature which is to be found in sub-rule (7) in R. 94-A of the Defence of India Rules; namely, "No person shall accept or give any consideration for any securities in respect of an issue of capital made or proposed to be made in British India or elsewhere unless the consent or recognition of the Central Government has been accorded to such issue of capital." The result is that both the acceptance and the giving of consideration for any of the securities mentioned in Rule 94-A is prohibited by the Statute. It should be stated here that the Travancore Cochin case, AIR 1957 Trav-Co 6 does not refer to sub-r. (7). It may be that the particular sub-rule was not placed for consideration in that case or it may be that it was not necessary to go into the question by reason of the conclusion that the hypothecation in that case was not within the mischief of Rule 94-A. Cheshire in the Law of Contracts, 6th edition (page 312) states that the effect of the

two maxims *Ex turpi causa non oritur actio* and *in pari delicto potior est conditio defendantis* is that neither can maintain an action against the other if he requires any aid from the illegal transaction to establish his case. See 1915 AC 106. If a plaintiff cannot maintain his cause of action without showing as part of such cause of action that he has been guilty of illegality then the courts will not assist him in his cause of action. This was the opinion of A. L. Smith L. J. in *Scott v. Brown Doering Menab and Co.*, (1892) 2 QB 724. Counsel on behalf of Ranjit Bose's heirs contended that the plaintiff appellant asked for preliminary mortgage decree and Ranjit Bose was sued as a trustee and also for self. In view of my conclusion that the mortgage transaction is of the company there is no liability of the heirs of Ranjit Bose. In my view the illegality inherent in the transaction prevents the plaintiff appellant from relying on it either for the enforcement of rights under the instrument or for the recovery of the consideration money for the transaction.

36. Counsel for the respondent Tea Company, in my view, rightly contended that the consideration of Rs. 2,75,000/- in the present case was the entire consideration for the mortgage by deposit of title deeds. Apart from the mortgage there was exhibit C which created a charge on movables. The consideration was the same for both the deeds. It was one entire integral consideration. The result is that the illegality of the transaction prevents the plaintiff appellant from relying upon the same consideration for recovery of the same.

37. A contention was advanced by counsel for the appellant that the appellant bank was entitled to exemption. The exemption was based on the notification No. D. 4114-E. C.I./44 in exercise of the power conferred by sub-r. (9) of R. 99-A of the Defence of India Rules. The exemption in short is that "the Central Government is pleased to exempt issue of securities (other than debentures) by persons in the ordinary course of their normal business and strictly and solely for the purpose of that business to a person carrying on the business of banking or his nominee in respect of advance made or to be made or over-draft granted or to be granted by that person from time to time". The learned judge rightly came to the conclusion that there was no pleading to that effect and that no issue was raised. The learned Judge came to the conclusion that the plaintiff-appellant was not entitled to exemption for three broad reasons. First, there was no pleading. Secondly, there was no issue. Thirdly, there was no evidence. Counsel for the appellant relied on oral evidence of Nirmal Kumar Pal in questions 5, 6 and 7 where the deponent said that Rangaroon Tea Company Ltd. was incorporated for doing tea

business and the tea business was done by purchasing a tea estate. In my opinion, this evidence is utterly useless in aid of the appellant's contentions. In order to succeed on exemption there is to be specific pleading and there is to be evidence that the exemption is available by reason of the transaction having been entered into in the ordinary course of normal business and secondly that it is strictly and solely for the purpose of that business. There is no evidence to establish such a case of exemption.

38. The last question was whether the transaction of mortgage satisfied the requirements of registration under S 109 of the Companies Act. If the transaction was of the company and if there was no registration under Section 109 the result would be that any person who fails to register it would rank as unsecured creditor. This would be so in case of valid transactions. In the present case irrespective of the illegality under Rule 94-A of the Defence of India Rules the plaintiff appellant did not have the mortgage registered in accordance with Section 109 of the Indian Companies Act.

39. For these reasons, I am of opinion, that the contentions advanced on behalf of the appellant fail. The judgment is affirmed. The appeal is dismissed. The order as to costs made by the learned judge in the trial court is set aside. This being a transaction which is illegal neither party should, in my opinion, be entitled to costs against the other and each party should pay and bear its own costs of this appeal and of the trial Court. The liquidator will retain his costs as between attorney and client, certificate for two counsel, out of the assets including the assets lying with the official receiver in the case of Rangaroon Tea Company Ltd and including the assets lying with the court liquidator in the case of Calcutta National Bank Ltd.

40. S. K. MUKHERJEA, J : The main question which has to be decided in this appeal is whether having regard to the provisions of Rule 94-A of the Defence of India Rules a company could create a valid mortgage by an instrument for its own benefit except with the consent of the Central Government.

41. The relevant portions of the Rule provide

94-A Control of Capital Issues — (1) For the purpose of this Rule —

(a) securities shall mean the following instruments issued or to be issued by or for the benefit of a company, viz., (i) shares, stocks and bonds, (ii) debentures, (iii) other instruments creating a charge or lien on the assets of the company, and (iv) instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party or entered into jointly with a third party;

(b) a person shall be deemed to make an issue of capital who issues any securities whether for cash or otherwise.

(2) (a) No company, whether incorporated in British India or not, shall except with the consent of the Central Government —

(i) make an issue of capital in British India,

(ii) make in British India any public offer of securities for sale;

(iii) renew or postpone the date of maturity or repayment of any security maturing for payment in British India.

X X X X

(7) No person shall accept or give any consideration for any securities in respect of an issue of capital made or proposed to be made in British India or elsewhere unless the consent or recognition of the Central Government has been accorded to such issue of capital.

X X X X

(10) If any person contravenes the provisions of this rule he shall be punishable with imprisonment for a term which may extend to five years or with fine or with both.

42. The Rule expired over two decades ago but it has lost none of its importance as it still rules from its grave through the Capital Issues (Control) Act 1947, by which its material provisions have been re-enacted with slight modifications.

43. The learned trial judge has found and so have we, that on or about August 30, 1944, the respondent company by its trustee or benamdar one Ranjit Bose, deposited title deeds of Rangaroon Tea Estate with the appellant bank with intent to create a security on the said estate. It transpires that Ranjit Bose, the trustee or benamdar, was the ostensible owner and the respondent company, the real owner of the property.

44. On August 30, 1944 an agreement was entered into between the appellant bank and Ranjit Bose which was recorded in a Memorandum of Agreement subsequently registered with the Registrar of Assurances. It is recited in the Memorandum that the mortgagor has already deposited with the appellant bank title deeds of properties which are free from encumbrances, with intent to create a security on the same, by way of mortgage by deposit of title deeds in favour of the appellant bank for due repayment of the sum of Rs 2,75,000/- which the mortgagee has lent and advanced to the mortgagor. The terms and conditions on which the loan has been advanced and on the basis of which the mortgage has been created are set out in the memorandum in great detail. No instrument avowedly creating a mortgage could have been more elaborate and

complete. Even the right of the mortgagee to appoint a receiver in the event of the mortgagee instituting a suit against the mortgagor has been reserved. There is no question that the parties themselves, in the language of Sir Richard Couch, C.J., considered and made the Memorandum in writing the only repository and the appropriate evidence of their agreement. The intention of the parties is amply borne out not only by the nature of the document and the terms of the agreement but also by the fact that the parties themselves, assisted by their Solicitors, thought it necessary to register the agreement. In these circumstances, it must be held that the mortgage was created not merely by deposit of title deeds but also by the instrument described as Memorandum of Agreement in the light of pronouncements made in a series of decisions from (1873) 11 Beng LR 405 to 1950 SCR 548 = (AIR 1950 SC 272).

45. The question then arises whether the mortgage created by the Memorandum of Agreement is a charge created by an instrument within the meaning of Rule 94-A. It is said that a 'charge' as defined in Section 100 of the Transfer of Property Act, is not a mortgage. In fact, the section provides that where an immoveable property of one person is made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property. Relying on the Section, Mr. Das contended that the same meaning is to be given to the expression 'charge' in Rule 94-A as in Section 100 of the Transfer of Property Act. He also drew our attention to the use of the word 'mortgage' in Rule 94 (4) of the Defence of India Rules. If the framers of the Rules intended to extend the operation of Rule 94-A to mortgages, the Rule, he argued, should have clearly said so. He also referred to the definition of 'Security' in Rule 92-A where mortgage is not spoken of at all. He submitted that as the definition of 'Security' in R. 94-A is exhaustive, in the absence of any reference to mortgage, mortgages are outside the scope of the Rule.

46. The definition of 'Security' in Rule 92-A is, in my opinion, not relevant because 'Security' is defined again in Rule 94-A specifically for the purpose of that Rule. It is true that the Rule does not speak of mortgage, but only of charge. It cannot be disputed that every mortgage creates a charge and, in its generic sense, a mortgage must, and does, include a charge. A statute must be given the meaning that its language permits so as to carry out and not to defeat its object. The object of the Rule, as is provided by Section 2 (xxii) of the Defence of India Act, 1939, is to control the possession, use or

disposal of, or dealing in Securities. It will be unreasonable to construe the expression 'charge' in a restricted sense, as confined to a transaction not amounting to mortgage as contemplated under S. 100 of the Transfer of Property Act and not in its wider and generic sense. To do so will be to hold that under Rule 94-A although a company cannot lawfully create a charge by an instrument on its assets except with the consent of the Central Government it can create a mortgage by an instrument in the absence of such consent. In my opinion, such a construction is not tenable. Having regard to the object of the Rule and the principle that every mortgage necessarily creates a charge, it must be held that the expression 'charge' in R. 94-A includes a mortgage. It is more than likely that R. 94-A made no mention of mortgage because the framers of the Rule thought that as a mortgage necessarily creates a charge, it is not necessary to make specific reference to 'mortgage' in the definition.

47. In these circumstances, I am of opinion that a mortgage is within the ambit of Rule 94-A (1) and (2) of the Defence of India Rules.

48. In construing Indian Statutes of the British period, it is often useful to refer to corresponding English Statutes by which they were directly inspired. R. 94-A was inspired by Clause 6 of the Defence (Finance) Regulations, 1939, the relevant provisions of which are as follows:—

(6) Control of capital issues. — (1) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful, except with the consent of the Treasury, to make an issue of capital in the United Kingdom, to make, in the United Kingdom, any public offer of securities for sale, or to renew or postpone the date of maturity of any security maturing for repayment in the United Kingdom.

(2) Subject to such exemptions as may be granted by order of the Treasury, it shall not be lawful to issue any prospectus or other document offering for subscription, or publicly offering for sale, any securities which does not include a statement that the consent of the Treasury has been obtained to the issue or offer of the securities.

(3) For the purposes of this Regulation a person shall be deemed to make an issue of capital who —

(a) issues any securities (whether for cash or otherwise), or

(b) receives any money on loan on the terms express or implied that the loan will or may be discharged or secured wholly or partly by the issue of any securities or by the transfer of any securities issued

after the making of the loan, or will or may be repaid wholly or partly out of the proceeds of any securities issued after the making of the loan.

(4) A security shall not be invalid by reason that the consent of the Treasury has not been given to the issue thereof, or that any conditions imposed by the Treasury in relation to the issue thereof have not been complied with, but nothing in this paragraph shall be construed as modifying the liability of any person to any penalty in respect of any failure to obtain such consent or to comply with such conditions.

(5) In this Regulation, references to securities and to the issue of securities respectively include, references to any mortgage or charge whether legal or equitable, and to the creation of, or the increasing of the amount secured by, any such mortgage or charge, and the expression "security" includes shares, stocks, bonds, notes, debentures, debenture stock, Treasury bills, a bill of exchange other than a bill payable on demand or at a fixed period not exceeding six months after date or after sight, a promissory note of a local authority, a promissory note payable more than six months after date, a deposit receipt for money lent, issued, by a local authority or by any person carrying on a business other than the business of banking, and a unit or sub-unit of a unit trust, but does not include any other security — Butterworth's Emergency Legislation— The Defence (Finance) Regulations 1939

49. In the Defence Regulations, mortgages created by instruments are specifically included in the definition of securities. In this connection, it may be pointed out that the legal position in India has been made clear by the Capital Issues (Control) Act 1947 as amended by an Act of 1957, which re-enacted the provisions of Rule 94-A. In the Act of 1947, the expression 'securities' has been defined so as to include 'mortgage deeds' 'instruments of pawn,' 'pledge' or 'hypothecation' The argument that Rule 94-A does not contemplate mortgage because there is no express mention of mortgage in the definition of securities is, in my opinion, not tenable.

50. It seems to me that the Defence (Finance) Regulations 1939 and the Capital Issues (Control) Act 1947 specifically speak of mortgages ex abundanti cautela and even apart from any reference to mortgage in the definition of 'securities', mortgage is included in the expression 'charge' in those statutes. Many instances are found of provisions put into Statutes merely by way of precaution — Craves on Statute Law, 5th Edition, p 98

51. It was contended on the basis of the decision in AIR 1957 Trav-Co 6, that

'instruments creating a charge on the assets of the Company' should be read ejusdem generis with shares, stocks, bonds and debentures. To dispose of this argument it is only necessary to point out that on a fair reading of the sub rule which includes within its ambit things so diverse as shares, bonds, debentures, instruments acknowledging loan to or indebtedness of the company and guaranteed by a third party and instruments creating a charge or lien on the assets of the company, no genus is discernible. Most of the instruments contemplated under sub-rule (1) (a) of Rule 94A do not and some may not create a charge. In certain events, share capital may have to be restored to the shareholders out of the assets of a company but it cannot be said that a shareholder has a charge on the assets. A debenture, again, may be an unsecured debenture. Some of the instruments referred to in the sub-rule do not even create a liability or a debt, e.g. the category of instruments contemplated in paragraph (iv) of sub-rule (1)(a), that is to say, instruments acknowledging loan to or indebtedness of the company entered into jointly with a third party. They do not create any liability but are only evidence of liability. I am unable to hold that the ejusdem generis principle has any application in construing Rule 94A(1)(a) of the Defence of India Rules.

52. It was also submitted on the basis of the Travancore-Cochin case that the expression 'issue' is singularly inapt in relation to mortgage. A mortgage is created or executed, not issued. A company issues shares or debentures. The term 'issue' is a mercantile term and has a specific meaning in trade and commerce which it has acquired by long usage. One does not speak of issuing mortgage. Therefore, it is contended, mortgages are not contemplated under Rule 94A which relates to control of capital issues. It is true that in popular parlance or in commercial language one does not speak of issuing a mortgage; but then, one does not speak of issuing a charge either, and yet the Rule contemplates issue of instruments creating a charge or lien. After all the Defence of India Rules cannot be described as a piece of commercial legislation although commerce and trade come within its scope. The expression 'issue' has a special meaning given to it by the character and scope of the Rules themselves. That the term is not used in a popular or mercantile sense is clear from the fact that the Rule provides that a person shall be deemed to make an issue of capital who issues any securities for cash or otherwise. When a company borrows money on a deed of hypothecation or any other instrument creating a charge on its assets, it does not issue capital, in fact typical balance-sheets will make it clear that although monies raised on debentures are sometimes characterised as capital loan, loans taken by a company on hypo-

theation of its stock-in-trade or other assets are never treated or specified as capital; and yet the Rule provides that a person shall be deemed to make an issue of capital who issues any security whether for cash or otherwise.

53. It is clear that in Rule 94A the expression 'issue' has been given an extended and wider signification. The Rule in my judgment, contemplates issue of mortgages. To set all reasonable doubts at rest that in the context of legislative enactments or statutory orders, it is permissible to speak of issue of mortgages, reference may be made to an order of the British Treasury dated June 1, 1943 made under The Defence (Finance) Regulations 1939 by which it was directed that "no mortgage shall be issued or renewed on terms providing for repayment before a date seven years after the date of issue or renewal". (Butterworth's Emergency Legislation, Defence (Finance) Regulations, 1939).

54. In the view I have taken I am unable to agree with the learned judges who decided the Travancore-Cochin case, AIR 1957 Trav-Co 6 that the word 'issue' is not used in the sense of 'executed' or 'created' in relation to mortgages or hypothecations and that mortgages and hypothecations are not hit by the Rule.

55. The mortgage created by the respondent company has in my opinion been created in contravention of sub-r. (2) of R. 94-A. By the combined operation of sub-rules (7) and (10) the mortgagor and the mortgagee in such cases are liable to penalty. The transactions, namely, creation of the security and the giving and taking of consideration for the security are prohibited by Rule 94-A. Not only must the transaction be held illegal but the consideration given by the appellant bank must also be held to be an illegal consideration having regard to sub-rule (7). In this connection reference may again be made to The Defence (Finance) Regulations, 1939, Cl. (6) paragraph 4 of which provides: "A security shall not be invalid by reason that the consent of the Treasury has not been given to the issue thereof, or that any conditions imposed by the Treasury in relation to the issue thereof have not been complied with, but nothing in this paragraph shall be construed as modifying the liability of any person to any penalty in respect of any failure to obtain such consent or to comply with such conditions." No similar provision is to be found in Rule 94-A. In the context of the Statute it must be held that not only the mortgage is invalid but the consideration given for the mortgage is also irrecoverable because the entire transaction is tainted with illegality.

56. Having regard to the finding that the mortgage is invalid and that the consideration given for the mortgage is not recover-

able in law, it is not necessary to go into other questions. However as an issue was raised before the learned trial judge with regard to the effect of non-registration of the mortgage under Section 109 of the Companies Act, I propose to deal very briefly with that aspect of the matter. As the mortgage was created by the company in respect of its properties, the mortgage is registrable under Section 109 of the Companies Act. It appears that the mortgage has been registered under Section 109-A within the time extended by an order of S. B. Sinha J.: That order was presumably made on the basis that it was a case of registration of charge on properties acquired subject to charge as contemplated under Section 109-A of The Indian Companies Act of 1913. It is the case of the respondent company that the mortgage is a benami transaction. It is not in dispute that the name of the company nowhere appears on the mortgage instrument. According to the tenor of the instrument, the company is neither the mortgagor nor the mortgagee. In fact the name of the company appears nowhere in the instrument itself. Be that as it may, if the mortgage has been created by the company as is the case here, and the property on which the mortgage is created is the property of the company, the mortgage, if it has not been registered under S. 109 is void against the liquidator and the creditors of the company. In the result the mortgage must be held to be void against the liquidator and the creditors of the company for non-registration under S. 109 even if it be held that the mortgage is a valid mortgage. In saying so, I do not intend to mean that I have decided that a benami mortgage created by a company by an instrument through a benamidar or a trustee is contemplated under Section 109 of the Indian Companies Act 1913. If the declarations made in the prescribed form are at complete variance with and are not related to the tenor of the instrument and if the Registrar of Companies cannot receive any notice of trust under Section 33 of the Indian Companies Act, it is more than doubtful whether he is competent to register the charge under Section 109. However, as it is not necessary to decide that question for the purpose of this appeal, I do not propose to decide it but I consider it only proper to express the gravest doubt which I entertain on the subject. It may not be out of place to mention that the learned trial Judge has also expressed the same doubt in his judgment where he says, "I can visualise that there could be initial difficulties in effecting registration but there is no evidence that the company requested the Registrar to register the mortgage"

57. On the question whether the appellants are entitled to the benefit of the relevant exemption order. I agree that there is total lack of evidence on this question. It is not, therefore, possible for the Court to

hold that the appellant company is entitled to exemption-

58. In the view I have taken, I agree that the appeal should be dismissed and I concur in the order my Lord has made
BNP/D V C Appeal dismissed.

**AIR 1969 CALCUTTA 504 (V 56 C 102)
N C TALUKDAR, J.**

Superintendent and Remembrancer of Legal Affairs, West Bengal on behalf of the State of West Bengal Petitioner v D Surya Rao and another, Accused, Opposite Parties

Criminal Revn. Case No 1294 of 1968, D/- 18-7-1969

(A) Railway Property (Unlawful Possession) Act (29 of 1966) Ss. 3, 5 and 8 — Institution of case for offences mentioned in the Act is on complaint — Section 173 (4) Criminal P. C. need not be complied with — Criminal P. C. (1898) Ss. 173(4), 190(1)(b), 251(b) and 4(p).

In view of the nature of the provisions of the Railway Property (Unlawful Possession) Act 1966, cases instituted thereunder are not on a police report but on a complaint attracting the provisions of Section 252 onwards of the Code of Criminal Procedure making it ultimately unnecessary on the part of the prosecution to conform to the provisions of Section 173 (4) of the said Code and serve copies of documents and statements as enjoined therein upon the accused (Para 7)

Although Section 3 of the Railway Property (Unlawful Possession) Act 1966 lays down a quantum of sentence making of fence cognizable the provisions of Section 5 of the Act clearly and categorically enjoin that offences under the Act are not cognizable. Merely because an officer of the R P F holding an enquiry under the Act "may exercise the same powers and shall be subject to the same provisions as the officer in charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case" the same would not convert him into "a police officer properly so called" within the meaning of Section 190 (1)(b) of the Code and convert his report into a police report. The enquiry referred to in Section 8 of the Act is not tantamount to an investigation held under Chapter XIV of the Code and unless and until such an investigation is held, leading on to the submission of a charge sheet, cognizance is not taken by the learned magistrate on a police report. Such an officer, under Act 29 of 1966, will have to make a complaint under Section 190(1)(a) of the Code if he wants the magistrate to take cognizance of an offence under the Act and consequently the case that is ultimately started

is "any other case" within the meaning of Section 251(b) under Chapter XXI of the Code of Criminal Procedure (Para 5)

The concept of liberal interpretation cannot be introduced for interpreting the provisions of the special Act (29 of 1966). Procedure is the handmaiden of law and the two are so interrelated that the one cannot be separated from the other and any deviation from the procedure laid down by law on a purported liberal interpretation is not only unwarranted and untenable but is also illegal and is fraught with undoubted prejudice being caused to one of the parties to the proceedings, vitiating the ultimate trial Justice, after all, is in accordance with law (Para 8)

(B) Civil P. C. (1908) Pre.—Precedents—Obliter dicta of Supreme tribunal are entitled to considerable weight — (Constitution of India Art. 141). (Para 6)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 4 (V 56) = 1969
Cri LJ 239 Ashiq Miyan v State of Madhya Pradesh 7
- (1969) AIR 1969 Cal 535 (V 56) = Cri Revn No 1018 of 1967 D/- 22-4-1969, Ramendra Singh v Mohit Chowdhury 6
- (1969) Cri Revn Cases Nos 401 of 1967 and 680 of 1964 D/- 30-4-1969 (Cal), Sahu Jain Ltd Calcutta v. The State 2
- (1969) Cri Revn Case No 161 of 1969 D/- 20-6-1969 (Cal) Supdt and Remembrancer of Legal Affairs v S K Rahamattulla 6
- (1968) AIR 1968 Cal 540 (V 55) = 1968 Cri LJ 1411, Supdt and Remembrancer of Legal Affairs West Bengal v Vimla Dassi 7
- (1967) AIR 1967 SC 1167 (V 54) = 1967 Cri LJ 1081, Raghubans Dubey v State of Bihar 7
- (1967) AIR 1967 Cal 352 (V 54) = 1967 Cri LJ 858 Malay Banerjee v State 7
- (1966) AIR 1966 SC 1746 (V 53) = 1966 Cri LJ 1353, Badaku Joti Svant v State of Mysore 6
- (1965) AIR 1965 SC 1185 (V 52) = 1965 (2) Cri LJ 250, Pravin Chandra Modv v State of Andhra Pradesh 6, 7
- (1962) Unreported Decision decided on 31st May 1962 (Cal) Ramaprosad Gupta v State of West Bengal 7
- (1961) 1961 (1) Cri LJ 644 = ILR (1961) 2 Cal 346, Nanakraj Pandit v State 2
- (1959) AIR 1959 SC 814 (V 46) = (1959) Supp (2) SCR 375, Commr. of Income-tax, Hyderabad, Deccan v Vazir Sultan and Sons 6
- (1958) AIR 1958 Cal 213 (V 45) = 1958 Cri LJ 622, Prem Chand Khetry v The State 7
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(1955) AIR 1955 Bom 220 (V 42) =

ILR (1955) Bom 69 (FB), Kai

Khusroo v. State of Bombay 6

Mrs. Mukti Moitra, for the Supdt. and Remembrancer of Legal Affairs, W. B.; Prasun Chandra Ghosh as amicus curiae.

ORDER: This Rule is at the instance of the Superintendent and Remembrancer of Legal Affairs, West Bengal and is against an order dated the 11th September, 1968 passed by Shri A. K. Sen, Magistrate, 1st Class, Midnapur (S) in case No. 164 (S) of 1968/T. R. 1929/68 under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966, allowing the prayer made on behalf of the defence for granting copies of the documents and statements upon which the prosecution wanted to rely and rejecting the objection made on behalf of the prosecution in that behalf.

2. The facts leading on to the Rule can be put in a short compass. At about 23 hours on 8-5-68 a General Diary was entered at the Nimpura R. P. F. Post Station stating inter alia that at about 9-30 p. m. during the course of their patrol duty, some members belonging to the Railway Protection Force, referred to in the said diary, noticed the two accused in the company of some others proceeding towards the Bombay Road through the maidan close to the Rakha Jungle and nearby the Marshall Yard. When challenged by the R. P. F. staff, they took to their heels and after a hot chase, the R. P. F. personnel managed to arrest the two accused while the others fled away leaving several fishplates. The said persons who were arrested failed to account for the possession of the Railway properties recovered from them nor could they produce any authority for carrying the same. They gave their names as D. Surya Rao and Masala Kameswara Rao. The articles were seized and seizure-lists were drawn up on the same date. A report followed on the basis whereof the above-mentioned G. D. No. 262 dated the 8-5-68 was entered in the Nimpura R. P. F. Post Station. The O. C. of the Railway Protection Force, Nimpura thereafter made an investigation and recorded several statements on 8-5-68, 8-6-68 and 9-6-68. Ultimately he submitted a report on the 11th June, 1968 to the learned Sub-Divisional Magistrate, Midnapur (S) mentioning the above-mentioned facts and also that a case of theft of some fish-plates from the railway track near the Arora Gate at about 5-30 hours on 7-5-68 was already reported, being Bankura F. R. P. S. case No. 5 dated 8-5-68 under Section 379, I. P. C. and prayed for a production warrant being issued on the learned Sub-Divisional Magistrate (N) Bankura for producing the two accused, D. Surya Rao and Masala Kameswara Rao in connection with R. P. F. case No. 2 under Section 3(a) of the Railway Property (Unlawful Possession) Act, 1966. On

the 31st July, 1969, the two accused persons were produced by the escort party and were taken in custody. The learned Sub-Divisional Magistrate (S), Midnapur thereafter by his order of the same date took cognizance upon the report referred to above and transferred the case to Shri A. K. Sen, Magistrate, 1st Class, Midnapur for disposal. On the same date, the learned transferee magistrate passed an order fixing 11-9-68 for the evidence of prosecution witnesses. On that date 5 witnesses were present, when the defence made a prayer for the copies of the documents and statements on which the prosecution wanted to rely but the prosecution objected thereto on the ground that this was a non-cognizable offence and that the defence was not entitled to the same. The learned Magistrate, however, was pleased by his order of the same date, to allow the prayer of the defence for copies and overruled the objection made on behalf of the prosecution, directing the latter to arrange for the delivery of such copies by the 9th October, 1968. This order has been impugned and forms the subject-matter of the present Rule.

3. Mrs. Mukti Moitra, Advocate, appearing for the Superintendent and Remembrancer of Legal Affairs, West Bengal, on behalf of the State of West Bengal, had made a two-fold submission. The first contention of Mrs. Moitra is one of law and relates to procedure. She has contended that in view of the nature of the provisions of the Railway Properties (Unlawful Possession) Act, 1966 (Act 29 of 1966), cases instituted thereunder are not on a police report but on a complaint, attracting the provisions of section 252 and the following sections under Chapter XXI of the Code of Criminal Procedure and ruling out the necessity to furnish to the accused the copies of the documents and statements referred to under Section 173(4) of the Code. The steps of Mrs. Moitra's reasoning are that (a) the officer of the R. P. F. holding an enquiry under Section 8 of Act 29 of 1966 may exercise "the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898) when investigating the cognizable case" but is nonetheless not a police officer properly so-called within the meaning of Section 190(1)(b) of the Code of Criminal Procedure; (b) the inquiry made by such an officer is not an investigation held under Chapter XIV of the Code of Criminal Procedure; and that he has no power to submit a charge-sheet under Section 173 Cr. P. C.; (c) a R. P. F. officer under Act 29 of 1966 will have to make a complaint under Section 190(1)(a) of the Code of Criminal Procedure if he wants the magistrate to take cognizance of the offence thereunder and (d) the provisions of Section 173(4) of the Code are not applicable to a case under the said Special Act, where-

to the provisions of Section 252 and the following sections under Chapter XXI of the Code would apply. An ancillary submission was made by the learned Advocate referring to the language of the order dated the 31st July, 1969 passed by Shri A. K. Dutt, Sub-Divisional Magistrate (S), Midnapur, viz., that "Seen the complaint of S I, R. P. F., Nimpura Cognizance taken". In support of her contention Mrs Moitra also referred to several cases decided under different Special Acts as decisions *pari materia* and those will be considered in their proper context. The second contention of Mrs Moitra centered round the maintainability of the impugned order itself dated the 11th September, 1968, in view of the findings arrived at therein by the learned magistrate himself. Mrs Moitra submitted that the concept of liberal interpretation referred to therein has been wrongly introduced by the learned Magistrate for interpreting the provisions of a Special Act viz., of Section 8 of Act 29 of 1966, relating to procedure violating ultimately the resultant trial.

4. There is no appearance on behalf of the opposite parties, who are in jail, although notices appear to have been served on them in due course. The point involved being of some importance and also in the interests of justice this court requested Mr. Prasun Chandra Ghosh, Advocate, to appear as *amicus curiae* and he was good enough to agree. Mr Ghosh submitted in the first instance that the provisions of the Railway Property (Unlawful Possession) Act 1966 are quite clear and cogent, enjoining that cases instituted thereunder are on a police report, attracting the provisions of Section 251A of the Code of Criminal Procedure and requiring the supply of copies of documents and statements to the accused as laid down under Section 173 (4) of the Code. In support of his contention Mr Ghosh submitted in the first place that Section 8 of Act 29 of 1966 consists of two parts as embodied in the two sub-sections. The first sub-section lays down that an officer of the Railway Protection Force shall proceed to enquire into the charge against a person arrested by him for an offence punishable under the Act or is forwarded to him under Section 7 of the said Act. The provisions of sub-section (2), however, along with those contained in proviso (a) make it clear that a report under Section 190(1)(b) of the Code of Criminal Procedure is enjoined thereby and not a complaint so that the court can take cognizance. The provisions under Section 5 of the Act laying down that offences under the Act shall not be cognizable do not alter the position because of the quantum of sentence provided for by way of penalty under Section 3 of the said Act. Mr. Ghosh next contended that in Act 29 of 1966, there is no provision for cognizance as contained in the Essential Commodities Act, X of 1955 or in the Official Secrets

Act but on a proper interpretation of Sections 5 and 8(2) along with provisos (a) and (b) of the latter section of the Railway Property (Unlawful Possession) Act, 1966 the report referred to in the said Act is to be deemed to be one under Chapter XIV of the Code of Criminal Procedure and as such the cognizance taken is on a report by a police officer under Section 190(1)(b), entailing the procedure provided for under Section 251A of the Code of Criminal Procedure relating to cases instituted on a police report. In this connection Mr Ghosh referred to Sections 5(2), 29 and the 2nd item of schedule II of the Code of Criminal Procedure and submitted that section 5 of Act 29 of 1966 is to be interpreted against the background of the said provisions and that the same makes the offence under the Act cognizable. Mr Ghosh further referred to the order dated the 11th June, 1968 wherein the expression 'report' has been mentioned clearly and categorically and naturally so because the same was sent by the officer-in-charge, R. P. F., Nimpura under Section 8(2). Mr Ghosh submitted that the word 'complaint' used in the order dated the 31st July, 1969 has been loosely used and really meant a report as referred to in the order dated the 11th June, 1968 and in the Railway Property (Unlawful Possession) Act, 1966 itself Mr Ghosh also referred to several cases in support of the above-mentioned proposition and further distinguished the principles laid down in the cases cited by Mrs Moitra. With regard to the second contention of Mrs Moitra, Mr Ghosh submitted that the question is not of any liberal interpretation but one of legal interpretation and that upon ultimate analysis on an interpretation of the relevant provisions of the Special Act, the order passed by the learned magistrate for granting copies of the documents to the accused is sustainable.

5. Having heard the learned Advocates appearing on behalf of the respective parties and on going through the materials on the record, I hold that there is a considerable force behind the submissions of Mrs Moitra. The first point raised by Mrs Moitra touching procedure, is an intriguing one and of some importance. Mrs Moitra has contended that in view of the nature of the provisions of the Railway Property (Unlawful Possession) Act, 1966, cases instituted thereunder are not on a police report but on a complaint attracting the provisions of Section 252 onwards of the Code of Criminal Procedure and as such there is no obligation on the part of the prosecution to conform to the provisions of Section 173(4) of the said Code. In order to test the above-mentioned contention of Mrs Moitra, I will in the first instance refer to the provisions of the Railway Property (Unlawful Possession) Act, 1966. Sec-

tion 3 of the said Act lays down the penalty for unlawful possession of railway property and under sub-section (a) imprisonment for a term which may extend to 5 years or a fine or with both is provided for in the case of a first offence and under sub-section (b) for a second or the subsequent offences, the imprisonment provided for is for a term which may extend to 5 years and also with fine etc. It would appear therefore that in view of the quantum of sentence the offence is cognizable. Section 5 of Act 29 of 1966 however lays down that notwithstanding anything contained in the Code of Criminal Procedure, an offence under this Act shall not be cognizable. Therefore specifically it is provided for that offences under the Act shall not be cognizable. The provisions of Section 8 would also be material and are as follows:

“(1) When any person is arrested by an officer of the Force for an offence punishable under this Act or is forwarded to him under Section 7, he shall proceed to inquire into the charge against such person (2) For this purpose the officer of the Force may exercise the same powers and shall be subject to the same provisions as the officer in charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case; Provided that — (a) if the officer of the Force is of opinion that there is sufficient evidence or reasonable ground of suspicion against the accused person, he shall either admit him to bail to appear before a Magistrate having jurisdiction in the case, or forward him in custody to such Magistrate; (b) if it appears to the officer of the Force that there is not sufficient evidence or reasonable ground of suspicion against the accused person he shall release the accused person on his executing a bond, with or without sureties as the officer of the Force may direct to appear, if and when so required before the Magistrate having jurisdiction, and shall make a full report of all the particulars of the case to his official superior.” Section 9 of the Act lays down that an officer of the R. P. F. shall have power to summon any person whose attendance he considers necessary for giving evidence and for producing documents, and sub-section (4) enjoins that every such inquiry shall be deemed to be a “judicial proceeding” within the meaning of Sections 193 and 288, I. P. C. It is to be seen that although Section 3 of the Railway Property (Unlawful Possession) Act 1966 lays down a quantum of sentence making the offence cognizable, the provisions of Section 5 of the said Act clearly and categorically enjoin that offences under the Act are not cognizable. This is a feature which cannot be overlooked in considering the later provision under Section 8 sub-section (2) and the two provisos mentioned thereunder. Merely because an

officer of the R. P. F. holding an enquiry under the Act “may exercise the same powers and shall be subject to the same provisions as the officer-in-charge of a police station may exercise and is subject to under the Code of Criminal Procedure, 1898 (5 of 1898), when investigating a cognizable case” the same would not convert him into “a police officer properly so called” within the meaning of Section 190 (1)(b) of the Code and convert his report into a police report. The enquiry referred to in Section 8 of the Act is not tantamount to an investigation held under Chapter XIV of the Code and unless and until such an investigation is held, leading on to the submission of a charge-sheet, cognizance is not taken by the learned magistrate on a police report. Such an officer, under Act 29 of 1966, will have to make a complaint under Section 190(1)(a) of the Code if he wants the learned magistrate to take cognizance of an offence under the Act and consequently the case that is ultimately started is “any other case” within the meaning of Section 251(b) under Chapter XXI of the Code of Criminal Procedure. Mr. Prasun Chandra Ghosh, Advocate, has relied on the provisions of Section 3 of the Act and contended that in view of the quantum of sentence provided for thereunder by way of penalty, the offence is really a cognizable one. It is difficult for me to agree with the said proposition in view of the clear provisions of Section 5 of the said Act ruling out the same. Mr. Ghosh further contended that on a proper interpretation of Section 8(2) of Act 29 of 1966, along with the two provisos given thereunder, the report referred to therein is really one under Chapter XIV of the Code of Criminal Procedure as the result of investigation held thereunder and accordingly cognizance is ultimately taken on a report by a police officer under Section 190(1)(b) of the Code of Criminal Procedure. Mr. Ghosh has submitted that a proper interpretation of Section 5 of Act 29 of 1966, enjoining that offences under the said Act would not be cognizable, can only be made in the light of the provisions of Sections 5(2), 29 and the second item of Schedule II of the Code of Criminal Procedure. It is difficult for me to uphold the said contentions in view of the clear provisions of a special statute ruling out offences thereunder to be cognizable and the same cannot be deemed to be cognizable merely because of Section 3 of the said Act. I accordingly hold that the provisions of Section 173 (4) of the Code of Criminal Procedure will not be applicable to a case under Act 29 of 1966 making it necessary for the prosecution to supply copies of the statements and documents to the accused.

6. I will now pass on to the case law cited for the purpose of finding out whether the same lends assurance to the interpretation of the statute law as made above. Mrs. Moitra referred in the first instance to

the case, not yet reported, of Ramendra Singh v Mohit Chowdhury, being Criminal Revn No 1018 of 1967 decided by Mr Justice A K Das and Mr Justice K K Mitra on 22-4-1969 (since reported in AIR 1969 Cal 535) wherein their Lordships held that "A trial under the Official Secrets Act will proceed under the provisions of Section 252 of the Code of Criminal Procedure ruling out thereby any necessity for serving copies of documents referred to under Section 173 of the Code of Criminal Procedure on the accused person" Mr Ghosh submitted that the facts in the above-mentioned case are distinguishable, that Section 13 of the Official Secrets Act uses the word "complaint," and that the decision of the Division Bench did not lay down any general principle but only one based upon the special provisions of that particular statute. A reference therefore to the relevant provisions of the Official Secrets Act is pertinent. Subsection (3) to Section 13 reads as follows "No Court shall take cognizance of any offence under this Act unless upon complaint made by order of or under authority from the Governor General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf." Section 14 of the said Act again provides for the exclusion of the public from the proceeding and it enjoined *inter alia* that "If in the course of proceedings before a Court against any person for an offence under this Act, or the proceedings on appeal or in the course of the trial of a person under this Act, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the proceedings would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Court may make an order to that effect . . .". Therefore, it would become abundantly clear that the provisions referred to above invest the Court under the said Special Act with powers to hold trial in camera for reasons of State and under Section 5(2) of the Code of Criminal Procedure, it is the said procedure that shall prevail. Such a court accordingly takes cognizance of an offence under the said Act under Section 190(1)(a) and as a result, the procedure as laid down under Section 251(b) under Chapter XXI of the Code shall apply, ruling out the requirement to conform to Section 173(4) of the Code of Criminal Procedure. Their Lordships of the Division Bench accordingly observed in the said decision, not yet reported, (since reported in AIR 1969 Cal 535) in Criminal Revision Case No 1018/67 that "the Official Secrets Act provides for a special procedure of complaint and if it was upon a complaint by a person authorised under the Act, cognizance was taken

under Section 190(1)(a) and not under Section 190(1)(b). The procedure for trial would, therefore, be under Section 252 of the Code of Criminal Procedure and not under Section 251A". I agree with the said observations but I hold that the decision in the above-mentioned case cited by Mrs Moitra does not constitute any precedent for determining the point involved in the present case which is against the backdrop of quite a different statute. The next case cited by Mrs Moitra is a decision, not yet reported, viz., Superintendent and Remembrancer of Legal Affairs v Sk. Rahamatulla, being Criminal Revn Case No 161 of 1969 decided by Mr. Justice R N Dutt and Mr Justice A P Das on 20-6-1969 (Cal). The said case is one under the Opium Act and cognizance was taken by the learned Chief Presidency Magistrate, Calcutta, of offences under Sections 9(a) and 9(c) of the said Act on the prosecution report submitted by an Excise Officer. The point that arose for consideration is whether in such a case the accused is entitled to the copies of the documents etc enjoined under Section 173 (4). After traversing several decisions under the Act and also under other Acts which are *pari materia*, their Lordships ultimately held that "even now the decision of this court in Premchand Khetry's case that a prosecution report submitted by an Excise Officer under Section 20G of the Opium Act after investigation under the provisions of that Act is that it is not a police report within the meaning of Section 173(1) of the Code and in that view of the matter we hold that the procedure to be followed in the instant case is the procedure as laid down in Section 252 onwards of the Code; and the result is that the accused is not entitled to copies of the statements recorded during investigation". Mr Ghosh contended that the observations made in the above-mentioned case should not determine the ultimate procedure applicable in the present case which is under an altogether different Act, containing different provisions. I agree with the submission made by Mr. Ghosh in this behalf and I hold that the decision in the case of *Cri Revn Case No. 161 of 1969 D/- 20-6-1969 (Cal)* which is against the background of a different Act containing different provisions, would not be applicable to the present case and as such the interpretation of Mrs Moitra put forward in this behalf fails. Mrs Moitra next referred to a recent Supreme Court case of *Badaku Joti Svant v State of Mysore* reported in AIR 1966 SC 1748. Mr Justice Wanchoo (as His Lordship then was) considered the material provisions of Section 21 of the Central Excises and Salt Act 1914 (Act 1 of 1944) and observed that "All that Section 21 provides is that for the purpose of his enquiry, a Central Excise Officer shall have the powers of an officer-in-charge of a police station when investigating a cognizable case. But even so it appears that

these powers do not include the power to submit a charge sheet under Section 173 of the Criminal Procedure Code for unlike the Bihar and Orissa Excise Act, the Central Excise Officer is not deemed to be an officer-in-charge of a police station". His Lordship proceeded further to observe that "A police officer for the purpose of Clause (b) above can in our opinion only be a police officer properly so called as the scheme of the Cr. P. C. shows and it seems therefore, that a Central Excise Officer will have to make a complaint under Clause (a) above if he wants the magistrate to take cognizance of an offence for example under Sec. 9 of the Act." Mrs. Moitra relied on the above-mentioned observations and contended that the provisions of Section 21 of the Central Excises and Salt Act, 1944 being similar to those of Act 29 of 1966, the decision of the Supreme Court would be a clear pointer to the procedure that should apply in a proceeding under the Railway Property (Unlawful Possession) Act, 1966, viz., one under Section 251A of the Code of Criminal Procedure. Mr. Ghosh however, submitted that the facts of the aforesaid case are quite distinguishable inasmuch as it is not only under a different Act viz., the Central Excises and Salt Act 1944 but the point for consideration also as involved therein is a different one as to whether the statement made by an accused to the Deputy Superintendent of Customs and Excise will be hit by Section 25 of the Evidence Act and become inadmissible in evidence and that the Supreme Court ultimately held that such a statement would not be hit by Section 25 of the Evidence Act and would be admissible in evidence unless the accused can take advantage of Section 24 of the Evidence Act. The said case therefore, according to Mr. Ghosh, is in a different context. Mr. Ghosh further contended that the earlier decision of the Supreme Court in the case of Pravin Chandra Mody v. State of Andhra Pradesh reported in AIR 1965 SC 1185 which supports his contention, does not appear to have been cited and considered in the case of AIR 1966 SC 1746 and that the findings as to whether a cognizance of an offence under the Central Excises and Salt Act, 1944 is under Section 190(1)(a), are in the nature of obiter dicta and as such are not really binding for determining the present point at issue. I do not agree with the submissions of Mr. Ghosh. The said observations though made in a different context are relevant for interpreting the provisions of Act 29 of 1966 in ascertaining the correct procedure and are not in any way obiter dicta. As has been held by some High Courts viz. in the case of Ram Surat v. Ram Murat, reported in, AIR 1955 All 543 and in the case of Kai Khushroo v. State of Bombay reported in AIR 1955 Bom 220 (FB) the obiter dicta of the Supreme Court constitute "law" within the meaning

of Article 141 of the Constitution of India. But even if it were otherwise, according to the ordinary rules relating to precedents, the obiter dicta of the Supreme Tribunal are entitled to considerable weight. A reference in this context may be made to the case of The Commissioner of Income-tax, Hyderabad, Deccan v. Vazir Sultan and Sons, reported in AIR 1959 SC 814 at p. 821. On a reference to the Central Excises and Salt Act, 1944, I find that the provisions of Section 21 of the said Act are almost similar to those of Section 8 of Act 29 of 1966. There is in addition a clear and specific provision in Act 29 of 1966 viz., Section 5 whereby offences under the said Act have not been made cognizable. The fiction arising out of Section 3 of the said Act cannot do duty for a specific provision enjoining that offences under Act 29 of 1966 shall not be cognizable. The decision of the Supreme Court in Badaku Joti Svant's case, AIR 1966 SC 1746 therefore supports Mrs. Moitra's contention that the procedure that should ultimately obtain in a case under Act 29 of 1966, which is a similar Act, will be one under Section 252 onwards of the Code of Criminal Procedure, being not instituted on a police report within the meaning of Section 251-A under chapter XXI of the Code.

7. Mr. Prasun Chandra Ghosh, Advocate, also referred to several cases in support of his interpretation. He referred in the first instance to the case of Malay Banerjee v. State, reported in AIR 1967 Cal 352. The proceeding was under S. 7 (1) (a) (ii)/10 of the Essential Commodities Act and the learned trying magistrate directed the trial to proceed in accordance with the provisions of Section 251-A of the Code of Criminal Procedure, relying on a decision of the Calcutta High Court in, the case of Nanakraj Pandit v. State, reported in 1961 (1) Cri LJ 644 (Cal) as also an unreported decision of the said High Court in the case of Ramaprosad Gupta v. State of West Bengal, decided by Mr. Justice S. K. Sen and Mr. Justice Amaresh Roy on the 31st May, 1962 (Cal). Mr. Justice T. P. Mukherjee delivering the judgment in Malay Banerjee's case AIR 1967 Cal 352 observed at page 354 that "The present case was started for an offence constituted by contravention of Cls. 4 and 5 of the Iron and Steel Control Order, 1956 and the offences thus are covered by Section 7 (1) (a) (ii) of the Essential Commodities Act and would attract imprisonment for a term which may extend to 3 years, thereby making them cognizable offences. If so, they would be liable to be investigated under Chapter XIV of the Criminal Procedure Code and the report that is submitted as result of that investigation would be a 'police report' within the meaning of Section 173 of the Code and there would be no difficulty in holding that the procedure prescribed in Section 251A of the Code would apply in the trial of the offences

concerned". Mr. Justice Mukherjee further considered the Supreme Court decision in the case of AIR 1965 SC 1185 and observed that the said case "will serve as the authority for a finding that the procedure prescribed in Section 251A of the Code will be attracted to the trial of cases cognizable whereof is taken under Section 190 (1) (b) of the Code on the report of a police officer submitted under Section 11 of the Essential Commodities Act". Mr. Ghosh then referred to the case of *Supdt & Remembrancer of Legal Affairs, West Bengal v. Vimla Dassi*, reported in AIR 1968 Cal 540 wherein Mr. Justice T P Mukherjee held that even when cognizance is taken on the basis of a complaint under Section 190, in a case which has been preceded by an investigation under Chapter XIV but wherein no report under Section 173 of the Code of Criminal Procedure was filed the accused is entitled to the benefit of Section 173 (4) of the Code, in the shape of copies of documents referred to in the section being made available to him. The facts of the said case are distinguishable because the investigation that had taken place there was by the police and accordingly Mr. Justice Mukherjee held that the police officer without submitting a report under Section 173 of the Code, makes over the materials collected by him to some other authority or person to enable that authority or person to file a complaint that may be done if only the law permits. The law may permit the filing of a complaint by another authority or person in the case, but law would not permit remissness on the part of the police officer in the matter of submitting his report under Section 173 (1) of the Code. That is a mandatory duty of the police officer concerned. Even if the police officer does not do his duty, that would not take away the right of the accused to get copies". It is therefore abundantly clear that the facts are entirely different and that in the above-mentioned decision the case was investigated by the police unlike the instant case. Mr. Ghosh next relied on a Division Bench decision of this Court, not yet reported, viz., *Sahu Jain Ltd. v. The State in Cr Rev Case No 401/67 with Cr Rev. Case No 680/64* decided by Mr. Justice R N Dutt and Mr. Justice A P Das on the 30th April 1969 (Cal). The said decision is also under the Essential Commodities Act, 1955 and in course of the same, their Lordships referred to the observations of the Supreme Court in the case of *Pravin Chandra Mody AIR 1965 SC 1185* and ultimately came to the conclusion that a prosecution report submitted under Section 11 of the Essential Commodities Act 10 of 1955 is in law a police report under Section 173 (1) of the Code and as such the procedure laid down in Section 251A of the Code of Criminal Procedure will have to be followed in the case. Mrs. Moitra contended that the observations in the above mentioned cases are made

in the context of a different Act, the provisions whereof are not similar to those of Act 29 of 1966 and as such the same would not apply to the facts of the present case. Mrs. Moitra in this context further contended that in Act 29 of 1966 there is no provision like Section 11 of Act 10 of 1955 relating to the cognizance of offences and that unlike Section 5 of Act 29 of 1966, there is no specific provision in the Essential Commodities Act, 1955 enjoining that offences under the said Act are not to be cognizable. For a proper determination of the submissions of Mr. Ghosh and the objection made thereby by Mrs. Moitra on the basis of the above-mentioned three cases, I will now proceed to consider the principles laid down in the case of AIR 1965 SC 1185. Mr. Ghosh relied on the observations made therein by Mr. Justice Hidayatullah (as his Lordship then was), who in delivering the judgment of the Court, doubted the principles laid down by the Calcutta High Court in the case of *Prem Chand Khetry v. The State*, reported in AIR 1958 Cal 213 and ultimately held that "In our opinion, the position is clear that such reports, if they are regarded as made under Section 190(1)(b), must attract the provisions of Section 251-A of the Code because if the fiction is given full effect they cannot be regarded as falling within complaint under Section 190(1)(a) or Section 190(1)(c)." Mrs. Moitra submitted that the observations made by the Supreme Court in the above-mentioned case do not apply to the facts of the present case, enjoining in any way a procedure under Section 251A of the Code of Criminal Procedure, that this point relating to the procedure applicable, was not directly involved in *Pravin Chandra Mody's case*, AIR 1965 SC 1185 and that the observations made in that context by their Lordships of the Supreme Court should not be a pointer to the ultimate decision in the instant case. I have given the matter my anxious consideration and I hold that the observations made in the above-mentioned case are not ultimately applicable to the facts of this case. Though their Lordships of the Supreme Court have doubted the reasoning of the Division Bench in the Calcutta High Court relating to the creation of a fiction by the section whereby the report of an Excise or a Custom Officer was to be regarded as the report of the police officer but only for the purpose of Section 190(1)(b) of the Code of Criminal Procedure, not making the report a charge-sheet under Section 173 of the Code and not attracting the provisions of Section 251A of the Code inasmuch as it contemplated only a report under Section 173 of the said Code, it cannot be overlooked that the above-mentioned point of procedure was not directly or categorically involved in the case of AIR 1965 SC 1185 wherein the Supreme Court in fact held that where the information discloses a cognizable as well as a non-cognizable offence, the police officer is not

debarred from investigating any non-cognizable offence which may arise out of the same facts and that the police officer would be competent to include the offence under Section 7 of Act 10 of 1955 though non-cognizable, in the charge-sheet under Section 173 of the Code with respect to a cognizable offence under Section 420 of the Penal Code and the trial for the said offence would proceed under Section 251A of the Code of Criminal Procedure. The point involved therefore in the case of Pravin Chandra Mody, AIR 1965 SC 1185 wherein the Supreme Court incidentally questioned the soundness of the ratio decidendi in Prem Chand Khetry's case, AIR 1958 Cal 213 is different and I accordingly hold that the observations made by their Lordships of the Supreme Court in the case reported in AIR 1965 SC 1185 having been made against the backdrop of a different Act, containing provisions not similar to the Act under consideration, in the instant case and not containing similar provisions relating to cognizance as also a specific provision like Section 5 of Act 29 of 1966, will not apply to the facts of the present case. Mr. Prasun Chandra Ghosh, Advocate, also referred to the case of Raghubans Dubey v. State of Bihar, reported in AIR 1967 SC 1167 wherein Mr. Justice S. M. Sikri delivered the judgment of the Court. The facts of the said case are, however, entirely different. The cognizance taken therein was under Ss. 149/302/201 of I. P. C. and the main point for consideration was as to what was meant by the expression "taking cognizance of". In the said case, it appears that investigation was made by the police officer and a charge-sheet was submitted under Section 173(1) of the Code and therefore the circumstances being not similar, the said case does not constitute any precedent to determine the procedure to be followed when an enquiry is made by an officer of the Railway Protection Force under Section 8 of Act 29 of 1966. Mr. Ghosh finally referred to the case of Ashiq Miyani v. State of Madhya Pradesh, reported in AIR 1969 SC 4 wherein Mr. Justice Vaidialingam delivering the judgment of the court held that there was no illegality in a trial held by the magistrate under Section 251A of the Code of Criminal Procedure when an offence was investigated in accordance with the provisions of the Opium Act by the police Sub-Inspector and a report was submitted by him under Section 20G of the said Act. Their Lordships, however, made it quite clear that "It is not really necessary for us to consider the large question, as to whether, when an Excise Officer makes a report under Section 20G of the Act, whether the trial, following it, in such a case, would be governed by Section 251A". The said decision therefore does not support the submission put forward by Mr. Ghosh. On a consideration therefore of the case law on the point cited by the learned Advocates, I hold

that in view of the nature of the provisions of the Railway Property (Unlawful Possession) Act, 1966, cases instituted thereunder are not on a police report but on a complaint, attracting the provisions of Section 252 onwards of the Code of Criminal Procedure making it ultimately unnecessary on the part of the prosecution to conform to the provisions of Section 173(4) of the said Code and serve copies of documents and statements as enjoined therein upon the accused. Accordingly, the first point raised by Mrs. Moitra succeeds.

8. The second point raised by Mrs. Moitra, is also quite tenable. The learned trying magistrate was clearly wrong in introducing the concept of a liberal interpretation for the purpose of explaining the provisions of a special statute vis-a-vis the mandatory provisions of the Code of Criminal Procedure. Mr. Ghosh has aptly submitted that the question is not of a liberal interpretation but of a legal interpretation and I may add that it is also of a proper interpretation. On an interpretation of the relevant provisions of the special Act and on a consideration of the case law on the point, I have already held that the cases instituted thereunder are not on a police report but on a complaint, attracting thereby the provisions of Section 252 onwards of the Code of Criminal Procedure. Procedure is the handmaiden of law and the two are so interrelated that the one cannot be separated from the other and any deviation from the procedure laid down by law on a purported liberal interpretation is not only unwarranted and untenable but is also illegal and is fraught with undoubted prejudice being caused to one of the parties to the proceedings, vitiating the ultimate trial. Justice, after all, is in accordance with law. I accordingly find that the concept of liberal interpretation has been wrongly introduced by the learned magistrate for interpreting the provisions of the special Act viz., Act 29 of 1966 and I uphold the contention made in this behalf by Mrs. Moitra.

9. Before I part with the case, I must place on record my appreciation of the assistance rendered to this Court by Mr. Prasun Chandra Ghosh, Advocate as amicus curiae. Mr. Ghosh has spared no pains in placing the possible views bearing on the points for consideration, and he has been of considerable help to this Court in coming to its decision.

10. In the result, I make the Rule absolute; set aside the impugned order dated the 11th September, 1968, passed by Shri A. K. Sen, Magistrate, 1st Class, Midnapur (S) in case No. U.R. 164 (S) of 1968/T.R. 1929/68 allowing the prayer made on behalf of the defence for granting copies of the papers upon which the prosecution wanted to rely and rejecting the objection made on behalf of the prosecution; and I direct that the case shall go back to the court below for being

tried under the provisions of Section 252 onwards of the Code of Criminal Procedure, CWM/D.V.C. Rule made absolute

AIR 1969 CALCUTTA 602 (V 56 C 103)

A K DAS AND K K MITRA, JJ
State, Petitioner v. D Rudra, A. D M,
and another, Opposite Parties

Misc Cases Nos 23 and 76 of 1969, D/- 1-4-1969

Contempt of Courts Act (1952), Ss. 1, 4—
Appeal against conviction by accused dismissed by High Court and accused directed to surrender to bail — Additional District Magistrates not carrying out orders — Time allowed to accused which was in contravention of Rule 43(5) of the Criminal Rules and Orders — Additional District Magistrates members of Indian Administrative service inexperienced in Court procedure and relying on Bench Clerk — Held, that the Additional District Magistrates were guilty of contempt of Court but in the circumstances High Court would accept apology tendered by them—Laxity in judicial administration in the District deplored — (High Court Rules and Orders — Calcutta Criminal Rules and Orders R. 43 (5). AIR 1969 SC 189, Ref (Para 11)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 189 (V 56) —
1969 Cri LJ 401 = Criminal Appeal
No 55 of 1965, D/- 2-7-1968,
Debabrata Bandopadhyay v. State of
W B 12

Pnti Bhusan Burman, for Petitioner,
Ranjit Kumar Banerjee and Mukul Gopal
Mukherjee, for Opposite Parties

DAS J.: This contempt Rule is against
Mr D Rudra, Mr B K Sarkar and Mr A
K Dasgupta, Additional District Magistrates
Alpore and the Officer-in-Charge, Beli-
ghata Police Station in circumstances stated
below:

Criminal Appeal No- 86 of 1967 preferred
by Shyamsundar Pathak and Kapildeo
Narayan Sharma, A S. I of Police Cal-
cutta, against conviction under Section 414
of the Indian Penal Code was dismissed by
this Court by an order dated July 18 1968
and this order was communicated and re-
ceived by the District Magistrate on July 20,
1968

2. The order reads as follows

"We direct the accused-appellants, name-
ly, Shyamsundar Pathak and Kapildeo Na-
rayan Sharma be called upon to surrender
forthwith to their bail to serve out the re-
mainder of sentence imposed upon them"

3. This order was not, however, carried
out by the contemnors who functioned as
Additional District Magistrates, Alpore, dur-
ing the relevant period, as disclosed during
hearing of an application under Article 134
(1)(c) of the Constitution filed in Septem-

ber, 1968, and heard some time after long
vacation in November, 1968-

4. Sub-rule (5) of Rule 43 of the Criminal
Rules and Orders reads as follows.

"In the cases mentioned in clauses (3)
and (4) above the Court by which the ac-
cused was admitted to bail shall forthwith
call upon the accused to surrender, and is-
sue a notice to the surety in Form No (P)
65 to produce the accused within three days
after the receipt of the notice. If no sur-
render is made within the period a warrant
of arrest shall issue, and at the same time
the surety shall be called upon to show
cause why his bail bond shall not be for-
feited. No extension of the time to surren-
der or to produce the accused shall be allow-
ed in any case"

5. In view of the above order by this
Court and the relevant Rule, the learned
Magistrates should have directed the surety
to produce the two persons within three
days and on the surety's failure to do that,
issue warrants against convicts and forfeit
the bailbonds of the surety. The order-
sheet of the case does not however indicate
that the learned Magistrates were conscious
of their obligation to carry out the order
of a superior court or that they ever ap-
plied their mind. They seemed to be pris-
oners in the hands of their Bench Clerk and
signed whatever draft order was placed be-
fore them

6. The order of this Court was produced
before the learned Additional District Mag-
istrate on July 25, 1968 and he signed a
routine order in the hand of the Judicial
Peshkar directing production of the con-
victed persons on August 2, 1968, taking no
notice of sub-rule (5) of Rule 43 of the Cr-
iminal Rules and Orders. On August 2, the
convicted persons were not produced and
then followed a series of adjournments at
the instance of the surety for production of
the convicted persons, apparently taking no
notice of the order of this Court for taking
them into custody forthwith or of the Rules
regarding surrender. The contemnors are
holding responsible posts in the judicial ad-
ministration as Additional District Magis-
trates and they exercise their supervising
authority over the Magistrates at the sta-
tion. Apparently they were never troubl-
ed over their authority to extend time on
prayer of surety in clear violation of this
Court's orders. The orders again did not
disclose that they applied their mind but
obviously they signed the draft orders plac-
ed before them by the Judicial Peshkar.
This continued for several dates and the
convicted persons were neither arrested nor
the surety pulled up by way of forfeiture
of bond. Warrant of arrest is ordered
after four adjournments for appearance on
26th August, 1968. Next date is fixed a
month ahead on September 20 1968 and
in the meantime on September 10, an
enquiry was made from this Court re-
garding surrender. This alerted the office

and an order for drawing up proceeding under Section 514 of the Code of Criminal Procedure is placed before the learned Magistrates and signed by them. This also appears to be a make-believe order, not meant to be carried out and a proceeding is really drawn up on 12-10-68, i.e. 22 days thereafter for showing cause on 25-10-68. On this date the surety filed a petition for time and time was allowed till 11th November, 1968. In the principal record the next date was fixed on October 25, 1968. It is recorded that warrant of arrest was received back with a prayer for extension of time and time was automatically allowed till 11-11-68. In the meantime, the application for certificate of fitness for appeal to the Supreme Court comes up before this Court for hearing on November 8, 1968. The convicted persons, however, surrendered one day before this, that is to say, on the 7th November, 1968. The entire matter appears to have been well planned and the only reasonable inference is that the adjournments were granted according to the plan, chalked out between the convicted persons and some officers in the office of the Additional District Magistrate responsible for assisting the Magistrate in the discharge of his duties. This is apparent from the paragraphs 4 and 5 of the explanation of Sri Sarkar, contemner, where he stated that he virtually signed whatever order was placed before him by the Judicial Peshkar who was earlier directed to place only routine orders, in view of his preoccupations in other urgent executive matters.

7. It is apparent from the state of the record that the Additional District Magistrates, Sri Sarkar and Sri Rudra, junior members in the Indian Administrative Service, had at no time any control over the case or the record and the Judicial Peshkar could get any order signed by them. Obviously, they did not know the correct legal position nor had any opportunity of ascertaining it and were completely inexperienced to deal with court cases and therefore had to rely upon the Bench Clerk. Added to this, there was extra work allotted to them as enumerated in the affidavit of Sri Sarkar. The Additional District Magistrate is in a pivotal position of the judiciary in the district, being the Additional District Magistrate in charge of the Criminal Administration, and such administration would obviously be in a quandary. We are prepared to accept that these officers did not wilfully override any order of this Court. But the entire trouble was due to the fact that it was not a case of the Additional District Magistrate controlling the Judicial Peshkar but the latter controlling the Magistrate. The blame in our view, should squarely rest on the State Government which puts such young officers without any experience whatsoever in judicial work, as Additional District Magistrates

and burdens them with multifarious miscellaneous work, thereby betraying lack of appreciation of the importance of Administration of Criminal Justice. In olden times, Senior Deputy Magistrates with experience in judicial work were drafted for such position. But the old order has changed and we have now the rule of the Administrative Services with a nostalgic attitude towards Court and administration of justice and running of the judicial administration is left in the hands of inexperienced young officers who had neither the training in law nor the inclination and desire to learn the law but who carried on the work relying on the judicial Peshkar for their law and for the administration of the departments.

8. The matter did not end here. This Court by an order dated November 15, 1968, asked for a report from the District Magistrate as to circumstances in which the Court's order for arrest of the two convict constables was not complied with and also for the record of the case to be submitted within seven days from the date of receipt of this order. No notice was taken of this order from this Court; neither was report sent, nor did the record arrive in this Court. The only alternative left for this Court in the circumstances was to issue on 11-12-68 a Rule calling upon the District Magistrate to show cause why proceedings for contempt shall not be drawn up for failure to give effect to the order of this Court dated the 18th July, 1968 and subsequent orders calling for the record and report. Only thereafter, the contemner, Mr. D. Rudra, Additional District Magistrate, sent the record with the report asked for with a forwarding letter dated November 14, 1968. There was a formal expression of regret regarding the delay in submitting the report and the records. This report unfortunately is neither full nor does it disclose the entire facts correctly. The report does not disclose that even after the record was placed before him for orders on 25-7-68 as many as three adjournments for production of the accused persons were granted on bare petitions of the surety, often to enable the convicts to prefer appeal to the Supreme Court. It was stated that proceedings under Section 514 of the Code of Criminal Procedure against the sureties were drawn up. But here also, there was no clear disclosure as to when order for drawing up of proceedings was passed and when proceedings in fact were started. The record disclosed that the proceedings were actually drawn up 22 days after the order for drawing up proceedings was passed. Obviously this also was a report in the hands of the Judicial Peshkar, but it is unfortunate that Mr. Rudra did not personally care to check up the report to make sure that a full and complete report is sent to this Court.

9. The next stage comes when the warrant of arrest was issued. The Additional

District Magistrate has reported that the officer-in-charge, Belaghata police station did not execute the warrant of arrest and returned the same and wanted extension of time. This order of arrest was passed on August 26, 1968 and it took 8 days to reach Belaghata police station from Alipore. Eighteen days thereafter the warrants were returned unexecuted with a prayer for extension of time on the ground that the two policemen could not be traced. The explanation, in our view, is worse than the fault, namely, the failure to carry out the court's order. Shyam Narayan Pathak and Kapildeo Narayan Sharma are two policemen Assistant Sub-Inspectors of Police and they were under suspension during the trial. It is unlikely that their whereabouts would be unknown to the police or that they would be untraceable while their sureties were applying for extension of time to produce, to enable them to appeal to Supreme Court. The time was extended and a report came only after these two men surrendered on November 7, one day before the date fixed for hearing of the application for leave to appeal to the Supreme Court that they have surrendered. The warrant was, therefore, never executed and the entire thing was arranged in such a way that the two persons had no occasion to surrender before the application for certificate got ready for hearing. Here also either the Officer-in-Charge had no control over his men or he took lukewarm interest in discharging duties by way of arresting the two persons when the warrants were sent by the Additional District Magistrate, Alipore. This is hardly type of a man who makes out a good officer-in-charge of a police station in Calcutta, upon whom the peace in the area and life and property of the citizen can be entrusted.

10. Having considered all aspects of the matter we now proceed to consider the explanation offered by the contemners. So far as Mr Das Gupta is concerned, we find that the only order passed by him is for drawing up of proceeding under Section 514 of the Code of Criminal Procedure against the surety and he, therefore, virtually played no part in the matter and he must be found not to have committed any contempt of the orders of this Court.

11. So far as Mr Rudra and Mr Sarkar are concerned, they have offered full apology and have candidly pointed out that they were neither aware of the implication of the orders which were put up before them for signature by the Judicial Peshkar, nor did they in any way mean to by-pass any order of this Court. From what we have pointed out earlier it also seems to us that there is something wrong in the subordinate staff there and that the young officers sent there as Additional District Magistrates can hardly exercise the type of control which one should expect them to do, for efficiently running the administra-

tion of justice. Both of them are junior officers still to pick up that type of experience which would be necessary in controlling the staff at Alipore and to saddle them with that responsibility for carrying on the judicial administration of the District and further to burden them with multifarious executive duties is hardly expected to yield better results. Naturally they depended too much upon the Judicial Peshkar who it seems, could get any order signed by them. They do not seem to have, for reasons explained by them any grip over the matter at any stage even in sending a report to this Court or in dealing with the delinquents after they found that they were misguided and landed into difficulty. The machinery assisting the Additional District Magistrates at Alipore—perhaps the same state of affairs will be found in other Districts too—require over-hauling.

11-A. Mr Rudra and Mr Sarkar are undoubtedly guilty of contempt of Court but we accept the apology tendered by them. The same observation will apply to the police officer, namely, officer-in-charge of Belaghata police station, who neglected to execute the warrant of arrest sent by the Additional District Magistrate. Against him also, we do not proceed further in imposing any punishment, but warn him against recurrence of similar conduct in dealing with Court's orders.

12. Before we end we may, however, point out to the contemners and through them, to all concerned the recent observations of the Supreme Court in Criminal Appeal No 55 of 1965, Debabrata Bandopadhyay v. State of West Bengal, AIR 1969 SC 189. The relevant portion reads as follows:

"We, however, caution all concerned that orders of stay, bail, injunctions received from superior courts must receive close and prompt attention and unnecessary delay in despatching or dealing with them may well furnish grounds for an inference that it was due to a natural disinclination to deal with the matter born of indifference and sometimes even of contumaciousness."

13. We have accepted the apology tendered by them and the matter is not, therefore, proceeded with any further and the Rules are disposed of accordingly.

14. K. K. MITRA, J.: I agree
MVJ/D.V.C. Rules discharged.

AIR 1969 CALCUTTA 604 (V 56 C 104)
D BASU, J

M M Dutta, Petitioner v. Union of India and others, Respondents

Civil Rule No 1173 (W) of 1965, D/- 16-7-1969

(A) Railway Establishment Code, Rules 1707, 1708, 1712 and 1710 — Charge sheet, mentioning major penalty of removal. Issu-

HM/HM/D609/69/B

ed — Punishing authority is not barred from inflicting minor penalty of recovery of pay for pecuniary loss caused by negligence after complying with procedure for minor penalties — Rule, that after initiating action for special remedy, the alternative general remedy cannot be availed of, on failure to comply with the special procedure, does not apply, as both the major and minor penalties are provided for by the same code — Where a minor penalty only has been imposed the authority cannot be asked to justify the order with reference to the requirements of the procedure laid down for major penalties. AIR 1961 SC 619 and AIR 1958 SC 232 and Civil Rule 2307 of 1959 D/- 2-8-1961 (Cal) Distinguished. (Paras 12 and 13)

(B) Railway Establishment Code, Rules 1708 and 1716 — Not the intention or object of the Railway authorities at the commencement of the proceedings, but the nature of the penalty which is eventually imposed, determines procedure which must be followed in order to render the order valid.

(Para 10)

Cases Referred: Chronological Paras
(1961) AIR 1961 SC 619 (V 48) =
1961-3 SCR 386, Akshaibar Lal v.

Vice Chancellor

9

(1961) Civil Rule No. 2307 of 1959, D/-
2-8-1961 (Cal).

12

(1958) AIR 1958 SC 232 (V 45) =
1958 SCR 1052, Balakotiah v. Union of
India

9, 10

Madhusudan Banerjee, for Petitioner;
Ajay Kr. Basu, for Respondent.

ORDER: Having been appointed as Assistant Inspector of Works in 1934, the Petitioner was, at the material time, working as Inspector of works at the Kanchrapara workshop of the Eastern Railway. There was a raid on the workshop by dacoits in November 1961, after which it was discovered that 657 steel tees were missing. After a fact-finding inquiry, the Divisional Engineer (Respondent No. 3) issued against the petitioner the charge-sheet at Ann. A to the petition, dated the 25th March, 1964 asking him to show cause why he should not be punished with removal or any lesser penalty for negligence of duty—

(i) for failure to ensure the proper locking and sealing of the godown under his charge, which caused loss of Rs. 6600 approximately to the Railway;

(ii) for failure to verify the stock every 6 months;

(iii) for failure to exercise casual check of the stock.

2. After the petitioner submitted his explanation to this charge, however, no inquiry was held but by the ex parte order at Annexure C, dated the 27th July, 1965, respondent No. 2, the Divisional Superintendent held the petitioner guilty of the charge and ordered that Rs. 6600 should be recovered from the petitioner "for the pecuniary loss caused to the Railway Administration by your negligence".

3. On the 2nd September, 1965, the petitioner preferred an appeal against the aforesaid order to the Chief Engineer, but, without disposing of that appeal, the order at Annexure D has been issued on the 16th September, 1965 for the recovery of the sum by monthly instalments of Rs. 125 from the salary bill of the petitioner commencing from August 1965.

4. In the present Rule, obtained on the 21st December, 1965, the petitioner challenges the validity of the order for recovery at Annexures C.D. The petition is opposed by an affidavit filed by respondent 2, on behalf of all the respondents.

5. The primary contention advanced on behalf of the petitioner is that having issued the charge-sheet at Annexure A, the respondents could not impose the penalty of recovery of a pecuniary penalty without holding an inquiry upon the charge in accordance with the Rules contained in the relevant Discipline Rules.

6. The various penalties which may be imposed upon a Railway servant, under Rule 1707 of the Railway Establishment Code, volume I, are divided into two categories, for procedural purposes; major and minor, and the two different sets of procedural rules applicable to the two categories of penalty are laid down in Sections V and VI, respectively, of Chapter XVII of the Code. Now, while removal is a 'major' penalty, recovery of pay of any pecuniary loss caused to the Government by negligence (Clause III of R. 1707 (1)) is a 'minor' penalty.

7. The result is that while for a major penalty, the procedure includes a charge followed by a full-fledged inquiry as laid down in Rule 1712, the procedure laid down in Rule 1716, for a minor penalty, such as recovery of loss, is—

(a) the railway servant must be informed in writing of the allegations against him and the action proposed to be taken against him;

(b) he must be given an opportunity to make any representation he wants to make against such notice;

(c) such representation must be taken into consideration by the Disciplinary Authority;

(d) the Disciplinary Authority must write an order, with the reasons therefor (Rule 1716 (2) (e)).

In this case, the requirements of Rule 1716 appear to have been complied with. Though the order reproduced at Annexure C is brief, the punishing authority gave a reasoned judgment as is to be found at Annexure R/2 to the counter-affidavit. Admittedly, there was a fact-finding inquiry anterior to the charge and several witnesses, including the petitioner (Annexure R/1) were examined there. The punishing authority has held the petitioner guilty of negligence on the basis of the evidence collected at that in-

quity and the value of the materials lost was Rs 6600 according to the petitioner's own initial report after the dacoity (Annexure R). The punishing authority held him guilty except on the third item of the charge.

8. It thus appears that the procedure for minor penalties was complied with. It is, however, contended on behalf of the petitioner that having once issued a charge-sheet in which the major penalty of removal was mentioned, the respondents could not shift to the procedure for minor penalties. From para 3 of the order of the punishing authority, at Annexure R/2 it appears that the Railway shifted to the minor penalty because it was useless to order removal from service inasmuch as the petitioner was already under re-employment and was due to retire from such re-employment in November, 1965.

9. Nevertheless the question of law raised must be answered namely whether it was open to the respondents to resort to the procedure for minor penalty after having started a proceeding for a major penalty.

(a) On behalf of the petitioner, reliance is placed on the Supreme Court decision in the case of Akshaibar Lal v Vice-Chancellor, AIR 1961 SC 619 at p 626. In that case it was laid down that the general rule when alternative remedies were open to a person or authority was that "one or the other or both can be invoked unless one remedy is expressly or by necessary implication excluded by the other." To this an exception was engrafted by the Court, namely that where there was a general as well as a special remedy, the authority, if it has initiated action under the special procedure must pursue that course and cannot, in case of failure to comply with that procedure fall back upon the general remedy. This decision has no application to the instant case where both the remedies major and minor penalties, — are provided by the same code.

(b) To the same effect as in Akshaibar Lal's case, AIR 1961 SC 619 is the decision of the Supreme Court in Balakotiah v. Union of India, AIR 1958 SC 232 at p 236. That was also a case of a general and a special remedy provided by two different laws. Rule 148 of the Railway Establishment Code provides for the termination of the services of non-pensionable employees by notice. The Railway Services (Safeguarding of National Security) Rules 1949, on the other hand were made with the specific object of terminating the services of employees engaged in subversive activities, after following the special procedure prescribed therein. The Railway authorities started proceedings against an employee under the Security Rules in order to punish him for subversive activities but after proceeding to some length, eventually terminated the services of the employee by issuing a notice under Rule 148 of the Code. The

Court held that the intention of the authorities was to take action against the employee under the special law of the Security Rules and that, accordingly, the validity of the order that was eventually made must be tested by the requirements of the Security Rules.

10. The decision in Balakotiah's case, AIR 1958 SC 232 also does not apply to the instant case inasmuch as no special law is involved in the instant case. Apart from that, the language of Rules 1708 and 1716 (1) of the Railway Establishment Code volume I, shows that under these Rules, it is not the intention or object of the Railway authorities at the commencement of the proceedings, but the nature of the penalty which is eventually imposed, that is to determine which procedure must be followed in order to render the order valid. Thus Rule 1708 says —

"Without prejudice to the provisions of the Public Servants (Inquiry) Act, 1850, no order imposing on a railway servant any of the penalties specified in cls (iv) to (vii) of sub rule (1) of Rule 1707 shall be passed except after an inquiry held in the manner provided in Rules 1709 to 1715."

11. It is abundantly clear that the procedure prescribed for major penalties has to be followed only if eventually a major penalty is imposed. On the other hand, Rule 1716(1) says—

"No order imposing any of the penalties specified in clauses (i) to (iii) of sub-rule (1) of Rule 2707 (sic) shall be passed except after."

12. It is clear that the procedure laid down by the Rules being safeguards prescribed to protect the employees from arbitrary action, the law will demand the more stringent safeguards to be complied with only in the case of the graver punishments. Since, in the instant case, only a minor penalty has been imposed, the respondents cannot be asked to justify the impugned order with reference to the requirements of the procedure laid down for 'major penalties'. The matter was not dealt with from this point of view by Banerjee, J in Civil Rule No 2307 of 1959 D/- 2-8-1961 which was referred to before me.

13. This contention must also fail accordingly.

14. No other point having been urged at the hearing this Rule is discharged but without any order as to costs. I should also observe that though no legal relief is available to the petitioner, nothing herein stated will stand in the way of the respondents' giving any relief to the petitioner administratively, having regard to the circumstances of the case and also in view of the fact that he must have left the service by this time.

MKS/D.V.C.

Rule discharged

AIR 1969 CALCUTTA 607 (V 56 C 105)

A. K. SINHA, J.

Jiban Krishna Chatterjee, Petitioner v. State Transport Authority. W. B. and others, Respondents.

Civil Rule No. 263 (W) of 1965, D/- 9-1-1969.

Motor Vehicles Act (1939), Ss. 60 (1) (a), 31 (1), 59 (3) — Cancellation of permit — Breach of rights and privileges does not warrant cancellation — Person holding permanent stage carriage permit allowing bus being operated by another person — Cancellation of permit on ground of breach of condition of Section 60 (1) (a) — In absence of condition under Section 59 (3) and contingency under Section 60 (1) (c), cancellation held to be erroneous.

(Para 6)

Kashi Kanta Moitra and Nripendra Nath Bhattacharyya, for Petitioner; Ranjit Kr. Banerjee and Amal Kr. Basu Chowdhury, for Respondents.

ORDER: In this Rule the petitioner prays for quashing certain orders made by the respondents Nos. 2 and 3 cancelling the petitioner's permanent stage carriage permit. Briefly the facts are as follows:

The petitioner was granted a permanent stage carriage permit in respect of Bus No. WBR 396 on Route No. 84 granted by the respondent No. 3. By a show cause notice dated 19-9-1963 the petitioner was asked to submit his explanation against the proposed order of cancellation of his said permit on the ground that the said bus was being operated upon by another person named Tarapada Saha. The petitioner submitted his explanation but the respondent No. 3 not being satisfied cancelled the petitioner's permit under Section 60(1)(a) of the Motor Vehicles Act, 1939 (hereinafter referred to as the Act).

2. Against this order the petitioner preferred an appeal to the State Transport Authority. The appeal was heard and dismissed by the Appellate Sub-Committee, the respondent No. 3 by its order dated 27-7-64. That is how the petitioner felt aggrieved and obtained the present Rule.

3. Upon these facts several grounds were taken but Mr. Moitra on behalf of the petitioner contended in the first place that there was no transfer of vehicle or the permit by the petitioner and, therefore, the order of cancellation on the ground of such transfer was bad in law. In the second place, he contended that even assuming that there was such transfer, the Regional Transport Authority or the Appellate Authority had no power or jurisdiction to cancel such permit as restriction on transfer was not a condition on breach of which the permit was liable to be cancelled.

4. In support of the first contention it was submitted that the order of the respon-

dent No. 3 (annexure B to the petition) would show that the permit was cancelled under Section 60 (1) (a) on the view that the permit-holder allowed the vehicle to be operated by another person in flagrant disregard of the fundamental condition of the permit. The Appellate Authority also took the view that the Power of Attorney executed by the petitioner in favour of his Manager and Financier was a complete abdication in his favour from all the rights and privileges the petitioner was entitled under the permit held by him. This view was patently erroneous. In any event, by virtue of the Power of Attorney the petitioner did not cease to own the vehicle. Mr. Moitra also drew my attention to Section 31(1) of the Act and contended that the transfer of the vehicle could be made only in the manner laid down there.

5. I think the first question for consideration really in this case is whether the petitioner who is the holder of the permit ceased to own the vehicle covered by such permit as contemplated under Section 60(1) (c) of the Act. The relevant portion of the order made by the Appellate Authority runs thus:

"We found that the power of attorney executed by the appellant was a complete abdication in favour of his Manager and Financier from all the rights and privileges to which he was entitled under the permit held by him. We accordingly hold that the R. T. A. acted rightly in cancelling his permit."

6. From the above order it seems to me quite clear that the real question in controversy before such cancellation order could be made was not at all decided. There is no finding that by virtue of the power of attorney executed in favour of the petitioner's Manager and Financier the petitioner ceased to own the vehicle. What was stated was that by virtue of such a document there was a complete abdication from all rights and privileges to which he was entitled under the permit. These are entirely vague and unspecific and in any case, cannot be treated as a decision on the material question. There are number of rights and privileges attached to the permit contained in several provisions of the Motor Vehicles Act but breach of any of these rights and privileges does not warrant cancellation of the permit. The permit may be cancelled or suspended only under certain breach of conditions specified under sub-section (3) of Section 59 or of any condition or several contingencies contemplated under sub-clauses (b) to (f) under Section 60(1) of the Act. In the instant case, the notice to show cause upon the petitioner was issued on grounds contained under Section 60(1)(a) and (c). Although such is the notice, it appears that the respondent No. 3 cancelled this permit by a resolution on the only ground that the permit holder allowed the vehicle to be

operated by fundamental and flagrant breach of the condition of the permit under Section 60 (1) (a) of the Act This is neither a condition under Section 59 (3) nor a contingency contemplated under Section 60 (1) (c) of the Act. Such a resolution seems to be wholly inconsistent and on the face of it erroneous

7 There is again no condition either under the Act or any condition attached to the permit prohibiting operation of a stage carriage by another person It is only in case of transfer of permit without the consent of the Authorities concerned operation of such a stage carriage by transferee is prohibited under Section 61 (1) of the Act. Nevertheless in such a case it is doubtful whether such a transfer of permit will entail cancellation of the permit on grounds enumerated under provisions of Section 60 (1) and sub-clauses (a) to (f) Be that as it may, in the instant case one of the proposed grounds for such cancellation as noticed earlier was that the petitioner ceased to own the vehicle as provided in Section 60 (1) (c) of the Act

8. Mr Banerjee on behalf of the respondents sought to contend that on the petitioner's own showing he ceased to become the owner of the vehicle on the basis of the hire-purchase agreement embodied in the so-called power of attorney executed by him in favour of his Manager. For this, he relied on definition of 'owner' under the Act which means also a person in possession of the vehicle on the basis of the hire purchase agreement This may or may not be correct For, in the affidavit-in-opposition on behalf of the respondents it has

been stated in paragraph 8 that the power of attorney had already been revoked by the petitioner. So this becomes primarily a disputed question of fact which cannot be conveniently decided by this Court In any event, if it is for the Appellate Sub-Committee to decide as to whether in fact the petitioner ceased to be the owner of the vehicle taking into consideration all these material documents along with surrounding circumstances It is only on a proper decision on this question of fact will depend further action by the respondents Considering, therefore, the matter from this aspect the impugned order passed by the Appellate Sub-Committee cannot be sustained as valid.

9. In the above view of the matter it is unnecessary to examine the correctness of the second contention raised by Mr Moitra and I do not express any opinion on it

10. The result is, the petition succeeds in part The impugned order passed by the Appellate Sub-Committee is quashed The matter will now go back to the Appellate Sub-Committee for a fresh decision in accordance with law and in the light of the observations made above All other objections are left open

11. The Rule is made absolute to the extent indicated above But there will be no order as to costs.

12. Let a writ both in the nature of mandamus and certiorari issue accordingly

SSG/D V C

Order accordingly

END

confusion into the working of the system."

There are further pertinent observations in Maxwell on Interpretation of Statutes, 11th Edition, at pages 17 and 18, which are also worth noting. They are as below:—

"The equivocation or ambiguity of words and phrases, and especially such as are general, is said by Lord Bacon to be the great sophism of sophisms (Lord Bacon, *Advancement of Learning*, b. 2). They have frequently more than one equally obvious and popular meaning. Words used with reference to one subject-matter or set of circumstances may convey a meaning quite different from that which the same words used with reference to another set of circumstances and another subject-matter would convey. General words admit of indefinite extension or restriction, according to the subject to which they relate, and the scope and object in contemplation."

This is why the general words "belonging to" have only the particular meaning of "being constituted in and functioning in" a particular area in the context of our case. The suggestion that the words "belonging to" must mean that the Police Force must be employed by a Provincial Government is not, therefore, admissible in the context noted above. Another observation in Maxwell at pages 19 and 20 is also apposite. It says:

"Extrinsic evidence of the circumstances or surrounding facts in which a will or contract has been made, so far as they throw light on the matter to which the document relates, and on the condition and position and course of dealing of the persons who made it or are mentioned in it, is always admitted as indispensable for the purpose not only of identifying such persons and things, but also of explaining the language, whenever it is latently ambiguous or susceptible of various meanings or shades of meaning, and of applying it sensibly to the circumstances to which it relates."

External evidence in our case is the existence of a Central Government Police Force prior to the enactment of the Act of 1946. As the Act does not say that the said Police Force was thereafter to be a Provincial Force, the expression "belonging to" cannot be interpreted to mean that the said Police Force must thereafter belong to a Provincial Government. To the same effect is the observation of Lord Halsbury in *Herron v. Rathmines and Rathgar Improvement Commissioners*, (1892) AC 498, 502, which runs as follows:—

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"The subject-matter with which the Legislature was dealing and the facts existing at the time with respect to which the Legislature was legislating are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act."

The state of things existing at the time of the passing of the Act as showing the circumstances in which it was passed was taken into account as a relevant consideration in several other cases such as *R. v. Dean of Hereford*, (1870) LR 5 QB 196, in *Green v. The Queen*, (1876) 1 AC 513, 531, and *Mayor Alderman, Citizens of the City of Manchester v. Lyons*, (1882) 22 Ch D 287 (302).

10. How the existence of a fact preceding the legislation influenced the interpretation of the legislation is further illustrated by the Supreme Court decision in *Messrs Bridge and Roof Co. v. Union of India*, AIR 1963 SC 1474. In that case, the contribution to the Employees Provident Fund by the Company was to be a certain percentage of the "basic wages" paid by it to its employees. The definition of 'basic wages' excluded 'bonus'. On behalf of the employees, it was argued that 'bonus' meant only the profit bonus, that is to say the share in the profits which is given by the employer to the employees by way of bonus. It was, however, brought to the notice of the Court that when the Employees Provident Funds Act, 1952, was passed, several other kinds of bonus were known as being paid by employers to the employees. The kinds of bonus other than the profit bonus then being paid were the production bonus, the festival bonus and the customary bonus. The Supreme Court observed that the legislature could not have been unaware that the different kinds of bonus were being paid when it passed the Act in 1952. Therefore, the contention of the employees that the word 'bonus' used in the Act would mean only the profit bonus could not be accepted. In the context of the circumstances and the facts in which the legislation was passed, the word "bonus" must have applied to all kinds of bonus which were being paid at the time the Act of 1952 was passed. On the same reasoning it must be said that the Delhi Special Police Establishment as a Central Government Police Force was known to the Central Legislature as existing prior to the passing of the Delhi Special Police Establishment Act, 1946. The Central Legislature, therefore, must have regarded it as a police force belonging to a part of British India within the meaning of entry 39 of the Federal Legislative List of the Government of India Act.

11. The nature and the subject-matter of the Act is the extension of the jurisdic-

tion and powers of the Special Police Force to other areas of British India. The offences to be investigated by the Delhi Special Police Establishment are to be notified by the Central Government under Section 3. Similarly, the extension of these powers and jurisdiction to other areas in British India outside the Chief Commissioner's Province of Delhi was to be done by the Central Government under Section 5(1). The fact that the exclusive power in these respects is given to the Central Government would show that the Delhi Special Police Establishment was always intended to be a Central Government Police Force. If, as argued for the petitioner, the Delhi Special Police Establishment was to be in the employment of a Provincial Government, then it is not understood how the Central Government could be expected to issue a Notification under Section 3 and an Order under Section 5(1) in respect of a police force which is of a Provincial Government. Under Section 4(1) the Superintendence of the Delhi Special Police Establishment is also vested in the Central Government. This also negatives the argument that this special police force was intended to belong to the Provincial Government or to the Government of a Chief Commissioner's Province which is not the Central Government if any such thing was at all possible under the Government of India Act in view of Sections 94(3) and 100(4) thereof. Further, the jurisdiction and powers of the said Special Police Force could not be extended outside the Chief Commissioner's Province of Delhi except with the consent of the Provincial Government concerned. This would also show that the Delhi Special Police Establishment was not to belong to any Provincial Government or any other Chief Commissioner's Province other than the Chief Commissioner's Province of Delhi. The external circumstances as well as the internal evidence of the provisions of the Act itself would show that the expression "belonging to" in entry 39 of the Federal Legislative List did not mean that the police force contemplated therein must be under the employment of a Provincial Government or of a Chief Commissioner as distinct from the Central Government.

12. Under Section 2 of the Police Act, 1861, the entire police establishment under a Provincial or State Government shall be deemed to be one police force. The Central Legislature in 1946 was, therefore, aware that the use of the word "under" showed the employment of the police establishment by the Provincial or the State Government. This concept may perhaps be said to be embodied in entry 3 of the Provincial Legislative List but entry 39 of the Federal Legislative List did not describe the police force as be-

ing "under" the Provincial Government. On the other hand, it used the words "belonging to any part of British India". Apparently, therefore, the concept of being employed by a particular Government was not to be the basis of entry 39 of the Federal Legislative List. The use of different words shows that the basis was also to be different. For the reasons stated above, the most appropriate meaning to be given to the words "belonging to" would be "constituted in and functioning in" a part of British India. These words leave the question as to who was to be the employer of the police force open. The circumstances existing before 1946 were however, that the police force was actually employed by the Central Government. The Ordinance and the Act of 1946, therefore, dealt with the Central Government Police Force on the footing that it could be constituted and be functioning as a police force contemplated by entry 39 of the Federal Legislative List. Another consideration in construing the Legislative List is that they have to be construed broadly and not in a narrow or pedantic sense. This rule has been established by the Federal Court decision in *re. C P & Berar Sales of Motor Spirit and Lubricants Taxation Act, 1938*, AIR 1939 FC 1, and has been reiterated by the Supreme Court in several decisions including the decision in *Waverly Jute Mills Co. v. Raymon and Co. India (P) Ltd.*, AIR 1963 SC 90. All that is necessary, therefore, is to consider whether the words "belonging to a part of British India" were capable of bearing the meaning "constituted in and functioning in" a part of British India. If they were capable of being so construed and if this construction fitted with the existing fact, we are left with no option but to hold that this was the meaning of the said words. The final consideration is the presumption in favour of the constitutionality of a legislative enactment.

The Delhi Special Police Establishment Act, 1946, is now 22 years old and its validity has never been doubted though thousands of investigations and prosecutions must have taken place thereunder. If the argument for the petitioner is to be accepted, then, from the very inception, it was illegal for the Central Government to employ a Special Police Force and such a police Force could not be constituted in and could not function in Delhi. We see no reason at all to give our support to such an astounding proposition leading to such absurd results. In *Ram Krishna Dalmia v. Justice S. R. Tendolkar*, AIR 1958 SC 538 at p 548 Das, C. J. observed as follows:—

"In order to sustain the presumption of constitutionality the Court may take

into consideration matters of common knowledge, matters of common report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation." In *Mahomed Hanif Quareshi v. State of Bihar*, AIR 1958 SC 731, where the Supreme Court considered the constitutionality of various State legislations banning slaughter of certain animals, references were made to religious books, reports of committees, five year plans, memoranda etc. and the above observation in *Dalmia's case* was reiterated at p. 741. In *Hamdard Dawakhana v. Union of India*, AIR 1960 SC 554 the above observation was reiterated and the facts and circumstances existing at the time of the legislation under consideration were taken into account in determining its constitutionality. We, therefore, find that the Delhi Special Police Establishment, from its very inception, was a Police Force belonging to a part of British India within the meaning of Entry 39 of the Federal Legislative List of the Government of India Act, 1935.

POINT NO. (2):—

13. The matters considered under the first point very much reduce the discussion under the second point. On the commencement of the Constitution, entry 80 of the Union list in the 7th Schedule of the Constitution took the place of entry 39 of the Federal Legislative List of the 7th Schedule of the Government of India Act, 1935. In the place of the Governors' Provinces and the Chief Commissioners' Provinces of the Government of India Act, 1935, were substituted Part A and Part C States, by the Constitution. Therefore, the word "State" came to replace the words "Governor's Province" and "Chief Commissioner's Province" in entry 80 of the Union List. This change was merely nominal. In substance, entry 80 of the Union List is the same as entry 39 of the Federal Legislative List of the Government of India Act. To bring the provisions of the Delhi Special Police Establishment Act, 1946 along with other enactments in accord with the provisions of the Constitution the Adaptation of Laws Order, 1950, was issued under Article 372 of the Constitution. This substituted the words 'Part A States' for the 'Governor's Province' and the words 'Part C States' for the 'Chief Commissioner's Province' in the Act. This was not meant to be a substantial difference at all. Then we come to the amendment in the Act effected by Act No. 26 of 1952. The amendments were:—

The substitution of the words for "the State of Delhi for the investigation of certain offences committed in connection with matters concerning Departments of

the Central Government" by the words "in Delhi for the investigation of certain offences in Part C States."

In Section 2, for the words "in that State" the words "in any part C State" shall be substituted. In Section 2(2) and 2(3) for the words "the State of Delhi" the words "any Part C State" shall be substituted. In Section 3 the words "Committed in connection with matters concerning Departments of the Central Government" shall be omitted.

14. Each of the amendments may now be considered. The first change was the substitution of the words "in Delhi" for the words "for the State of Delhi." It was argued for the petitioner that the words "for the State of Delhi" had meant that the Delhi Special Police Establishment were a police force of the State of Delhi which corresponded to former Chief Commissioner's Province of Delhi. While it is true that the Act of 1946 had constituted the Delhi Special Police Establishment for the Chief Commissioner's Province of Delhi. It had never meant that the Delhi Special Police Establishment was a police force of the Chief Commissioner's Province of Delhi. On the contrary, the Act of 1946 constituted a police force under the superintendence and control of the Central Government for the Chief Commissioner's Province of Delhi. We have already stated that the Delhi Special Police Establishment was a Central Government Police Force. It, however, belonged to Delhi inasmuch as it was constituted and functioned in Delhi. In respect of its political, or governmental character, it was under the control of the Central Government. In respect of its constitution and functioning, it was located in Delhi. Therefore, the words "for the State of Delhi" or "for the Chief Commissioner's Province of Delhi" which existed in the Act prior to the amendment of 1952 had never meant that the Delhi Special Police Establishment was a police force of the State of Delhi or of the Chief Commissioner's Province of Delhi in the sense that it was under the control of the Chief Commissioner of the Part C State of Delhi or of the Chief Commissioner's Province of Delhi. Therefore, the substitution of the words "in Delhi" for the words "for the State of Delhi" did not in any way change the constitution and the functioning or the nature of the Delhi Special Police Establishment. They remained the same.

14A. The reason for the above-mentioned change is to be found in the substitution of the words "the State of Delhi" by the Words "in any part C State". The purpose of the amendment was to give the Delhi Special Police Establishment the original jurisdiction and powers not

only in the Part C State of Delhi but in all Part C States. As Parliament had plenary power of legislation for any matter whatever under Article 246(4) in respect of Part C States, this change was within the legislative competence of Parliament. *Mithan Lal v State of Delhi* AIR 1958 SC 682. Parliament could create a police force or a Special Police Force in addition to the existing police force for the Part C State of Delhi and for all the Part C States. So long as such a police force was given the original jurisdiction and powers only in respect of the Part C States, no objection could be taken to such a legislation. As the words "belonging to any State" in Entry 80 of the Union List have been construed by us as meaning "constituted in and functioning in any State" and as the original jurisdiction of the Delhi Special Police Establishment would after the amendment exist in all the Part C States instead of Delhi alone, the change cannot be considered to be contrary to entry 80 of the Union List in any way. For, the Delhi Special Police Establishment even after the amendment of 1952 continued to belong to Delhi in the sense that it was constituted in Delhi and was primarily functioning there and in other Part C States. It could function even as a State Police Force in the Part C States inasmuch as under Article 239 of the Constitution, the administration of the Part C States was to be carried on by the President and Parliament had full powers of legislation for Part C States under Article 246(4) of the Constitution. Thus is why according to Section 3(60) (a) and (b) of the General Clauses Act, "State Government" as respects anything done before the commencement of the Constitution or after the commencement of the Constitution but before the Constitution (Seventh Amendment) Act, 1956, meant "in a Part C State," the Central Government.

15. The learned counsel for the petitioner has in this connection argued that the Part C States were legal entities distinct from the Central Government. In support of this proposition he relied on the Supreme Court decision in *State of Madhya Pradesh v. Moula Bux*, (1962) 2 SCR 794 = (AIR 1962 SC 145) and in *Satya Dev Bushahri v. Padam Dev* (1955) 1 SCR 549 = (AIR 1954 SC 587). But it may be pointed out with great respect that the above-mentioned decisions were given in a totally different context and circumstances. Their Lordships of the Supreme Court were not considering the question whether for all purposes, a Part C State was a distinct entity separate from the Union of India. Further, the Part C States were to be administered by the President under Article 239(1) of the Constitution. Under Section 3 (8) (a) and

(b) of the General Clauses Act, the Central Government prior to the commencement of the Constitution meant the Governor-General-in-Council and after the commencement of the Constitution meant the President. In *Jawantulal Amratlal v. F. N. Rana*, AIR 1964 SC 648, the Supreme Court speaking through Shah, J., observed that there was a distinction between functions which vested in the Union of India and those which vested in the President as such and the latter were not the powers of the Union Government. It is to be noted that in the enumeration of the powers of the President as such in the paragraph (12) of the report, the Supreme Court did not mention Article 239 of the Constitution. The Court apparently regarded the powers of the President under Article 239 and the powers of the Union Government. Therefore, the powers to govern the Part C States were vested under Article 239(1) in the Union Government or the Central Government. It is unnecessary for the purpose of this case to consider whether the Central Government in administering Part C States had a different capacity than the capacity of the Central Government in administering the rest of India. Whatever its capacity the fact remains that the Central Government had the fullest executive and the legislative power in respect of the Part C States. Even when Parliament passed the Government of Part C States Act, 1951, creating legislative assemblies for them, Section 21 thereof provided that the legislative assembly of the State of Delhi shall not have power to make laws with respect to public order, police including railway police and the offences against laws with respect to any of the matters enumerated in the State List and the Concurrent List. Similarly, under S. 39 of the said Act, the Consolidated Fund of the Part C States consisted only of revenues received by the State in relation to any matter with respect to which the legislative assembly of the said Part C States had power to make laws. The moneys out of the Consolidated Fund were to be appropriated only in accordance with the Act. It follows, therefore, that the executive, legislative and financial powers regarding the police in the Part C State of Delhi remained vested in the Central Government throughout. The Delhi Special Police Establishment could therefore be lawfully constituted and operated only by the Central Government.

16. Another change made by the Act of 1952 was that the functions of the Delhi Special Police Establishment were not restricted to offences committed in connection with Departments of the Central Government. No constitutional significance can be attached to this change. It was open to Parliament to enlarge the

original jurisdiction and powers of the Delhi Special Police Establishment in the Part C States. Our conclusion, therefore, is that the Act of 1952 did not make any change in the Delhi Special Police Establishment Act, 1946, which could be said to conflict with Entry 80 of the Union List of the 7th Schedule of the Constitution or with any other provision of the Constitution.

POINT NO. (3):—

17. Point No. 3 arises only because of the changes made in the Constitution by the Constitution (7th Amendment) Act, 1956. Inter alia, the Part C States were abolished and their place was taken by the Union Territories. As Entry 39 of the Federal Legislative List of the Government of India Act, 1935, had referred to a police force belonging to any part of British India including not only the Governors' Provinces but also the Chief Commissioners' Provinces, Entry 80 of the Union List of the 7th Schedule of the Constitution should have, strictly speaking, referred to Part A and Part C States. Since all these were States, the word "State" was perhaps thought sufficient to denote the whole of India inasmuch as the Governor's Provinces and the Chief Commissioner's Provinces of the Government of India Act, 1935, were completely covered by the three kinds of States under the Constitution. However, the Constitution (7th Amendment) Act, 1956, for the first time created two kinds of territories in India, viz., the territory of States and the territories of the Union, viz., the Union Territories. While the Part C States were at least in name "States", their successors were "Union" territories even in name. So far as the Constitution was concerned, a Union Territory was no longer a State.

In our recent Judgment in C. W. No. 543 of 1968 =(AIR 1969 Delhi 246) H. L. Rodhey etc. v. Delhi Administration etc. delivered on the 14th August 1968, we had occasion to point out that the General Clauses Act as adapted under Article 372 of the Constitution only applied to the interpretation of the Constitution. The changes introduced in the said Act by the subsequent adaptation made under Article 372-A consequent on the Constitution (7th Amendment) Act, 1956, were not applicable to the interpretation of the Constitution. Consequently, the definition of a "State" in Section 358(b) of the General Clauses Act whereby a Union Territory is included in the definition of "State" after the commencement of the Constitution (7th Amendment) Act, 1956, is not applicable to the interpretation of the Constitution. As pointed out by us, in our decision referred to above, this dis-

inction between the adaptations made in the General Clauses Act under Articles 372 and 372-A of the Constitution was unfortunately not brought to the notice of the Supreme Court. This was why in T. M. Kannian v. Income Tax Officer, Pondicherry, AIR 1968 SC 637 relying on Ram Kishore Sen v. Union of India, AIR 1966 SC 644, it was assumed that the definition of the General Clauses Act in Section 3(58) (b) including Union Territories into "States" was applicable to the interpretation of the Constitution. We may, however, for the purpose of the case before us concede straightway in favour of the petitioner that the meaning of the word "State" used in Entry 80 of the Union List of the 7th Schedule of the Constitution excludes Union Territory. The learned counsel for the petitioner, therefore, urges that the Delhi Special Police Establishment is a police force now belonging to a Union Territory of Delhi and not to any State. Therefore, its continuance after the commencement of the Constitution (7th Amendment) Act, 1956, is contrary to the provisions of Entry 80 of the Union List of the 7th Schedule of the Constitution. The existence of the Delhi Special Police Establishment thereafter became unconstitutional with the result that it cannot exercise any powers under the Delhi Special Police Establishment Act, 1946.

In considering this argument we have to first remember that the change in the Act whereby "Union Territories" are substituted for "Part C States" has been brought about not by any legislation of Parliament but merely by the Adaptation of Laws Order (No. III) of 1956 promulgated by the President in exercise of the powers conferred on him by Article 372-A(1) of the Constitution which runs as follows:—

"For the purposes of bringing the provisions of any law in force in India or in any part thereof, immediately before the commencement of the Constitution (Seventh Amendment) Act, 1956, into accord with the provisions of the Constitution as amended by that Act, the President may by order made before the 1st day of November, 1957, make such adaptations and modifications of the law, whether by way of repeal or amendment, as may be necessary or expedient, and provide that the law shall as from such date as may be specified in the order have effect subject to the adaptations and modifications so made, and any such adaptation or modification shall not be questioned in any Court of law."

The first question, therefore, is whether the change in the Act of 1946 was validly made by the Adaptation. It would be seen that the change had to be made to

bring the Act into accord with the provisions of the Constitution as amended by the Constitution (7th Amendment) Act, 1956. For, the Part C States had been substituted by the Union Territories and, therefore, it was no longer possible for the Act of 1946 to refer to Part C States thereafter. This being the case the ending words of Article 372-A(1) ensure that "any such adaptation or modification shall not be questioned in any Court of law." We have, therefore, to consider whether the Act of 1946 so adapted is in any way in conflict with the provisions of Entry 80 of the Union List. At the outset, it may be stated that the very purpose of the Adaptation was to bring the Act into accord with the provisions of the Constitution as amended by the Constitution (7th Amendment) Act, 1956. We have also seen that the Part C States having been substituted by the Union Territories, the Adaptation was properly made and that cannot be called into question in any Court of law. It would, therefore, be strange and *prima facie* unacceptable contention that because of this very adaptation, the Act of 1946 now conflicts with Entry 80 of the Union List of the Constitution.

18. The contention of the petitioner is based on a fundamental confusion of thought which has to be clarified for the proper understanding of the correct legal position. The contention of the petitioner firstly ignores the whole history of the Constitution and the Act of 1946. We know that the Act of 1946 was validly enacted under Entry 39 of the Federal Legislative List of the Government of India Act. For, it constituted a police force belonging to a part of British India thereunder. We also know that on the commencement of the Constitution, the Act of 1946 continued to be valid in view of Article 372(1) of the Constitution. Even if the distribution of legislative power under the Constitution had been different than the one under the Government of India Act in this respect, nevertheless the Act of 1946 would have continued to be valid. It is now well established that the words "subject to the other provisions of this Constitution" do not refer to the distribution of the legislative powers in the three lists of the 7th Schedule of the Constitution. However, the distribution of legislative powers in the Constitution in this respect remained the same inasmuch as Entry 80 of List 1 of the Constitution was in the same terms as Entry 39 of the Federal Legislative List of the Government of India Act, and therefore, the Delhi Special Police Establishment was also a police force belonging to a Part C State as contemplated by Entry 80 of the Union List of the 7th Schedule of the Constitution. This is why Parliament

was competent to legislate to amend the Act in 1952. It cannot be disputed, therefore, that the Act as amended in 1952, therefore, continued to be a valid enactment.

19. Secondly, it is necessary to remember that in 1956 Parliament did not amend the Act. The substitution of the words "Union Territories" in place of the words "Part C States" in the Act was made by the President acting under Article 372-A by the Adaptation of Laws (No III) Order, 1956. The adaptation had to be made as the words "Part C States" would have been meaningless and had to be substituted by the words "Union Territories" after the commencement of the Constitution (7th Amendment) Act, 1956. The adaptation actually brought the Act into accord with the Constitution and cannot, therefore, be challenged in any Court of law.

20. We must pause here to consider what is the grievance of the petitioner. Its grievance is that the Delhi Special Police Establishment is not entitled to exist and operate under the Act of 1946. To succeed in this contention, the petitioner was bound to prove that the legislation of 1946 enacting the Act and that of 1952 amending the Act were *ultra vires* the Constitution. The petitioner has not succeeded in doing so. The petitioner cannot validly contend that the continuance of the Delhi Special Police Establishment in any way depended on the adaptation made in 1956. The adaptation was made to bring the Act into conformity with the Constitution inasmuch as the Part C States were replaced by Union Territories in the Constitution. It can not be said, therefore, that this adaptation itself brought the Act into conflict with Entry 80 of List 1 of the 7th Schedule of the Constitution. It is only if Parliament were in need of legislating to constitute a Special Police Force belonging to a Union Territory that such legislation would have met with the objection that Entry 80 of List 1 contemplates only a special police force belonging to a State and not to a Union Territory. But this question does not arise as Parliament had no occasion to legislate after the Adaptation of 1956 to constitute a special police force belonging to Union Territories. The Special Police Force already existed its existence and continuance is not invalidated by the fact that the Part C States to which it belonged were henceforth called Union Territories.

In *S. I Corporation (P) Ltd v Secretary, Board of Revenue* AIR 1964 SC 207 the Supreme Court had to consider the contention that an agreement which was validly entered into under Article 278 of the Constitution was automatically invalidated by the deletion of that Article and

that the agreement was thereafter contrary to the Constitution, in particular to Article 277 thereof. The contention was repelled by their Lordships of the Supreme Court in the following words:—

"An obvious fallacy underlies this ingenious argument. The validity of an agreement depends upon the existence of power at the time it was entered into. Its duration will be limited by its terms or by the conditions imposed on the power itself. Article 278 conferred a power upon the Union and the B State to enter into an agreement which would continue in force for a period not exceeding ten years from the commencement of the Constitution. The agreement in question fell squarely within the scope of the power. That agreement, therefore, would have its full force unless the Constitution (Seventh Amendment) Act, 1956, in terms avoided it. The said amendment was only prospective in operation and it could not have affected the validity of the agreement. We, therefore, hold that the impugned assessment orders were not validly made by the sales-tax authorities in exercise of the power saved under Article 277 of the Constitution."

21. In this connection, it would be instructive to refer to the following decisions. In *Bihar Mines Ltd. v. Union of India*, AIR 1967 SC 887 the majority held that the mineral lease, though granted prior to the Mines and Minerals (Regulation and Development) Act, 1948, was not an existing lease within the meaning of that Act inasmuch as it vested in the State in 1949 and thereupon became a new lease. The majority did not, therefore, consider the further question whether the terms of the said lease could be modified under the Mining Leases (Modification of Terms) Rules, 1956 but the minority held that the lease continued to be an existing lease in spite of its vesting in this State. The minority, therefore, considered the question whether the lease could be modified under the 1956 Rules. Counsel for the appellant had submitted that the 1956 Rules were invalid as they were laws with respect to acquisition of property for State purposes which could be made only by the State Legislature in view of Entry 36 of the State List as it stood before the Constitution (7th Amendment) Act, 1956, and as they did not provide for payment of compensation. This contention was, however, repelled by the following observation (at page 892):—

"The Central Government professed to make the Rules in exercise of its powers under Section 7 of the pre-Constitution 1948 Act. The power to make the Rules was conferred on the Government by Section 7 of the 1948 Act and not by Entry

36, List II of the Constitution. As the Rules did not provide for payment of compensation in cases of reduction of the terms of the lease in conformity with Section 7(2)(b), they might not have been originally valid; but they purported to have been made under the 1948 Act. In view of Section 29 of the 1957 Act, the Rules, must now be deemed to have been made under the 1957 Act as if that Act was in force when the Rules were made. The validity of the Rules, must now be judged with reference to the 1957 Act. As the Rules are in conformity with the 1957 Act they must be regarded as validly made under it."

It would follow, therefore, that the Notifications issued by the Central Government under Sections 3 and 5 of the Act and the consent given by the State Governments under Section 6 of the Act are to be considered under the provisions of the Act which is valid and not with reference to adaptation made therein in 1956.

21A. In *Inder Singh v. State of Rajasthan*, AIR 1957 SC 510, the question was whether the Notification issued under Ordinance No. 9 of 1949 was valid. This Ordinance had been promulgated by the Rajpramukh whose power to legislate came to an end under Article 385 of the Constitution when the legislature of the State was constituted. On the date of the Notification, the Rajpramukh had ceased to have the power to make the Ordinance. The Supreme Court upheld the Notification in the following words:—

"It cannot be contended that the Notification dated 20-6-1953 is bad, because after the Constitution came into force, the Rajpramukh derived his authority to legislate from Article 385, and that under that Article his authority ceased when the legislature of the State was constituted. A Notification issued under Section 3 of the Ordinance was not an independent piece of legislation such as could be enacted only by the then competent legislative authority of the State, but merely an exercise of a power conferred by a Statute which had been previously enacted by the appropriate legislative authority. The exercise of such a power is referable not to the legislative competence of the Rajpramukh but to Ordinance No. IX of 1949, and provided Section 3 is valid, the validity of the Notification is co-extensive with that of the Ordinance. If the Ordinance did not come to an end by reason of the fact that the authority of the Rajpramukh to legislate came to an end neither did the power to issue a Notification which was conferred therein. The true position is that it is in his character as the authority on whom power

was conferred under Section 3 of the Ordinance that the Rajpramukh issued the impugned Notification and not as the legislative authority of the State"

22. It is well established that a pre-Constitution law made by a competent authority will not become invalid after the Constitution merely because it could not have been enacted under the Constitution because of a change in the distribution of legislative powers. This is why numerous pre-Constitution Acts are still in force though under the distribution of legislative powers in the Constitution they could not have been enacted by the same legislative authority after the Constitution. Therefore, the validity of the Act of 1946 as adapted in 1956 is not to be judged by the test whether such legislation would now be competent to be undertaken by Parliament. The question is not whether Parliament can now enact such a legislation. The question is whether the legislation which has already been enacted validly prior to 1956 becomes invalid merely because of the adaptation made into it by the President under Article 372-A of the Constitution. So put, the question can have only one answer and that is, that the adaptation of 1956 cannot make the Act unconstitutional.

23. Alternatively, even as a matter of textual interpretation, the adaptation made in 1956 is not contrary to Entry 80 of List 1. It is true that Section 3(58)(b) of the General Clauses Act does not apply to the interpretation of the Constitution and hence the word "State" in Entry 80 of List 1 cannot be construed to include "Union Territories" relying on the definition of "State" introduced therein by the adaptation of 1956. But the said definition applies to the construction of the Act of 1946 as adapted in 1956. What is the effect? Even if the adaptation had not been made in the Act of 1946, the word "State" therein would have included 'Union Territories' because of the above-mentioned definition. If "States" according to Section 3(53)(b) of the General Clauses Act include the 'Union Territories', the converse also must be true and a Union Territory must be included in a State. Therefore, a Special Force belonging to a Union Territory would be construed as belonging to a State. So viewed, the adaptation does not conflict with Entry 80 of List 1.

24. That the converse use of definitions in the General Clauses Act, in the manner made above, is permissible will be shown by the following two decisions. In *Union of India v A. L. Rallia Ram*, AIR 1963 SC 1685 paragraph (12), the correspondence constituting the contract was in the name of the Government of

India and was not expressed to be in the name of the Governor-General as required by Section 175(3) of the Government of India Act, 1935. Nevertheless, the Supreme Court held that the requirements of Section 175(3) were substantially complied with and observed as follows:

"The correspondence between the parties ultimately resulting in the acceptance note, in our judgment, amounts to a contract expressed to be made by the Government and therefore, by the Governor-General, because it was the Governor-General, who had invited the tender through the Director of Purchases, and it was the Governor-General who through the Chief Director of Purchases accepted the tender of the respondent subject to the conditions prescribed therein."

The equation of the Government with the Governor-General was obviously based on the definition of the "Central Government" in Section 3(6) (a) of the General Clauses Act which stated that the Central Government in relation to anything done before the commencement of the Constitution meant the Governor-General. Similarly, in *Ram Chander Singh v State of Punjab*, AIR 1968 Punj 178, the order was expressed to be in the name of the Governor as required by Article 166(2) of the Constitution. Nevertheless, the order was held to have substantially complied with the provisions of Article 166(2) apparently because the State Government is defined in Section 3(60) of the General Clauses Act to mean the Governor.

25. We, therefore, hold that the Act of 1946 continued to be valid in spite of the adaptation made therein by the Adaptation of Laws Order (No 3) of 1956.

POINT NO (4) —

26. The scheme of the Act of 1946 is that it would apply to only such offences as would be notified under Section 3 of the Act by the Central Government. Without such a notification, the Act would not have any real application at all. It is urged for the petitioner that the authority given to the Central Government is unfettered and unchannelled. It is pointed out that the original preamble of the Act of 1946 contained the words "for the investigation of certain offences committed in connection with matters concerning Departments of the Central Government." But, these words were omitted by the Amendment of 1952. Thereafter, there was no indication by the legislature as to what offences were to be notified by the Central Government under Section 3. The effect is that the Central Government can notify all possible offences thereunder and thus enjoy an arbitrary and unfetter-

ed power. This delegation, contends the petitioner, is excessive and, therefore, unconstitutional.

27. In reply the learned Counsel for the respondents pointed out firstly that Section 3 is an instance of conditional legislation as distinguished from delegated legislation and that secondly even if it is delegated legislation it is not excessive. In appreciating the precise nature of Section 3, it is to be remembered that the Act of 1946 creates a Special Police Force in addition to the ordinary police force which already existed. The ordinary police force had several functions to discharge under the Police Act of 1861. Out of these several functions, only one function, viz., investigation of offences is conferred on this Special Police Force. Even this function is not to extend to all the offences which the ordinary police force is to investigate but only to those offences which are notified by the Central Government under Section 3. It will be seen, therefore, that even in the Union Territories the investigation by the Special Police is limited only to the notified offences and that the Special Police is not concerned with any other functions of the ordinary police. As far as the States are concerned, the extension of the jurisdiction and powers of the police is dependent entirely on the consent of the State Government under Section 6. Such a consent can presumably be withdrawn by a State Government. The jurisdiction of the Special Police will not continue after the withdrawal of the consent. The power of the Central Government is, therefore, limited at both ends, viz., in conferring the initial jurisdiction and powers and in extending them to the States.

28. If, "in the case of conditional legislation the power of legislation is exercised by the legislature conditionally, leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend" (Per Kapur, J. in AIR 1960 SC 554 at p. 567) then, the power given by the legislature to the Central Government in Section 3 relates to the manner in which the Act is to be applied. That is to say, it is for the Central Government to decide what offences should be investigated by the Special Police in the Union Territories and for the State Governments to decide what offences should be investigated by this Special Police in their respective States by giving consent to such investigation under Section 6 of the Act. In numerous instances, the Courts have upheld the grant of such a power to the executive by the legislature. In the State of Bombay v. Narothamdas, AIR 1951 SC 69, Section 4 of the Bombay

City Civil Court Act had empowered the Provincial Government to invest the City Court by notification with jurisdiction of such value not exceeding rupees twenty-five thousand as may be specified in the notification. The Supreme Court held it to be conditional legislation and as such valid.

It is true that the upper limit of rupees twenty-five thousand was laid down by the legislature in that case. But in our case also the Act of 1946 creates only the Special Police keeping the ordinary police intact. In the nature of things, therefore, only such offences would be notified for investigation by the Special Police as could not be equally well investigated by the ordinary police. This is a built-in limitation on the power of the Central Government. In the Delhi Laws Act case; AIR 1951 SC 332, the Central Government had been empowered to select such State laws as they might find suitable for application to Part C States and to apply such laws to the Part C States by notification. There was no indication in the Act as to what laws should be applied to the Part C States by the Central Government and apparently there was no limit on the power of the Central Government as to what laws should be so applied. Nevertheless, the Supreme Court upheld the power on the ground that the legislative policy underlying the Act was that Part C States were small areas which did not have constitutional legislatures and it would not be possible for Parliament to go on legislating for them in respect of subjects included in the State list. It was, therefore, more convenient to give the power to the Central Government to apply the Provincial laws to the Part C States.

It would be seen that the power given to the Central Government under Section 3 of the Act of 1946 is much more limited than the power given to the Central Government by the Delhi Laws Act. The powers to extend the life of an Ordinance given to the Rajpramukh was also held to be conditional legislation in AIR 1957 SC 510. In Basant Kumar v. Eagle Rolling Mills Ltd., AIR 1964 SC 1260, the Central Government was empowered by the Employees' State Insurance Act, 1948, to decide to what factories the Act should apply in the same way as the Central Government is empowered under Section 3 of the Delhi Special Police Establishment Act, 1946, to decide what offences should be investigated by the Special Police. The Supreme Court held that this was conditional legislation and was, therefore, valid. Assuming that there was an element of delegation, the Court held that there was enough guidance given by the relevant provisions of the Act and the very scheme of the Act itself. In The

Empress v. Burah, (1877-78) 5 Ind App 178 (PC), the Lt Governor of Bengal was given the power to extend all or any of the provisions contained in a statute to a certain district at such time he considered proper. The Privy Council held that the proper legislature had exercised its judgment as to place, persons, laws, powers and result of that judgment had been to legislate conditionally as to those things. The legislation was, therefore, valid as conditional legislation. In *Baxter v. Ahway*, (1909) 8 CLR 626, the executive was given the power to notify to which goods the prohibition of imports was to apply just as the Central Government in our case is given the power to notify which offence would be investigated by the Special Police. This was held to be conditional legislation by the High Court of Australia.

29. Recently a Bench of seven Judges of the Supreme Court reviewed the whole case law on the subject of delegated legislation in the *Delhi Municipal Corporation v. Birla Cotton Spinning & Weaving Mills Ltd.* CA 1857 and 1858 of 1967 D/ 23-2-1968 (AIR 1968 SC 1232). The question was whether Section 150 of the Delhi Municipal Corporation Act suffered from the vice of excessive delegation. Chief Justice Wanchoo speaking for the majority stated that the safeguards against the arbitrary exercise of the powers under the said Section were to be found in various provisions of the Act itself. Such implied guidance was sufficient to validate the delegation of the legislative powers.

30. We are, therefore, of the view that firstly Section 3 of the Act of 1946 is an instance of conditional legislation. Secondly, even if it is assumed to be delegated legislation, the safeguards and limitations on the power of the Central Government to be exercised under Section 3 are to be found in the fact that the ordinary police already existed to investigate the ordinary offences and, therefore, the offences to be notified by the Central Government would only be such offences as cannot be well investigated by the ordinary police. Lastly, the investigation by the Special Police cannot be done in the States at all except by the consent of the State Governments. We, therefore, hold that Section 3 of the Act is valid.

POINT NO. (5)—

31. The original jurisdiction of the Delhi Special Police Establishment under Section 2(2) extends throughout the Union Territories in connection with the investigation of offences committed therein. Under Section 2(3), the Investigating Officer is to exercise all the powers of the officer-in-charge of a police station in

the area in which he is for the time being and he shall be deemed to be officer-in-charge of a police station discharging the functions of such an officer within the limits of his station. Under Section 156 of the Code of Criminal Procedure, the original jurisdiction of an Investigating Officer is confined to the investigation of the offences taking place in the local area or having a territorial nexus to it in precisely the same way as the local jurisdiction of a criminal Court is restricted in accordance with the provisions contained in Chapter XV of the Code of Criminal Procedure. As distinguished from the jurisdiction, the powers of the Investigating Officer are not restricted to any such local area. Under Section 54, a Police Officer may arrest certain persons anywhere. Under Section 58, a Police officer may pursue an offender into other jurisdictions. Section 165 enabling search and seizure also does not restrict these powers of the Police to any local area. Under Section 166(1) and (3), the police can enter other local areas for investigation. Sections 160 and 161 also do not place any restrictions as to local areas on the power of the police to examine witnesses. Therefore, the Special Police operating under the Delhi Special Police Establishment Act, 1946 are already possessed of powers to investigate anywhere in India an offence taking place in or having territorial nexus with a Union Territory.

The enactment of Section 5 would not have been necessary if it had merely intended to give a power to the Special Police to go beyond the Union Territories to investigate an offence provided it is committed within a Union Territory or is connected with it. For, such powers were already available in the Code of Criminal Procedure. The language of Section 5 makes it clear that it enables the Special Police to investigate an offence which has been committed outside the Union Territory. For, Section 5 (1) says that the Central Government may extend beyond the Union Territories the powers and the jurisdiction of the Special Police to investigate an offence notified under Section 3. It does not say that the offence should have been committed within the Union Territories. Section 5 (2) says that when the jurisdiction and powers of the Special Police is so extended to any such area (meaning an area beyond the Union Territories) the Special Police may discharge the functions of a Police Officer in that area (meaning beyond the Union Territories) and shall while so discharging such functions be deemed to be a member of the police force of that area and be vested with the powers of a police officer belonging to that police force (that is to say, a police force belonging to an area outside the Union Territories). Section 5 (3) confers the powers of an officer-

in-charge of a police station situated outside the Union Territories on the Special Police investigating an offence within the limits of such a police station. Nothing can be clearer to show that Section 5 confers the same powers on the Special Police as are enjoyed by the ordinary police of the local area outside the Union Territories in which the offence is being investigated including the power of an officer-in-charge of the police station. We have, therefore, no difficulty in rejecting the contention that Section 5 does not enable the Special Police to investigate an offence not committed within a Union Territory.

POINT NO. (6):—

32. The Bombay Police Act, 1951, no doubt consolidates the police forces of the different parts of the State into one common police force. It could not, however, repeal the Delhi Special Police Establishment Act, 1946, authorising the Special Police to go into the State of Maharashtra with the consent of the Maharashtra Government to investigate an offence which has been committed there. The consent given by the Government of Maharashtra under Section 6 of the Act is in the form of a letter dated 2nd July 1960 from the Government of Maharashtra acting through Shri J. C. Agarwal, Deputy Secretary to that Government in the Home Department. It is Annexure L at page 141 of the paper-book. It is addressed to the Secretary, Government of India, Ministry of Home Affairs and says that the Government of Maharashtra consents to the Delhi Special Police Establishment exercising powers and jurisdiction in the State of Maharashtra for the investigation of offences specified in the Notifications of the Government of India issued under Section 3 of the Delhi Special Police Establishment Act, 1946. Out of the four notifications which are mentioned in the said letter, we are concerned with the very first Notification, viz., Notification No. 7-5-55-AVD dated the 6th November 1956, which is reproduced as Annexure R2/B at page 204 of the paper-book. The offences involved in the present case, viz., Sections 409 and 477-A of the Indian Penal Code, and conspiracies to commit those offences are all included in the Notification of the 6th November 1956 issued by the Ministry of Home Affairs under Section 3 of the Delhi Special Police Establishment Act. It is true that the letter of consent itself does not set out the offence to the investigation of which the consent was given. But it is a legitimate method of describing the offences to refer to the Central Government Notification under Section 3 of the Act dated the 6th November 1956 and to say that the offences described therein are the offences to the investiga-

tion of which the consent is given. In adopting this method of describing the offences, the letter of consent incorporated the description of the offences committed in the letter dated the 6th November, 1956 into the consent letter itself.

33. Learned counsel for the petitioner further argued that the said Notification issued under Section 3 has since then been repealed and superseded by another Notification though in the new Notification also all the offences which are being investigated in the present case are included. Learned counsel, however, argues that the repeal of the Notification under Section 3 which was referred to in the consent letter prevents the Special Police from investigating this case. We see no force in this argument. The principle of Section 8 of the General Clauses Act would apply here. The letter of consent referred to in the Notification under Section 3 which was in force when the consent letter was issued. The repeal of the said Notification and the issue of a new one in supersession of it would be like the repeal and re-enactment of a statute. Under Section 8, the reference to the repealed enactment thereafter is to be construed as a reference to the re-enacted provisions. For the same reason, the reference in the consent letter would have to be construed as a reference to the Notification which has repealed the Notification referred to in the consent letter. It would be contrary to all principle to take the view that the State Government has to go on issuing new letters of consent merely because the Central Government chose to issue new Notifications under Section 3. In fact, the State Government may refuse to issue a new letter of consent on the ground that it wanted the consent to be restricted to the offences mentioned in the Notification referred to in the consent letter. The superseding Notification may contain additional offences to the investigation of which the State Government may not wish the consent. In our opinion, therefore, the letter of consent continues to be valid and it is so valid in the present case.

34. The giving of consent by the State Government was no doubt an exercise of the executive power of the Government. Ordinarily, such an order or instrument expressing the consent has to be expressed in the name of the Governor and has to be authenticated by an authorised person under Article 166(2) of the Constitution. Though the letter of consent is not expressed to be in the name of the Governor, it is expressed in the name of the Government of Maharashtra. A State Government is defined in Section 3 (60)(c) of the General Clauses Act to be the Governor. The provisions of Article 166(2) corresponding to the provisions of Arti-

cle 77(2) have been held to be directory and not mandatory. The legal position on a review of the Supreme Court decisions on this point has been stated by a Division Bench of the Punjab High Court in AIR 1968 Punj 178 paragraph (25) as follows—

"The analysis of the law laid down by the Supreme Court in the various judgments referred to above would show that it is by now settled.

(1) That the provisions of Article 166 of the Constitution are directory and not mandatory. They are merely enabling provisions.

(2) That Clauses (1), (2) and (3) of Article 166 have to be read together. Clause (1) should not be read divorced from Clause (2) as an independent provision. The requirements of Clause (2) have to be fulfilled in accordance with the rules of business framed under Clause (3).

(3) When an order or instrument containing or referring to an executive action of the Government of a State complies with the requirements of Clauses (1) and (2) of Article 166, it would be immune from attack in Court of law on the ground that the order or the instrument had not in fact been made or executed by the Governor of the State

(4) That non-compliance with the provisions of either or both of first two clauses of Article 166 of the Constitution would only result in the order losing the protection contained in Clause (2) which it would have enjoyed if the order had been expressed in the manner required by Clause (1) and authenticated in accordance with the rules of business framed under Clause (3)

(5) That if the protection contained in Clause (2) of Article 166 of the Constitution is not available in respect of any particular order or instrument and the order or instrument is challenged in a Court of law on the ground that it was not, in fact, made by the Governor of the State, the burden of proof would shift to the State authorities to prove affirmatively that the order or instrument was, in fact, made or executed by the Governor; and

(6) That in order to see whether the requirements of Article 166 of the Constitution have or have not been satisfied in a particular case, it is the substance of the Article which has to be kept in view and if the substance of the requirements of the Article are satisfied, the protection given by that Article should be allowed to be invoked even though the expression used in the order or the instrument is

not exactly identical in every respect with the wording of that Article."

35. Applying the above-mentioned principles, the Punjab High Court held that the order of the State Government, not expressed in the name of the Governor, but only in the name of the Government, was in substantial compliance with Article 166(2) of the Constitution. According to this reasoning, the consent letter dated 2nd July 1960 substantially complies with Article 166(2) and is valid. The respondents have, however, filed an affidavit by Shri S P Agashe, Under-Secretary to the Government of Maharashtra, which is at page 211 of the paper-book, in which Shri Agashe stated as follows—

"In or about June, 1960, the then Chief Minister of the State of Maharashtra was in charge of the Home Department. The papers underlying letter No DPE 1260/6551-V dated the 2nd July 1960 regarding the consent under Section 6 of the Delhi Special Police Establishment Act, 1946, of the State Government to the functioning of the Delhi Special Police Establishment in the State of Maharashtra, were placed before the Chief Minister, prior to the said letter being issued. After reading and careful consideration of those papers, the Chief Minister passed the order granting consent under the Rules of Business he was competent to pass the said order. Thereafter the said consent was conveyed to the Government of India under the above-said letter. The letter was signed by Shri J C Agarwal who was then Deputy Secretary to the Government of Maharashtra in the Home Department and was as such authorised to sign such letters."

36. It is contended for the petitioner that firstly the Rules of Business of the Government of Maharashtra have not been produced. The Rules of Business made under Article 166(3) of the Constitution would be statutory rules. Judicial notice would have been taken of the same. They are not a fact which has to be proved by primary evidence. Certified copies of the same also would have been admissible in evidence. Learned counsel for the respondents offered to produce a copy of the Rules. The respondents should have done this before the stage of the arguments. But we are not prepared to be so technical as to hold that the Rules of Business did not authorise the Chief Minister of the State to give the consent. We, therefore, accept the affidavit of the officer of the State Government that the Chief Minister was so authorised. On that view we do not think that the non-production of the Rules

of Business should raise an adverse inference against the respondents that the Rules of Business either did not exist or that, if produced, they would be against the case of the respondents. Such an adverse inference could have been raised only if the affidavit of Shri Agashe would not have been filed. In view of the affidavit, we do not think that such an adverse inference can be raised.

37. The next contention of the petitioner was that the order of the Chief Minister himself or his noting on the file should have been produced. It is well known that the orders on the noting on the file are never produced either for public inspection or in Courts of law. What is produced is the orders or the letters which are meant to be communicated to the public. The letter dated 2nd July 1960 is the communication of the Maharashtra Government on the subject and it is sufficient that a copy of it has been produced. The affidavit of Shri Agashe says that Shri Agarwal was authorised to sign the consent letter. The authority is also given under Article 166 (2) of the Constitution by a Notification, which also being a statutory notification was a public document of which judicial notice could be taken. In view of the affidavit, no adverse inference can be drawn against the respondents for the non-production of the Notification under Article 166 (2) giving authority to the Deputy Secretary Shri Agarwal to authenticate an order on behalf of the Governor. It is well known that all officers from Under Secretary to the Secretary of the Central and State Governments are ordinarily authorised by Notifications under Arts. 77 (2) and 166 (2) of the Constitution to act on behalf of the President and the Governor in exercise of the executive power of the State. In view of this well-known position, we have no doubt that Shri Agarwal as the then Deputy Secretary must have been authorised to sign the consent letter on behalf of the Government of Maharashtra.

38. If the petitioner had really intended to take the stand that, in fact, no consent was given by the Government of Maharashtra or that Shri Agarwal was not entitled to sign the consent letter on behalf of the Government of Maharashtra then the petitioner should have made a definite pleading and sworn an affidavit to that effect. Without such a pleading and affidavit pointedly raising such an issue, the Court is not bound to go into it at all, as was observed by the Supreme Court recently in *Ishwarlal v. State of Gujarat*, AIR 1968 SC 870. We, therefore, hold that the consent of the State Government has been properly proved.

POINT NO. (7):—

39. A perusal of Sections 104 and 105 of the Insurance Act makes it clear that they are not identical with the offences punishable under Sections 405 and 409, Indian Penal Code, for which the petitioner is being prosecuted. In the State of Bombay v. S. L. Apte, AIR 1961 SC 578, the Supreme Court has also specifically held that the offence under Section 409, Indian Penal Code, is not identical with the offence under Section 105 of the Insurance Act. Further, the offence of conspiracy punishable under Section 120-B of the Indian Penal Code is not reproduced in the Insurance Act. The respondents could not, therefore, be expected to prosecute the petitioner under Section 105 of the Insurance Act rather than under Sections 405, 409 and 120-B of the Indian Penal Code, if the latter offences were more suitable to the facts of the case. There is nothing to show at all that the facts of the case are better covered by Section 105 of the Insurance Act and that they are not covered by Sections 405, 409 and 120-B of the Indian Penal Code. Therefore, the question of the respondents trying to by-pass the requirement of sanction under the Insurance Act does not arise at all. We find so.

40. The learned counsel for the petitioner did not press the contentions regarding mala fides and discrimination. It is well known that the question of mala fides does not arise if the respondents have the power to investigate the offences against the petitioner and if there is nothing to show that they are influenced by irrelevant considerations in doing so. The question of discrimination also does not arise inasmuch as the Delhi Special Police Establishment is precisely in the same position as the ordinary police in investigating the offences against the petitioner. No prejudice is caused to the petitioner by the fact that the investigation is done by the Special Police rather than by the ordinary police. No question of discrimination, therefore, arises. In view of the above findings, we dismiss the writ petition with costs. Counsel's fee Rs. 1000/-.

CWM/D.V.C.

Petition dismissed.

AIR 1969 DELHI 349 (V 56 C 61)
I. D. DUA, C. J.

Bhan Singh, Petitioner v. S. Kanwaljit Singh and others, Respondents.

Civil Revn. No. 288 of 1968 D/- 14-11-68, from order of Sr. Sub. J. Delhi, D/- 4-5-1968.

LL/CM/F911/68/D

(A) Civil P. C (1908), S 115 and O. 39, Rr. 1 & 2 — Appellate court reversing Trial Court's order under O. 39, Rr. 1 & 2 — Revision against Appellate order — Power of High Court — Discretion in granting interim injunction not improperly exercised — No jurisdictional infirmity — No interference in revision.

On an appeal against the order of interim injunction granted by the Trial Court, the Appellate Court reversed it holding that the balance of convenience was also not in favour of the plaintiff. It also took into consideration other factors. The appellate order was challenged in the revision petition. It was not argued that the appellate court had no jurisdiction to make the order or that it committed material irregularity in the exercise of its jurisdiction in reversing the order of the Trial Court.

Held, that in the absence of any jurisdictional infirmity in the impugned order, the High Court could not interfere with it in revision under Section 115 of Civil P. C. Whether or not the High Court, functioning as a court of first appeal, would have reversed the order of temporary injunction made by the original court was not the test. The test was a very much narrower one that of jurisdictional or similar infirmity envisaged by Section 115, Civil P. C. The granting of an injunction was purely within the discretion of the court, but this discretion has to be exercised in accordance with reason and on sound recognised judicial principles. The appellate court had jurisdiction to reverse the Trial Court's order, and on revision, the High Court had to be satisfied of an error in the appellate order which might attract revisional power. (Para 6)

(B) Civil P. C. (1908), O. 41, R. 27 — Whether applies to appeals against orders granting temporary injunction under O. 39, Rr. 1 & 2 — (Quaere). (Para 6)

Cases Referred: Chronological Paras
(1951) AIR 1951 SC 193 (V 38) =
1951 SCR 258, Arjan Singh v.
Kartar Singh 3

S L. Bhatia, for Petitioner; K. K. Mehra, for Respondents (Nos 1 and 2 only)

ORDER.— Six persons instituted a suit in the Court of Shri S C Ahuja, Subordinate Judge, 1st Class, Delhi for a declaration and permanent injunction. An application for temporary injunction under Order 39, Rules 1 and 2 read with Section 151, Code of Civil Procedure, was also filed praying that the defendants be restrained from interfering in the work of S Bhan Singh, plaintiff No 1, as Secretary of defendant No 1, the Prince Bus

Service, during the pendency of the suit. It was alleged that S Kanwaljit Singh defendant was interfering with the work of plaintiff No 1 as Secretary of the Association. This prayer was contested and the learned Subordinate Judge trying the suit considered it proper to restrain defendant No 1 from interfering with plaintiff No 1 in the discharge of his duties as Secretary of the Association in question. The defendant was also restrained from disturbing the possession of plaintiff No 1 of the office located in room No 5 where, according to him, he acted as Secretary.

2. The matter was taken on appeal to the Court of the learned Senior Subordinate Judge, who reversed the order of the trial Court and came to the conclusion that the balance of convenience was not in favour of the plaintiff. I consider it proper to reproduce the exact words of the lower Appellate Court.—

"In any case I am of the considered view that the balance of convenience was also not in favour of the plaintiffs. There is no doubt that majority of the members were with the appellants. Under such circumstances the comparative mischief or inconvenience which is likely to issue from granting injunction will be greater than that which is likely to arise from withholding it. Plaintiff No 1, in my view, would not suffer any irreparable injury if the temporary injunction was not granted. It is only a question of status for him. On the other hand, working of the Society is likely to be jeopardised."

Earlier, the lower Appellate Court had taken into consideration a copy of a resolution dated 9-10-1966 which showed that plaintiff No 1 had not been elected as an office-bearer and, therefore, was not entitled to any temporary injunction claimed. This factor also weighed with the lower Appellate Court. An objection was raised that this copy had not been produced in the Court of first instance and, therefore, could not be taken into consideration by the learned Senior Subordinate Judge on appeal. The Court below felt that the provisions of Order 41, Rule 27, Civil P. C., were not attracted in this case because the parties had not yet started leading evidence and there was, in the circumstances, no question of any permission to lead additional evidence. At the bar of the lower Appellate Court, it was stated that these documents had been filed earlier in some other suit instituted by the defendants and for this reason, they could not be produced in the trial Court in the present case. This explanation appealed to the lower Appellate Court and the documents in question were allowed to be produced and looked into.

3. Before me on revision, Shri S. L. Bhatia, the learned counsel for the plaintiff, has very strongly argued that the lower Appellate Court has acted with material irregularity in the exercise of its jurisdiction by allowing fresh documents to be placed on the record and to be taken into account. He has, in support of his submission, relied on *Arjan Singh v. Kartar Singh*, AIR 1951 SC 193, according to which, the discretion given to the Appellate Court by Order 41, Rule 27, to receive and admit additional evidence is not an arbitrary one, but is a judicial one circumscribed by the limitations specified in that rule. To allow additional evidence to be adduced contrary to the principles governing reception of such evidence is, according to this decision, a case of improper exercise of discretion and the evidence thus brought on the record deserves to be ignored.

In regard to the question of balance of convenience, the learned counsel has submitted that even though it be a question of status for the plaintiff, but if he is entitled as of right to claim that status, then his right cannot be defeated merely because the controversy centres round status. In this respect, the counsel argues, the Court below has again committed a material irregularity in the exercise of jurisdiction.

4. On behalf of the respondents, the impugned order has been supported on the ground that the majority of the members of the society in question, according to the lower Appellate Court, are with the defendants and on this part of the case, nothing has been urged by the learned counsel for the plaintiff-petitioner. If that be so, then, so argues Shri Mehra, the impugned order is substantially just and no interference on revision is called for. He has also submitted that merely because some documents have been taken into consideration by the lower Appellate Court on appeal from an interlocutory order, which may, from one point of view be not strictly covered by the first two clauses of Rule 27 of Order 41 of the Code, it cannot be described to be a jurisdictional infirmity or a material irregularity in the exercise of jurisdiction justifying interference on revision. In any case, submits Shri Mehra, the trial has not yet started and during trial, these documents can very well be placed on the record. If, therefore, while dealing with an interlocutory application of the present nature, the lower Appellate Court has taken into account these documents, then it would amount to a mere technical objection to say that the Court has wrongly taken into account these documents. The decision of the Court below on this ground should not be upset on revision, says the counsel.

My attention has also been drawn by Shri Mehra to some kind of a dispute about the genuineness of the signatures of some of the plaintiffs in the Court below who are represented to be siding with plaintiff No. 1, but I do not think I would be justified in taking these submissions into account for deciding this revision.

5. It appears that when this revision was admitted by a learned Single Judge on 20-5-1968, notice in regard to the interim injunction prayed for was given to the respondents. On 31-5-1968, on a statement made by Shri S. L. Bhatia at the bar that Shri Mehra had been supplied with the necessary copies and that he had promised to put in appearance, but had not done so, the stay prayed for was granted with liberty to the respondents to apply for having it vacated, if they so desired. On 15-7-1968, both the counsel appeared before the learned Judge and after hearing them, an order maintaining status quo was recorded. As to what was the point of time for fixing the status quo was not clarified with precision in the order. Before me, there is a dispute at the bar as to what is the actual state of affairs at the present stage pursuant to this order of status quo as understood by the parties and what did the order precisely connote. Whereas Shri Bhatia says that his client asserts that he is working as Secretary, Shri Mehra denies it and according to him, someone else is working as a Secretary.

6. Keeping in view all the facts and circumstances of this case, in my opinion, it is not possible to hold that there is any jurisdictional infirmity in the impugned order. The granting of an injunction is purely within the discretion of the Court, but this discretion has to be exercised in accordance with reason and on sound recognised judicial principles. It is true that the trial Court's discretionary order has been reversed by the lower Appellate Court, but that Court has statutory jurisdiction to do so, and on revision, this Court has to be satisfied of an error in the appellate order which may attract revisional power. Whether or not this Court, functioning as a Court of first appeal, would have reversed the order of temporary injunction made by the original Court is not the test. The test is a very much narrower one: that of jurisdictional or similar infirmity envisaged by Section 115, Civil P. C. However erroneous the appellate order may be either on facts or in law, and I express no opinion on this aspect at this stage, I am not convinced — and indeed this aspect is not developed at the bar — that the lower Appellate Court had no jurisdiction to make the order it did or that it committed any material irregularity.

city in the exercise of its jurisdiction in reversing the order of the Court of first instance, which would attract Section 115, Civil P. C.

I am also unconvinced if the impugned order has resulted in any grave failure of justice I must not be understood to affirm the view of the Court below that Order 41, Rule 27, Civil P. C., is inapplicable to appeals against orders granting temporary injunctions I am not expressing any considered opinion on this point. I would dismiss this revision, but without any order as to costs.

I, however, direct that the trial Court should proceed with due despatch and attempt to dispose of the suit within

three months from today. Cases of this nature demand priority and it is only in the fitness of things that business of the society in question is not allowed to suffer because of personal squabbles in such concerns. I am informed that the Court below has already fixed 7-12-1968 for awaiting the return of the record from this Court. I direct that the record be immediately sent back and the parties should appear in the trial Court on 25-11-1968 and the Court would make suitable orders for further proceedings, including, if considered desirable, production of evidence on 7-12-1968, already fixed

TVN/D.V.C.

Petition dismissed.

E N D

date. It does not lack pride of ancestry. It deals with substantive rights and obligations and their sources under Civil Law. It also deals with the rights acquired, such as, right of freedom, right of association, right of acquisition and so on. Succession and contracts in general and in particular; rights acquired by possession and prescription of immoveable and movable properties in particular and in general; positive and negative prescriptions, according to which, rights and also causes of action may be lost by prescription, the prescriptive period being generally 20 to 30 years, except in certain cases when such period is shorter in regard to movable property and other allied matters; 'Testamentos' (Wills) and some other matters of substantive nature, in addition, are dealt with in this Code. In short, the Code lays down the general law. The Commercial Code provides for the special rules applicable to merchants, covering the entire mercantile law. The Portuguese Civil Procedure Code regulate procedure in the conduct of civil suits. Article 529, as translated, reads as under :—

"When, however, the possession of immovables or "direitos imobiliarios" (immobile rights) as mentioned in the preceding section has lasted for 30 years, prescription will operate, regardless of bad faith or lack of title save what is provided under Article 510."

It speaks of what is known as acquisitive prescription. The prescription by which a right is acquired, as in the case of Section 25 of the 1963 Act, is called an acquisitive prescription. The prescription by which a right is extinguished, as in the case of Section 27 of the 1963 Act, is called an extinctive prescription. It prescribes a period of 30 years, on the expiry of which, not only the judicial remedy is barred but a substantive right is acquired or extinguished as the case may be. Article 510 has no application for the present purpose. Article 535, as translated, reads thus:—

"Whoever has assumed an obligation to do or give something to another stands relieved of the obligation if its performance is not demanded for a period of 20 years and the obligant stands in good faith, at the end of the prescription period; or when the performance is not demanded for a period of 30 years, regardless of good or bad faith, except where special prescriptions are provided in law.

Para unique : The good faith, in the case of negative prescription, consists in the ignorance of the obligation. This

ignorance is not to be presumed in the case of persons who originally contracted the obligation".

This Article also speaks of prescription but extinctive in nature; it absolves the debtor or the person incurring an obligation from the debt or obligation if performance is not demanded within the specified period. According to Mr. M. S. Usgaokar, these Articles are part of substantive law and not adjective or procedural law and they are so special in their nature and source that they stand outside the scheme of the corresponding Articles 74, 31 and 65 of the Schedule to the 1963 Act. Let us see what these Articles provide. Article 74 prescribes the period of one year for suit claiming compensation for a malicious prosecution. The starting point of limitation is when a plaintiff is acquitted or the prosecution is terminated. Article 31 prescribes a period of 3 years for a suit on a bill of exchange or promote payable at a fixed time after date. The starting point of limitation is 3 years from the date when the bill or promote falls due. There is no corresponding provision to Article 535 when the suit is not based on the bill of exchange or promote. Article 65 prescribes a period of 12 years for possession of immoveable property or any interest therein based on title. The starting point is 12 years when the possession of the defendant becomes adverse to the plaintiff. The argument of Mr. Usgaokar prima facie is not without substance. English law is committed to the view that statutes of limitation if they merely specify a certain time after which rights cannot be enforced by action, affect procedure, and not substance (Cheshire on 'Private International Law', 6th Edition, p. 685). The 1963 Act also seems to be committed to this view.

The Portuguese Civil Code has been adopted by Parliament and it is now our law, though based on the Continental system of law inspired by the Code Napoleon, 'Xec Ayub v. Goa Government' AIR 1967 Goa 102 at p. 110. It seems Articles 529 and 535 not only bar the judicial remedy but also seem to extinguish altogether the claim or right to sue. In substance, effect and application, these Articles are basically different from the corresponding Articles of the Schedule to the 1963 Act. A statute which ordains that actual ownership shall be obtained by long continued possession goes to the substance of a transaction (Cheshire p. 687). They are to be considered as special law, as they deal with special subjects or special class of objects in special circumstances in contradistinction to the general subjects

and class of subjects dealt with in the 1963 Act. There may be some Articles in the Portuguese Civil Code (for example Article 504) which deal with the procedural law but by and large, they deal with substantive law. The Portuguese Civil Code gives rise to special causes of action for which special and exclusive remedies have been provided therein and, applying the principles enunciated in the aforesaid decisions, I am inclined to treat these Articles as a 'special or local law' for the purposes of section 29 (2) of the 1963 Act, standing in their own right, outside the scheme of the 1963 Act, and not forming a constituent part thereof. In this view of the matter the suits instituted are well within time. It is common ground that if these Articles apply then the suits are not barred by limitation.

7. The second question, namely whether the 1963 Act repeals Articles 529 and 535 of the Portuguese Civil Code was argued by learned counsel for the parties at length. The arguments were canvassed on the assumption that S 29 (2) is inapplicable. It is said that that there may be another view different from the view taken by the Court on the application of the section and, therefore, the Court may also deal with this question. I propose to deal with it so that this matter is finally disposed of so far as this Court is concerned. The 1963 Act is 'an Act to consolidate and amend the law for the limitation of suits and other proceedings and for purposes connected therewith'. The object of consolidation is to present the entire body of the statute law on limitation. The 1963 Act is in the main, a restatement of the provisions contained in the Limitation Act, 1908, with certain additions and amendments. It repeals the Limitation Act, 1908, in express terms, as will be clear from section 32. In 'Municipal Council, Palai's case AIR 1963 SC 1561, (supra), the Supreme Court observed.

"It is undoubtedly true that the legislature can exercise the power of repeal by implication. But it is an equally well settled principle of law that there is a presumption against an implied repeal. Upon the assumption that the legislature enacts laws with a complete knowledge of all existing laws pertaining to the same subject the failure to add a repealing clause indicates that the intent was not to repeal existing legislation. Of course, this presumption will be rebutted if the provisions of the new Act are so inconsistent with the old ones that the two cannot stand together. Of course, there is no rule of law to prevent repeal of a special by a later general statute and, therefore, where the provisions of

the special statute are wholly repugnant to the general statute, it would be possible to infer that the special statute was repealed by the general enactment."

Mr. M. S. Usgaokar, learned counsel for the respondents, argued — and not without substance — that Parliament having continued in force the Portuguese Civil Code under section 5 of the 1962 Act, Parliament was aware of its existence and the failure to repeal it expressly indicates that Parliament did not intend to repeal the Portuguese Civil Code. He also argued that the subject matter of the 1963 Act and the Portuguese Civil Code being different, the two sets of the Articles cited can co-exist and that they are not inconsistent or repugnant. As against these arguments, Mr. S. K. Kakodkar, learned counsel for the appellant, contended that the intention to repeal can be gathered from the interval gap between the publication of the 1963 Act and its enforcement in the territory. He also contended that Articles 529 and 535 of the Portuguese Civil Code must give way to the corresponding Articles in the 1963 Act, as both cannot co-exist. Mr. Bernardo Reis and Mr. S. V. Joshi contended similarly.

I shall consider these rival contentions, but before I do so, I may also refer to the provisions of sections 30 and 31 of the 1963 Act. They seem to supply an answer against repeal by necessary implication, of the Portuguese Civil Code. Section 30 (a) relates to provisions for suits etc., for which the prescribed period is shorter than the period prescribed by the Limitation Act, 1908, it provides that "any suit for which the period of limitation is shorter than the period of limitation prescribed by the Indian Limitation Act, 1908, may be instituted within a period of 5 years next after the commencement of this Act or within the period prescribed for such suits by the Limitation Act, 1908, (9 of 1908) whichever period expires earlier". The period of grace in the two situations contemplated in this section is in relation to the 1908 Act only and not in relation to the suits for which the prescribed period may be shorter or longer under the Portuguese Civil Code. Section 31 (a) gives effect to the well-settled principle that the new law of limitation would not revive a barred debt on the date when the new limitation law comes into force, 'Govt of Rajasthan v. Sangram Singh', AIR 1962 Raj 43 (FB) and also the decision of the Supreme Court of Justice in Lisbon dated 11th June, 1941 published in "Revista de Legislaçao Jurisprudencia" — Ano 74 — no 2703 p 201, cited by Mr. Reis. In such a case no breathing time is given to the litigant. His remedy

must continue to be governed by the old law of limitation. The reason is obvious. The object of limitation is to extinguish stale demands. In Story's 'Conflict of Laws' Edition, 8, p. 794, it is stated:

"Statutes of limitation are statutes of repose to quiet titles. . . They proceed upon the presumption that claims are extinguished or sought to be held extinguished whenever they are not litigated within the prescribed period. They quicken diligence by making it in some measure equivalent to right. They discourage litigation by burying in one common receptacle all the accumulations of past times which are unexplained and have now from lapse or time become inexplicable. It has been said by John Voet that controversies are limited to a fixed period of time, lest they should be immortal while men are mortal."

Article 31 (a) would not revive the debt barred under the Limitation Act, 1908. We are however not concerned with this situation in the present case. Article 31 (b) does not affect any suit instituted before, and pending at the commencement of the 1963 Act. The present three suits were all instituted after the 1963 Act came into force and, therefore, this provision also is not attracted. Articles 30, 31 (a) and 32 refer in terms to the Limitation Act 1908 only, but not to the Portuguese Civil Code or any other special or local law on limitation. Articles 529 and 535 being a part of the substantive law, submitted Mr. M. S. Usgaokar, they are not affected by the procedural law enacted in the corresponding Articles of the Schedule to the 1963 Act, and therefore the question of repeal would not arise. This also is the view of the learned Subordinate Judges.

Mr. Reis submitted, on the other hand, that Article 535 is of procedural nature but not Article 529. They are *prima facie* substantive law, but assuming they are procedural law, will the application of section 29 (2) be in doubt? I would for a moment go back to this aspect before I consider the arguments on interval or gap. As pointed out earlier, this section is attracted when any special or local law prescribes for any suit a period of limitation different from the period prescribed by the Schedule to the 1963 Act. The possible contention may be that the Schedule to the 1963 Act containing the Articles cited does not provide for a period of limitation in suits identical with that for which the Portuguese Civil Code provides and, consequently, this section would be inapplicable. The answer to this contention may be that this section would still apply and, in this connection

the decision of the Supreme Court in Vidyacharan's case AIR 1964 SC 1099 (supra) may serve as the sheet anchor of the respondents. The ratio, in that case, was that even where there was no provision in the Schedule for an appeal in a situation identical with that for which the special law provides, the test of prescription of a period of limitation different from the period prescribed by the First Schedule to the Limitation Act 1908, is satisfied. The Supreme Court in stating this ratio relied on the observations of Chagla C. J., in 'Canara Bank Ltd. v. Warden Insurance Company Bombay' AIR 1953 Bom 35. This ratio, it is submitted, with respect, may also apply to the three suits instituted under the Portuguese Civil Code, assuming these Articles are procedural.

8. The scheme of the 1963 Act and the scheme of the Portuguese Civil Code are basically different. An essential requirement for the application of the principle of implied repeal is that there should be identity of the subject matter in the two Acts. There should be no difference as regards the objects, purposes, sources and scope. For my part, as I see this matter, there is really no conflict, repugnancy or inconsistency between the two sets of the Articles cited. Parliament, in its legislative wisdom, did not intend to affect the law enacted in Articles 529 and 535. In 'Municipal Council, Palai's case, AIR 1963 SC 1561' (supra) section 72 of the Travancore-Cochin Motor Vehicles Act (10 of 1125 M. E.), a later general law, was not construed as having repealed by necessary implication sections 286 and 287 of the Travancore-Cochin District Municipalities Act (23 of 1016 M. E.). The legislative intent, in that case, was to allow the two sets of provisions to co-exist because both were enabling provisions. The interval between the enactment of the 1963 Act and its coming into force was about 88 days.

Now, it is clear, that the enacting clause in section 1 (3) of the 1963 Act did not warn the litigants that they should institute the suits governed by the Portuguese Civil Code within a particular period. What it said in terms was that the Act shall come into force on such date as the Central Government may by notification in the official gazette appoint. This date may be a few days or a few months depending upon the Central Government, a delegated authority. Such a warning may have made the case of the respondents weaker. The 1963 Act also does not contain a provision on the lines of section 4 of the Goa, Daman & Diu (Laws) Regulation 1962, promulgated by the President on 22nd November, 1962.

Section 3 provides for extension of the Acts in force in other territories to the territory, subject to the modifications, if any. These Acts are specified in the Schedule to the said Regulation. Section 4 is repealing and saving clause, it repeals any law in force in the territory corresponding to any Act referred to in section 3, and, in addition, contains a saving clause on the lines of section 6 of the General Clauses Act, which applies to express repeals. Parliament was aware of the said section 4 but still left the Portuguese Civil Code untouched and confined itself only to the scheme of the Limitation Act, 1908. In this connection reference may also be made to sections 3 and 4 of the Goa, Daman and Diu (Extension of the Code of Civil Procedure and the Arbitration Act) Act, 1965, noted earlier. Mr S. K. Kakodkar cited 'Government of Rajasthan' case, AIR 1962 Raj 43 (FB) (supra) on implied repeal in the context of this interval or gap between the enactment of the 1963 Act and its enforcement. Mr Usgaokar referred me to 'Belgaum District School Board' case, AIR 1945 Bom 377 (supra) decided by the Bombay High Court, 'Joshi Maganlal Kunverji v. Thacker Mulji Budha' AIR 1951 Kutch 15, and 'Jethmal v. Ambisingh' AIR 1955 Raj 97 (FB) in support of his contention against implied repeal. I shall review these decisions briefly.

9 In the Belgaum District School Board case, AIR 1945 Bom 377 Chagla C. J., observed.

"Considering these authorities, it is clear that as a rule statutes of limitation being procedural laws must be given a retrospective effect in the sense that they must be applied to all suits filed after they came into force. This general rule has got to be read with one important qualification, and that is that if the statute of limitation, if given a retrospective effect, destroys a cause of action which was vested in a party or makes it impossible for that party for the exercise of his vested right of action, then the Courts would not give retrospective effect to the statute of limitation".

The question urged before the learned Chief Justice was that the claim of the respondents who were teachers was barred except for the amount deducted within 6 months of the filing of the suit and the claim for injunction, and thus contention was based on the Bombay Primary Education Act, 1923, as amended by Act 12 of 1938. The latter Act provided a period of limitation for filing suits against the District Board for anything done, or purporting to have been

done in pursuance of the 1923 Act, and the period of limitation provided was six months from the date of the Act complained of. The 1938 Act was published in the Gazette on 27th May, 1938, and section 1 provided that it shall come into force on such date as the Provincial Government may by notification in the Official Gazette appoint, and the date appointed by that Government was 1st July, 1938. There was thus an interval between 27th May, 1938 and 1st July, 1938, during which period, the operation of the Act as amended was suspended and the necessary intimation was given by the legislature to the public that the Act would come into force on 1st July, 1938, and that if they were not vigilant about their rights, they would be deprived of them. It is true that it was not open to the respondents in that case immediately to go to court on the Act being published on 27th May, 1938 because under section 26-E a notice of 30 days had to be given to the District Board; even so, if such a notice had been given and the necessary period had expired, still a few days would have been left to the respondents to file the necessary suits for claiming refund. According to the learned Chief Justice, this period was extremely short but he could not possibly hold that the respondents were deprived of an opportunity of exercising their right of action which had vested in them. In this view of the matter he 'reluctantly' came to the conclusion that the claim of the respondents except for a period of six months prior to the filing of the suit and for injunction was barred by limitation. In that case necessary intimation about the 1938 Act coming into force on 1st July, 1938, was given in no uncertain terms, but not in the present suits. There was no saving clause on the lines of section 30 (a) of the 1963 Act in that case, as in the case of AIR 1967 SC 1320 (supra) decided by the Supreme Court.

In this case, the suit for recovery of Wakf Property in Hyderabad was instituted by Mutwali on 3rd February, 1956, pleading that dispossession took place on 20th September, 1937. There was no period of limitation in such a suit under the Hyderabad Limitation Act, 1932. On 1st April, 1951, the Part B States (Laws) Act 1951 came into force in Hyderabad. By that Act the Limitation Act, 1908 was extended and the corresponding law in force stood repealed. Under Article 142 of the first schedule to the 1908 Act such a suit was barred. This Article for recovery of possession reckoned a period of 12 years from the date of dispossession. The Trial Court held that the suit was barred. The High Court, on appeal, held that the suit was governed by the Hyde-

rabad Limitation Act and, therefore, was not barred. According to the High Court the application of the 1908 Act would bar and confiscate the existing cause of action, as the Part B States (Laws) Act while extending the 1908 Act to Hyderabad did not allow a reasonable time to the plaintiffs for enforcing the existing cause of action and consequently the 1908 Act could not affect the suit which was governed by the Hyderabad Limitation Act. Bachawat J., speaking for the Supreme Court, observed that the said 1951 Act was passed on 27th February, 1951, and was brought into force in Hyderabad on 1st April, 1951. Further, the 1908 Act was extended with the addition of section 30 prescribing a shorter period of limitation for the institution of the suits. Section 30 enabled the plaintiffs to institute the suit within a period of 2 years after 1st April, 1951, while extending the 1908 Act to Hyderabad. Parliament allowed the plaintiffs reasonable time to institute the suit for recovery of the property. The extension of the 1908 Act to Hyderabad and the consequential change in law prescribing a shorter period of limitation, according to their Lordships, did not confiscate the existing cause of action and must be regarded as an alteration in the law of procedure for the enforcement of the cause of action. In this view of the matter, it was held that since the plaintiffs did not institute the suit within 2 years from 1st April, 1951, therefore, they could not avail themselves of the benefit of section 30 and hence the suit for recovery of the Wakf property was barred.

The decision by Chagla C. J. cites 'Gopeshwar Pal v. Jiban Chandra' AIR 1914 Cal 806 : 41. Cal 1125 (FB); 'Khusalbai v. Kabhai' (1881-82) 6 Bom 26; 'Reg. v. Leeds and Bradford Ry. Co.' (1852) 21 L. J. M. C., 193; 'The Yudan' (1899) 1899 p. 236; and 'Rajah of Pitapur v. Venkata Subba Row', AIR 1916 Mad. 912 (FB), where there was either no interval or a short interval, and the effect was to confiscate the right to sue or bring about alteration or improvement in the law of procedure. In the case at s. no. (1), the plaintiff was dispossessed by the assignee of the landlord in 1908. The suit was filed on 9th July, 1909. Under the law then in force, suits could be brought within 12 years after dispossession in such cases. On 11th May, 1907, an Amending Act was passed cutting down the period of limitation to 2 years. No interval was given for the Amending Act to come into force, and the question that arose for consideration was, whether the Amending Act should have retrospective effect. At p. 1132, in the course of the arguments, Jenkins C. J. observed:

"The tendency of the cases seem generally to be not to construe an Act so as to take away any existing right. But there is no objection to say that where the time for suing is cut down, but it does not amount to a confiscation of right, the new Act is applicable. That reconciles all cases".

It was held in this case that it was impossible for the plaintiff to comply with the provisions of the Act; that he had a vested right of suit; and that the Act could not be construed to mean that that vested right had been destroyed by the passing of that statute. There was no provision on the lines of section 30 (a) of the 1963 Act and further there was no interval for the Amending Act to come into force. In the case at s. no. (2), an important consideration that weighed with the Bombay High Court in refusing to give retrospective effect to the Amending Act of limitation was that it came into force at the moment at which it received the assent of the Governor General. In the case at s. no. (3) there was an interval of 6 weeks between the passing of the Act and its coming into operation. This concession indicated that the hardship in question was in the contemplation of the legislature, and had been provided for. The retrospective operation in this case was regarded as valid. In the case at s. no. (4), a sufficient interval was given by the legislature from 5th December, 1893, to 1st January, 1894, so that if the intending suitors were not vigilant their right of action would be barred. It was said in this case that:

". . . . It is clear that what must be taken to be an improvement in procedure is not to be considered as interference with a vested right of those who would have preferred the procedure to remain in its unreformed condition".

In the case at s. no. (5), the question arose whether sections 210 and 211 and Article 8 of Part A of the Schedule of the Madras Estates Land Act (1 of 1908), should be given a retrospective effect. In that case the Act came into force two days after it received the assent of the Governor General; and as stressed by the learned Judges of the Madras High Court, it gave no opportunity to the plaintiff for the exercise of his vested right of suit. The claim for rent pleaded in the suit was not barred at the date of the passing of the Act, and the result of the passing of the Act, was to give no opportunity for the exercise of the plaintiff's vested right of suit. In the premises the learned Judges of the Madras High Court held that the effect of the amendment would be, if construed retroa-

tively, to destroy the plaintiff's right of suit which was in existence when the Act came into force In Maganlal Kunverji's case, AIR 1951 Kutch 15 (supra) the plaintiff had a vested right under the Limitation Act repealed to bring his suit when the new Limitation Act came into force The effect of the new Limitation Act was to destroy this vested right outright In such circumstances the new Act was construed prospectively In reaching this conclusion the learned Judicial Commissioner relied on 'Gopeshwar Pal's' case (supra) decided by the Calcutta High Court He cited the following observations from that case.

"The law as amended may regulate the procedure in suits in which the plaintiff could comply with its provisions, but cannot govern suits when such compliance was from the first impossible. The effect is to regulate and not to confiscate There are two positions, where in accordance with its provisions a suit could be brought after the passing of the amendment it may be that the amendment may apply but when it could not then the amendment would have no application"

In 'Jethmal v. Ambisingh's case AIR 1955 Raj 97 (supra) the Rajasthan High Court dealt with the suit instituted by the plaintiff against the defendant on 23rd January, 1952 This was on the basis of an account stated on 15th December, 1947. The original period of limitation applicable was 6 years under Article 64, Marwar Limitation Act, 1945 The Marwar Limitation (Amendment) Act 1949 provided in section 4 a saving clause but there was no interval between its enactment and coming into force. It came into force from its publication on 27th March, 1949 The period of limitation under Article 64 was reduced from 6 years to 3 years under the 1949 Act This reduced period was to start within 3 years after the commencement of the 1949 Act The suit filed therefore was within time, as this period expired when compared to the 6 years period under the 1945 Act The suit could have been filed up to 26th March, 1952. The period of grace was 3 years or 6 years under the 1949 Act, whichever period expired first The saving clause was on the lines of section 30 (a) of the 1963 Act, Modi J, who delivered the leading judgment, stated that whether a saving provision exists or not, when an Amending Act of limitation cuts down the period formerly available and such Act comes into force at once, the true principle of limitation is, and must be, that the Amending Act should not receive a retrospective operation so as to 'destroy pre-exist-

ing and vested rights of suit in spite of the general principle that a law of limitation is procedural and, must therefore, receive retrospective effect The learned Judge also referred to some of the cases reviewed by Chagla C J, in the above Belgaum District School Board case, AIR 1945 Bom 378

The 1963 Act has a saving provision in relation to the 1908 Act only, and also it provides an interval in relation to the proceedings regulated by this Act only, before it came into force Lastly, in AIR 1962 Raj 43 (FB) (supra) the Rajasthan High Court also reviewed, amongst other decisions, its earlier decision in AIR 1955 Raj 97 (supra) The learned Judges laid down propositions of law which are well settled What was particularly emphasized was that in case the remedy to enforce a vested right is altogether barred on the date when the new law comes into force without providing any breathing time to the litigants, that remedy must continue to be governed by the old law of limitation.

10 It is true that breathing time of about 83 days was provided before the 1963 Act came into force in the territory but this action, by itself, does not imply that the Portuguese Civil Code was repealed by necessary implication As stated already, Parliament left the Portuguese Civil Code untouched when the 1963 Act was enacted Parliament could have brought the Portuguese Civil Code within the sweep of the 1963 Act, but in its legislative wisdom, and in order to avoid hardships to litigants governed by an entirely different system of law before the appointed day, Parliament confined itself only to the repeal of the limitation Act, 1908 I have no hesitation in agreeing with Mr M S Usgaokar that the doctrine of implied repeal is not attracted. The situation in this case at bar differs widely from the aforesaid cases reviewed.

It is true as Mr. S K. Kakodkar contends, that no person has a vested right in any course or procedure but it is equally true that where vested rights are affected prima facie it is not a question of procedure but of substance A new procedure would not apply when its application would affect or prejudice rights acquired under old law A new law ought to impose from on what is to follow, not on the past (nova constitutio futuris formam imponere debet non praesentis) Settled things should not be unsettled except for good reasons This is true of life as well as of law If Articles 74, 31 and 65 of the Schedule to the 1963 Act were to be applied, the vested right to sue which the respondents had

at the material time would be confiscated or destroyed, in absence of a saving clause on the lines of section 30 (a) of the 1963 Act. In the 'agravo' appeal, the respondent was acquitted on 6th April, 1960. In the very nature of the things compliance was from the first impossible. Parliament would not expect compliance with impossible situations, nor Judges would regard such situations as reasonable.

Finally, Mr. S. K. Kakodkar fell back on the argument of hardship and possible discrimination and he contended that if Articles 529 and 535 of the Portuguese Civil Code continue to hold the legislative field undisturbed, the litigants governed by the other Indian laws in the territory where the 1963 Act applies would be at a disadvantage. This is because of the long periods of limitation, irrational in their nature, under these Articles. Now, the arguments on discrimination, were not urged in the two courts below, nor in the memo of appeal in this Court. The Constitutional questions are to be properly pleaded, carefully argued and soberly considered. They are not to be decided on academic considerations. The question of discrimination, in the context of Article 14 of the Constitution, would be considered if and when it directly arises for consideration. As to the other argument, in the very nature of the things, there is something arbitrary about the periods of limitation (or prescription). The law is well settled that in considering statutes of limitation, considerations of hardship and anomaly are out of place.

In 'Boota Mal v. Union of India, AIR 1962 SC 1716 at p. 1719, Wanchoo J., (as he then was), speaking for the Supreme Court, observed that equitable considerations and also considerations of great hardship are out of place in construing provisions of law limiting the periods of limitation for filing suits or legal proceedings. Fixation of these periods must always be to some extent arbitrary. I am not quite sure whether long periods under the Portuguese Civil Code are irrational in their nature, but assuming they are, it is for Parliament to rationalize the law on limitation in matters governed by the Portuguese Civil Code and other Portuguese laws still in force in the territory. To vindicate the policy of the law is not a necessary part of the office of a Judge. The view of the learned District Judge in the first appeal that the provisions of section 30 of the 1963 Act, as adapted, in pursuance of S. 8 of the Goa, Daman and Diu (Administration) Act, 1962, could also be invoked so as to save the present suits from being barred by limitation, with respect, is

obviously untenable. Section 8 is not intended to apply in this case.

11. The facts and the arguments presented have been carefully considered. As I see this matter, the law is on the side of the respondents. In the second appeal there are concurrent findings of facts on the question of non-payment of the money due under the pronote. They are based on the evidence. The question of limitation is decided against the respondent, as in the other two proceedings. In this view of the matter section 100 of the Civil Procedure Code, 1908, is not applicable, and therefore, this second appeal is dismissed. The 'agravo' appeal and the revision petition are also dismissed. The record and proceedings may be sent back to the learned Subordinate Judges with directions to proceed with the trial of the suits in accordance with the provisions of the law. Interim stay orders granted in these matters are hereby vacated. In the revision petition under section 115 of the Civil Procedure Code, 1908, Mr. S. V. Joshi, learned counsel for the applicants, submitted that the respondents Jose Miguel Carmelino do R. Pires and his wife have filed the suit for declaration against the applicants Jose Paulo Santana Desiderio Lucas Teles, his wife and the other respondents with a view to harass them. The sale took place as early as 1954 and, inaction on the part of these respondents until October, 1966, indicates that the suit was filed with an ulterior object. The said submission of Mr. S. V. Joshi is to be considered by the learned Subordinate Judge and, if what is urged by him is correct, he will no doubt grant appropriate relief to the applicants. As to the costs in the two appeals and the revision application, in the special circumstances of the cases, I direct that they should be borne by the parties themselves. I also direct that preference should be given to the suits pending so that they are disposed of without further avoidable delay. The decisions in these matters will accelerate disposal of a number of cases pending where the 1963 Act has been pleaded as a bar to the suits instituted under the Portuguese Civil Code. Order accordingly.

DVT/D.V.C.

Order accordingly.

AIR 1969 GOA, DAMAN & DIU 136
(V 56 C 33)

V S JETLEY, J C

Joao Francisco Coelho, Applicant v.
Maria Luciana de Souza and another,
Respondents

Criminal Revn. Appln. No 3 of 1969,
D/- 24-3-1969

Criminal P. C. (1898), Section 488 (3),
First proviso, Explanation — Applicability — Causes mentioned in explanation can be considered at the stage of an order under Sub-section (1) of Sec. 488 — Expression "may make an order under this section" in first proviso, interpretation of — Object of proceedings under Section 488 — (Civil P. C. (1908), Preamble — Interpretation of Statutes). AIR 1968 Pat 139, Dissented from.

The object of the proceedings for maintenance is to prevent vagrancy and destitution by compelling the husband or father to support his wife or child unable to support itself. The explanation added by the Code of Criminal Procedure (Amendment) Act, 1949 to the first proviso enables the Magistrate to make an order of maintenance even when a wife refuses to live with her husband because of his second marriage or keeping a mistress. (Para 3)

It cannot be said that the Explanation to the first proviso is not applicable at the stage of making an order under sub-section (1) of Section 488. The first proviso envisages "an order under this section" and not under sub-section (3) only and, therefore, it would also apply at the stage of sub-section (1). The object of the legislature is to bring about reconciliation when the offer to maintain is bona fide. The object also is to promote domestic happiness and not keep a husband and a wife separate. The offer may be made before an order for maintenance is passed. The offer may also be made at the stage of enforcement of the order under sub-section (3). A husband may not have a mistress at the stage of an order under sub-section (1). He may have a mistress thereafter at the stage of enforcement, and this fact could be a just ground for his wife's refusal to live with him. He may also have a mistress before order is passed under sub-section (1). Thus too would be a just ground for his wife's refusal to live with him and if neglect or refusal is proved, an order of maintenance under sub-section (1) would be legal and proper. The conditional offer, in that case, would not come in the way of the Magistrate making an order under sub-section (1). By

limiting the scope of the explanation to enforcement, the social object of the amendment would not be served. That object was removing the hardships suffered by a wife who refuses to live with her husband because he has kept a mistress or has another wife. The amendment sets at rest the controversy on the question whether such a ground constitutes sufficient reason to grant separate maintenance to the wife. Case law discussed AIR 1966 Bom 48 and AIR 1958 Mys 128, Rel on AIR 1968 Pat 139 Dissented from; AIR 1956 Cal 134, Explained. (Paras 5 and 6)

The expression "may make an order under this section" is to be construed so as to make it operative for the purpose of the entire section and not only sub-section (3). The word "section" is not used unnecessarily or superfluously by the legislature. The presumption is against such a use, and so effect must be given if possible, to all the words used, for the legislature is deemed not to waste its words or say anything in vain. It has to be given a sensible meaning. (Para 5)

Cases Referred: Chronological Paras

(1968) AIR 1968 Pat 139 (V 55) = 1968 Cri LJ 539, Subagi Devi v. Murli Pradhan	4
(1966) AIR 1966 Bom 48 (V 53) = 1966 Cri LJ 131, Tejabai v. Shankarrao	5
(1966) AIR 1966 Goa 32 = 1966 Cri LJ 1412 (FB), Caetano Colaco v Joao Rodrigues	5
(1959) AIR 1959 Punj 295 (V 46) = 1959 Cri LJ 767, Ishwar v. Soma Devi	4, 7
(1958) AIR 1958 Mys 128 (V 45) = 1958 Cri LJ 1201, Syed Ahmad v N. P. Taj Begum	4, 6
(1957) AIR 1957 All 658 (V 44) = 1957 Cri LJ 1052, Ram Kishore v Sm. Bunla Devi	4, 7
(1957) AIR 1957 Mad 693 (V 44) = 1957 Cri LJ 1282 (2), M. Ponnambalam v. Saraswati	4, 7
(1956) AIR 1956 Cal 134 (V 43) = 1956 Cri LJ 526, Sm. Bela Rani v Bhupal Chandra	4, 7
(1954) AIR 1954 All 30 (V 41) = 1953 Cri LJ 1197, Maiki v. Hemraj	4, 5

S K. Kakodkar with A. J. Kenkre, for Applicant; R. R. Kolwalkar, for Respondent. No 1, S Tamba Govt. Pleader, for Respondent, No 2.

ORDER:— The short question for consideration in this revision petition is

whether the explanation to the first proviso to sub-section (3) of Section 488 of the Code of Criminal Procedure applies at the stage of making an order of maintenance under sub-sec. (1) of S. 488 (hereafter referred to as "the Code"). This explanation has caused some doubt or difficulty in its construction. It has led to difference of opinion in some High Courts.

2. The material facts which are few and simple may be set out before this question is examined. The respondent — Maria Luciana de Souza — married the applicant — Joao Francisco Coelho — in April, 1965. The applicant, his brother and his brother's wife were living in the house of the applicant at the time of the marriage. The brother of the applicant after some time left for abroad, but his wife continued to live with the applicant. The married life of the applicant and the respondent lasted for a few months when the respondent left the house of the applicant and went to reside with her mother. The reason for leaving the house was that she found the applicant on terms of illicit intimacy with his brother's wife. They shared the bed together but, as far as she was concerned, she was treated, in a manner of speaking, like a "hewer of wood and drawer of water". According to her, she was ill-treated and often beaten both by the applicant and his brother's wife. Efforts were made to bring about reconciliation but they proved abortive. The respondent ultimately filed the application for maintenance under Sec. 488 of the Code, in June, 1967. In that application, she claimed maintenance on the basis of the following allegations:— a) Ill-treatment; b) physical and mental cruelty which compelled her to leave the house of the applicant; and c) neglect by the applicant to maintain her. The applicant denied these allegations. It was his case that the respondent had left him, of her own accord, and that he is prepared and willing to receive her in his house and treat her as his wife. The learned Magistrate after examining the evidence adduced on behalf of the parties recorded the following conclusions:— 1) The evidence produced does not prove that the respondent had been ill-treated; 2) it is not proved that she was often refused food and other essential requirements; 3) that the applicant has illicit connections with his brother's wife and therefore the respondent has a good reason to leave the house of the applicant; and 4) that neglect or refusal to maintain her is implied in this case from the circumstances on the record. In this view of the matter, the learned Magistrate passed an order directing the applicant to pay to the respondent a sum of Rs. 70/-

as a monthly allowance for her maintenance. The applicant felt aggrieved by this decision and later moved the Court of Session in revision. The learned Sessions Judge concurred with the learned Magistrate that the applicant has illicit connections with his brother's wife and, therefore, the respondent has a just ground for not living with the applicant. He also added that the applicant ceased to maintain the respondent from the day she left his house and that neglect or refusal to maintain her is established. He did not accept the argument at the bar, on behalf of the applicant, that the explanation to the first proviso to sub-section (3) of Section 488 applies at the stage of enforcement of an order under sub-section (3), and not at the stage of an order under sub-section (1). The applicant also felt dissatisfied with this decision and then moved this Court in revision under Sections 435 and 439 of the Code.

3. There are concurrent findings of fact based on the evidence that the applicant has been having illicit connections with his brother's wife. These findings of fact are based on the evidence and therefore have to be accepted. Mr. S. K. Kakodkar, learned counsel for the applicant, in this situation, confined himself only to the question of law set out in the opening paragraph. Learned counsel for the parties cited certain authorities which I shall consider but before doing so it may be worthwhile turning to the scheme of Section 488. This section is included in Chapter XXXVI of the Code under the heading "Of the Maintenance of Wives and Children". It consists of 8 sub-sections. The sub-sections (6) to (8) are not material for the present purpose and, therefore, it is not necessary to refer to them. The object of the proceedings for maintenance is to prevent vagrancy and destitution by compelling the husband or father to support his wife or child unable to support itself. Sub-section (1), for the present purpose provides for grant of a monthly allowance when, a husband having sufficient means neglects or refuses to maintain his wife. Sub-section (2) mentions the respective dates when such allowance shall be payable. Sub-section (3) provides for enforcement of the order passed under sub-section (1). This sub-section is important and it reads thus:—

"If any person so ordered fails without sufficient cause to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance

remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment if sooner made

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing

If a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him.

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due." The substantive part of sub-section (3) relates to enforcement of an order of maintenance passed under sub-section (1). The first proviso is concerned with an offer of a husband to maintain his wife on condition of her living with him and her refusal to live with him. The explanation "if a husband has contracted marriage with another wife or keeps a mistress it shall be considered to be just ground for his wife's refusal to live with him" was added by Section 2 of the Code of Criminal Procedure (Amendment) Act, 1949, in February, 1949. It enables the Magistrate to make an order of maintenance even when a wife refuses to live with her husband because of his second marriage or keeping a mistress. The second proviso limits the period for recovering the amount due by way of maintenance. Sub-section (4) disentitles a wife from receiving a monthly allowance because of the causes mentioned therein. It operates as a bar on a wife to receive an allowance from her husband at the stage of the proceeding under sub-section (1) or thereafter. Sub-section (5) postulates cancellation of the order of maintenance on proof of the causes mentioned therein. It will be noticed that the causes mentioned in sub-sections (4) and (5) are the same, but sub-section (5) expressly provides for cancellation of an order under sub-section (1). A judicial order passed has to be cancelled on proof before it ceases to have effect.

4 Mr S K. Kakodkar, learned counsel for the applicant, cited 'Subhag Devi v. Murli Pradhan', AIR 1968 Pat 139, *Sm. Bela Rani v. Bhupal Chandra*, AIR 1956 Cal 134, *M. Ponnambalam v. Saraswathi*, AIR 1957 Mad 693, *Ram Kishore v. Sm.*

Bimla Devi, AIR 1957 All 658, and *Ishar v. Soma Devi*, AIR 1959 Punj 295, in support of the scheme of section 488 generally and in particular in support of his contention that the consideration of keeping a mistress or contracting a second marriage is relevant after an order for maintenance is passed under sub-section (1), and not at the stage of an order under sub-section (1). Mr R R Kolwalakar contended that this consideration is quite relevant at the stage of sub-section (1) and, in support of that contention, he relied on *Maiki v. Hemraj*, AIR 1954 All 30 and *Syed Ahmad v. N. P. Taj Begum*, AIR 1958 Mys 128. I shall review these decisions and endeavour to show that the said contention of Mr S K Kakodkar has not the support of Section 488. AIR 1968 Pat 139 is a judgment by a Single Judge. This decision is the sheet anchor of his argument. It was decided in this case that sub-section (3) including its two provisos comes into play only after the person has failed without sufficient cause to comply with an order passed against him under sub-section (1). It was also decided that it is not applicable at the very first stage when the Magistrate is called upon to pass an order under sub-section (1). The expression "may make an order under this section" which is to be found in the first proviso means that the Magistrate may issue a warrant for levying the amount due notwithstanding the offer of the husband to maintain his wife where he is satisfied that the wife has just ground for refusing to live with him. In the premises according to the learned Judge, what the Magistrate has to consider at the stage of passing an order under sub-section (1) is whether the husband though possessor of sufficient means has neglected or refused to maintain his wife and not whether the wife has just ground for refusing to live with the husband. In reaching this conclusion, the learned Judge relied on AIR 1956 Cal 134 but dissented from AIR 1954 All 30. In his own words:—

"Mr Ghose, however, relies upon the decision of a learned Single Judge of the Allahabad High Court (Lucknow Bench) in *Smt Maiki v. Hemraj*, AIR 1954 All 30 where it was held that the effect of the amendment made in Section 488 by Act 9 of 1949 is that no other ground for refusing to live with the husband need be looked into if he has taken a second wife or kept a mistress. But it is not clear from the report as to whether such a consideration must be applied at the stage when the Magistrate is called upon to decide as to whether an order of maintenance should be passed or not under sub-section (1). If, however, it was intended to lay down that even at

that stage the Magistrate should have regard to the just ground for the wife's refusal to live with the husband, then, with respect, I am unable to accept the decision as correct, because under sub-section (1), the relevant question for consideration is whether or not there has been refusal or neglect to maintain the wife, and not whether the wife has or has not just ground for refusing to live with the husband.

In this view, I am supported by the decision of the Calcutta High Court in AIR 1956 Cal 134 to which I have already referred. There it was observed:

'In our view, it is not permissible to read into the explanation anything more than what it says in the context of proviso 1 to sub-section (3). There it was further held: "The mere fact of a second marriage cannot ipso facto establish 'such neglect or refusal' within the meaning of sub-section (1) of Section 488, Cr. P. C., for, a man may marry a second time and still not refuse to maintain his first wife.'

In our view, the mere fact that a husband has contracted marriage with another wife or keeps a mistress cannot, without more, be said to amount to neglect or refusal on the part of the husband to maintain his wife within the meaning of sub-section (1) of Section 488, Criminal P. C."

5. I am unable to agree, with respect, with the learned Judge, that the causes mentioned in the explanation are not to be considered at the stage of sub-section (1). The facts considered in AIR 1954 All 30 would seem to show that the explanation was relied upon at the stage of passing an order under sub-section (1) and not thereafter. The learned Single Judge of the Allahabad High Court said that the effect of the amendment in 1949 obviously is that the ground mentioned in this amendment which was sometimes accepted as a valid ground and sometimes not, should be accepted as a valid ground for the wife's refusal to live with her husband if he has taken a second wife or kept a mistress. He then went on to say that no other ground for refusal to live with the husband need be looked into if there is this good ground for the wife's refusal to live with her husband. With respect, I agree. The ratio of AIR 1956 Cal 134 is that the mere fact of a second marriage cannot ipso facto establish neglect or refusal for the purpose of sub-section (1), for, a man may marry a second time and still not refuse to maintain his wife. The mere fact that a husband has contracted marriage with another wife or keeps a

mistress cannot, without more, be said to amount to neglect or refusal on the part of a husband to maintain his wife within the meaning of sub-section (1). This decision is by a Division Bench. The proposition of law enunciated by the learned Judges is well settled. The condition precedent for an order under sub-section (1) is that a husband having sufficient means neglects or refuses to maintain his wife. This is the very foundation of an order under sub-section (1) and what the explanation stresses is that keeping a mistress or marrying another wife is a just ground for the first wife's refusal to live with her husband. It does not say that it is a just ground for awarding maintenance. This decision also stated:—

"At first sight it would appear that the effect of the explanation introduced by the amendment of 1949 would be material only after an order under sub-section (1) of Section 488 has been made, but the language of proviso 1 to sub-section (3) makes it clear that a Magistrate may consider such ground of refusal on a wife's part to live with her husband and make an order under the section, notwithstanding the husband's offer to maintain her on condition of her living with him".

The aforesaid observations, with respect, do not support the view that the explanation cannot be considered at the stage of an order under sub-section (1). In this case the learned Judges of the Calcutta High Court dealt with the question of maintenance by a wife against her husband under sub-section (1), and the explanation to sub-section (3) was considered at that stage and not thereafter. In the absence of proof of neglect or refusal the learned Judges did not consider the factum of second marriage by itself as a ground for granting maintenance. This is so. I am afraid this case relied upon by Mr. S. K. Kakodkar does not support him. I agree with the learned Judge of the Patna High Court that the second proviso to sub-section (3) is not applicable at the stage of making an order under sub-section (1) but, with respect, I find it difficult to agree with him that the first proviso is not applicable at the stage of sub-section (1). The question of an offer by a husband to maintain his wife on condition of her living with him may arise at the stage of sub-section (1) or even thereafter depending upon the facts of each individual case. It is possible to conceive of a situation where a wife may leave home on account of legal cruelty on the part of her mother-in-law. A husband may be helpless against his powerful and domineering mother. In

this situation he may neglect to maintain his wife or refuse to live separate from his mother. He may thereafter recover his lost independence and have a separate home. He could then offer to maintain his wife on condition of her living with him. The explanation and the first proviso are to be read in association with each other and not in isolation. The first proviso envisages "an order under this section" and not under sub-sec (3) only and, therefore, it would also apply at the stage of sub-section (1). The object of the legislature is to bring about reconciliation when the offer to maintain is bona fide. The object also is to promote domestic happiness and not keep a husband and a wife separate. It need hardly be emphasized that the proper place for a wife is with her husband. The offer may be made before an order for maintenance is passed. The offer may also be made at the stage of enforcement of the order under sub-section (3) (*Tejabai v Shankarrao*, AIR 1966 Bom 48). The expression "may make an order under this section" is to be construed so as to make it operative for the purpose of the entire section and not only sub-section (3). The word "section" is not used unnecessarily or superfluously by the legislature. The presumption is against such a use, and so effect must be given if possible, to all the words used, for the legislature is deemed not to waste its words or say anything in vain (*Halsbury's Laws of England*, Volume 36, Third Edition, p 390). It has to be given a sensible meaning. The construction placed by the learned Judge of the Patna High Court on this expression, if I may say so with respect, unduly narrows its scope. The sequence of this proviso may, at first sight, lend support to the view taken by him but, it is not to be considered in isolation.

6 In AIR 1958 Mys 128 relied upon by Mr R R Kolwalkar, the argument urged on behalf of the applicant husband in revision was that the explanation inserted by the amendment in 1949 applies during the course of the enforcement of the order under sub-section (1) and that it has nothing to do with the order to be made under sub-section (1). In other words, the explanation is not attracted at the stage of making an order under sub-section (1). This argument was repelled by K. S Hegde, J. (as he then was) in the following words:—

"If I accept the validity of the petitioner's argument, it would be necessary to come to the conclusion that the entire first proviso to sub-section (3) of S 488, Cr. P. C. will be relevant only when an action is taken under sub-section (3). It

could have nothing to do with sub-section (1). To put it in other words no husband in proceedings under sub-section (1) of S 488 Cr P C, can take a plea that he is willing to maintain his wife on condition of her living with him. That plea will be only available to him when the order is being enforced. This would make the whole section look ridiculous. Courts have uniformly accepted the view that a husband could in an application under S 488, Cr P. C take the plea that he is willing to maintain his wife if she lives with him. It is a good defence if it is a bona fide one. If the main proviso is available in proceedings under sub-section (1) then it necessarily follows that the amendment made to that proviso will also be applicable to such cases. If the husband can plead that he is willing to maintain the wife, she in her turn can plead that she is not willing to live with him on the ground that he has taken a second wife. I see no particular reason as to why the plea in question should be available only at the time of enforcement of the order and not at the time of its passing. The learned counsel for the revision petitioner has evaded this question. He seems to think that it is legislature's folly and nobody else's concern. I refuse to feel so helpless. The several sub-sections to S 488 Cr. P. C have never been considered by Courts in isolation. They are an integrated whole. They must be taken cumulatively. When the legislature amended the first proviso to sub-section (3) of S 488, Cr P. C, it knew full well the scope of the first proviso as interpreted by decided cases. If the decided cases did not truly represent the legislative intention, the legislature would have certainly clarified its intention. But the fact that the legislature left the first proviso untouched excepting to provide an exception to it shows that there was no conflict between the intention of the legislature and the judicial interpretation. Judicial opinion has been uniform on this point. I unhesitatingly reject the contention of the revision petitioner".

The above reasoning, with respect, I adopt and follow. The legislature could not have intended that the explanation should apply only at the stage of the enforcement of an order under sub-section (1) and not before. A husband may not have a mistress at the stage of an order under sub-section (1). He may have a mistress thereafter at the stage of enforcement, and this fact would be a just ground for his wife's refusal to live with him. He may also have a mistress before order is passed under sub-section (1). This too would be a just ground for his wife's refusal to live with him and if neglect or refusal is proved,

an order of maintenance under sub-section (1) would be legal and proper. The conditional offer, in that case, would not come in the way of the Magistrate making an order under sub-section (1). By limiting the scope of the explanation to enforcement, the social object of the amendment would not be served. That object was removing the hardships suffered by a wife who refuses to live with her husband because he has kept a mistress or has another wife. The amendment sets at rest the controversy on the question whether such a ground constitutes sufficient reason to grant separate maintenance to the wife. (For further statement of objects and reasons see Gazette of India Part V dated August 28th 1948 at p. 628). The legislature provided a clear answer in the explanation, so as to remove any doubt in this matter.

7. In AIR 1957 All 658, it was said that the proviso to sub-section (3) is added in the interest of the wife and not the husband. It is to stop a Court from too readily accepting the proposition that as soon as a husband offers to maintain his wife if she lives with him he ceases to 'neglect' or to 'refuse to maintain' his wife. This offer is to be carefully tested and if the wife gives adequate reasons for refusing to live with her husband, she is not to be deprived of her right to maintenance. The learned Single Judge then went on to add that it is only when her reasons are insufficient that her claim can be denied. This decision dealt with enforcement of the order of maintenance passed under sub-section (1). It did not deal with the question whether the explanation applies or does not apply at the stage of an order under sub-section (1). It was mainly concerned with the first proviso and its implications. It spoke of "maintaining the order passed by him". This may perhaps throw some light on the expression "may make an order under this section" in the first proviso. AIR 1957 Mad 693 dealt with the case of a wife's refusal to live with her husband on account of the tyranny of the stepmother, a virago by temperament. This decision is not helpful except for the fact that the first proviso and the explanation to sub-section (3) were applied at the stage of making an order under sub-section (1) as in Allahabad, Mysore and Calcutta cases. The explanation qualifies the proviso. This is not all. It also governs the proceeding under sub-section (1). AIR 1959 Punj 295 is the last case to be reviewed. This was also the case of contracting a second marriage as in the Patna, Allahabad, Calcutta and Mysore cases cited above. The learned Single Judge relied upon AIR 1956 Cal 134 in support of his

conclusion that the fact of the second marriage cannot ipso facto establish neglect or refusal within the meaning of sub-section (1). This would furnish a just ground for the first wife to refuse to live with him, but neglect or refusal have to be proved independently. It may be added that the explanation was considered in this case, at the stage of making an order under sub-section (1) and not at the stage of its enforcement under sub-section (3). The learned Judge observed:

"From the respondent's act of taking another wife it may be possible to infer that he has no longer any intention to satisfy the expectations of the petitioner as regards her connubial or consortial rights. But neither denial of connubium in the sense of marital intercourse, nor refusal of consortium in the sense of avoiding society of the spouse can be considered a just ground for claiming relief under section 488 of the Code of Criminal Procedure. Such an act may be proof of husband's neglect of the first wife, but not of 'neglect or refusal to maintain her'. The only want, which this provision of law purports to relieve, relates to providing of food, raiment, and shelter. The legislature has advisedly used two words "neglect" and "refuse". "Refuse" means a failure to maintain when asked to do so, while "neglect" means a failure on the part of the party bound to maintain, even in the absence of a demand. A husband, therefore, without refusing to maintain his wife, may still be guilty of neglecting to maintain her. When there is avoidance or disregard of duty whether from heedlessness, indifference or wilfulness, it is a case of "neglect". The term "neglect" includes disregard of duty wilfully as well as unintentionally. A person is said to "refuse" when he denies or declines to do what is asked of him. "Refusal" is always a wilful and deliberate act. On the other hand, the word "neglect" imports an omission accompanied by some kind of culpability in the sense of a blameworthy conduct. Neglect is not always synonymous with omission. A person "neglects" who is remiss in paying attention to or in discharging duty towards another. "Neglect" is, therefore, not a mere omission without fault. It is an omission accompanied by some kind of censurable conduct on the part of the husband. But a husband cannot be said to have neglected or refused to maintain his wife who voluntarily lives apart from him".

8. This decision succinctly explains the meaning of the two expressions "refuse" and "neglect". Mr. R. R. Kolkalkar, learned counsel for the respon-

dent, argued that the applicant is keeping his brother's wife as his mistress. It may be stated here that it is not necessary for the purposes of law that a mistress must always be a stranger. A woman illicitly occupying the place of a wife is a mistress in its ordinary sense. The wife of the brother of the applicant supplanted the respondent in the house of the applicant. According to the evidence, she slept in the same room with the applicant whereas the respondent was made to sleep alone in a separate room in the house. The brother's wife was a partner of the bed of the applicant. They were having illicit connections. The courts of justice can redress or punish legal wrongs, but they cannot go farther. They cannot make men virtuous. According to Mr S. K. Kakodkar, neglect or refusal has to be proved independently of the immoral act on the part of the applicant. This is so. The offer of the applicant to maintain the respondent on condition of her living with him has not been regarded as bona fide by the two courts below, and for good reasons. This offer makes me think of crocodile tears. It reminds me of "lady doth protest too much". The respondent was made to leave the house of the applicant somewhere in April 1966 and thereafter up till the date of filing the application in June, 1967, the applicant refused or neglected to maintain her. This refusal or neglect was wilful. The conduct of the applicant is indeed blameworthy. He would take the respondent back but on his own terms; he would not give up his brother's wife nor, it seems, would he give him up. The applicant kept her back from the witness box for reasons best known to him. The trouble in this case arose because of the departure of the brother of the applicant for Kuwait. How true is the saying in this case "frailty thy name is woman."

9. I do not agree with Mr S. K. Kakodkar that the explanation does not apply at the stage of an order under subsection (1). The view of the Courts below that it applies at that stage is in conformity with the scheme of section 488 and has my approval. In this view of the matter, the answer to the question raised in the opening paragraph is in the affirmative. The revision petition is thus devoid of substance and is accordingly rejected. Order accordingly. The scope of revision petition is discussed by this Court in 'Caetano Colaco v Joao Rodrigues' AIR 1966 Goa 32 (FB).

LGC/D V C.

Petition rejected.

AIR 1969 GOA, DAMAN & DIU 142 (V 56 C 34)

V S JETLEY, J. C.

Vaijanath H Sanadi (in jail), Petitioner v State, Respondent

Criminal Misc Appln. No. 16 of 1969, D/- 26-6-1969

(A) Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (1963), S. 7 (2) proviso — Proviso is not bad in law merely because it provides for confirmation of order or sentence of lower Court in case of difference of opinion between two Judges, though presence of third Judge to resolve conflict would be better alternative (Para 3)

(B) Constitution of India, Art. 134 (1) (c) — Certificate of fitness — Supreme Court not an ordinary court of criminal appeal — Case must involve something more than mere appreciation of evidence — Difference of opinion in the matter of sentence of death only between two Judges — No third Judge to resolve difference of opinion — In accordance with Goa, Daman and Diu (Judicial Commissioner's Court) Regulation (1963), S. 7 (2) sentence passed by Sessions Judge maintained and order passed by one of the Judges of the Bench and sent to the other Judge who had been transferred as J. C to Manipur and Tripura — Supplementary order by this Judge, when he was no more the Judge of the Goa, Daman and Diu, J. C's Court — Question whether this supplementary order can legally form part of the decision finally passed by the other Judge — Certificate granted.

(Para 6)

Cases Referred Chronological Paras
(1967) AIR 1967 Goa 40 (V 54) =
1967 Cri LJ 463, Rajamkant v.
State 5

G S Marathe, for Petitioner; S Tamba Govt Pleader, for Respondent

ORDER.— Shri G S Marathe, learned counsel for the petitioner — Vaijanath H Sanadi — applies for a certificate under Article 134 (1) of the Constitution

2 The petition arises out of the decision given by this Court dated 21st June, 1969, upholding the sentence of death passed by the learned Sessions Judge, Panam, for the murder of Sidappa Velgathi on the night of 25th October, 1965. The material facts are that the petitioner, after a proper trial was convicted by the learned Sessions Judge under Sections 302 and 201 of the Penal Code, and was sentenced to death. The

GM/GM/C994/69/D

other accused — Krishna Hema Chorlekar — was also convicted under S. 201 of the Penal Code and was sentenced to undergo R. I. for 5 years. He was, however, acquitted of the offences charged under section 302 read with section 114 of the Penal Code. They preferred an appeal to this Court. There was also a reference to this Court under section 374 of the Code of Criminal Procedure for confirmation of the sentence of death. By his order dated 24th April, 1969, my brother declined to accept the reference for confirmation of the sentence of death. In the particular view taken by him he altered this sentence to the sentence of imprisonment for life. In the case of the other accused — Krishna Hema Chorlekar the sentence was reduced from 5 years to 2 years. I could not persuade myself to agree with my brother. In agreement with the opinion of the learned Sessions Judge, the conviction recorded and the sentence passed by him on the petitioner and the other accused Krishna Hema Chorlekar were maintained by my order dated 7th May, 1969, and this order was sent to my brother for information at Imphal, where he was transferred as Judicial Commissioner, Manipur and Tripura. He ceased to be an Additional Judicial Commissioner with effect from 24th April, 1969. In his supplementary order dated 6th June, 1969, signed at Imphal, while commenting on the order made by me dated 7th May, 1969, he gave additional reasons in support of the sentence of imprisonment for life. There being no third Judge to resolve the difference of opinion the sentences passed by the learned Sessions Judge on the petitioner and Krishna Hema Chorlekar were confirmed in accordance with the proviso to section 7 (2) of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963. This decision was communicated to them and their counsel on 21st June, 1969. There is no petition for a certificate on behalf of Krishna, Hema Chorlekar. The petition is only on behalf of the petitioner. This, in short, is the background of the petition.

3. The first ground in support of the certificate applied for under Article 134 (1) (c) "is that the proviso to Section 7 (2) of the Goa, Daman and Diu (Judicial Commissioner's Court) Regulation, 1963 is bad in law because it is against the basic principles of administration of justice." Section 7 (2) and its proviso read as under:—

"Where there is a difference of opinion among the members of the Bench on any matter coming up before it for determination, the opinion of the majority shall prevail and the orders of the Court

of the Judicial Commissioner shall be in terms of the views of the majority:

Provided that where there is no such majority which concurs in a judgment varying or reversing the decree, order or sentence of the subordinate Court, such decree, order or sentence shall be confirmed."

There is no substance in this ground and Shri Marathe does not press it. The proviso is not bad in law, although the presence of a third Judge to resolve the difference would be a better alternative.

4. The second ground is that the supplementary order dated 6th June, 1969, signed by my brother from Imphal as Additional Judicial Commissioner when he was no more holding that office has no legal validity and therefore this is a fit case for granting the certificate applied for. Shri S. Tamba, learned Government Pleader, submits that I should direct that the supplementary order should not form part of the record as it is without jurisdiction. I am afraid it is not open to me to pass such an order. This apart, the supplementary order gives additional reasons in support of the sentence of imprisonment for life. It is in favour of the petitioner, and it would not be proper to accept the said submission made by the learned Government Pleader. Let it remain on the record for such use as is considered appropriate by Their Lordships of the Supreme Court. The question of law is whether it can legally form part of the decision announced by me on 21st June, 1969. It may not be proper or expedient for me to answer it.

5. There is one thing more. From the propriety and procedural point of view, was the supplementary order really called for? In 'Rajnikant v. State' AIR 1967 Goa 40, in a somewhat similar certificate proceeding under Article 134 (1) of the Constitution, a supplementary order was passed by my brother when he was an Additional Judicial Commissioner here. At that time there was also no third Judge to resolve the difference of opinion and hence the certificate applied for could not be granted. Special leave appeal by the condemned prisoner was dismissed by the Supreme Court on 7th December, 1966. It may be said in passing that the sentence of death was later commuted to imprisonment for life by the Lt. Governor. A suo motu action was taken by this Court requiring the Lt. Governor to show cause why that order should not be set aside. The President later commuted the said sentence to imprisonment for life. The order of the Lt. Governor was set aside as it had not

the authority of law. The order passed by the President was accepted as a valid order.

6. But for the legality and propriety of the supplementary order, I would have been reluctant to grant the certificate applied for. The two orders signed earlier—order dated 24th April, 1969, by my brother and order dated 7th May, 1969, by me—indicated our mind when the judgment was pronounced by me on 21st June, 1969. The first order signed by my brother was intended by him to be final. This would be clear from his supplementary order signed from Imphal. The order dated 7th May, 1969, by me was obviously final. A question of procedural law or principle is involved in this case which requires further consideration by the Supreme Court. The argument of Shri Marathe that because of the difference of opinion in the matter of sentence, this case is a fit one for an appeal to the Supreme Court is not a

convincing argument. The Supreme Court is not an ordinary Court of criminal appeal. A case must involve something more than mere appreciation of evidence for the purposes of grant of the certificate applied for. It may be added that there was no difference of opinion between my brother and myself in so far as conviction under section 302 read with section 201 of the I. P. C. is concerned.

7. In the view taken of the facts in this case, the petition for the certificate applied for under Article 134 (1) (c) is granted. I direct that a certificate should issue that this case is a fit one for an appeal to the Supreme Court. The execution of the sentence of death is hereby stayed until further orders. Order accordingly.

KSB

Leave granted.

E N D

(3) That, in any event, even the order was mala fide because the police authorities were biased against the petitioner.

(4) That the appellate authority could not have disposed of this appeal without giving any personal hearing to the petitioner.

4. Before going into the relevant provisions of the Act, it would be proper at the outset to examine the settled legal tests for determining whether the function is purely an administrative function or a judicial or a quasi-judicial function, and whether the power is to be judicially or quasi-judicially exercised on certain objective tests or the discretion is to be an absolute discretion.

In *P. L. Lakhanpal v. Union of India*, AIR 1967 SC 1507 at p. 1512, their Lordships in terms held that even the function which is in its inception executive in character may not retain the executive character all throughout and it may become quasi-judicial at later or some intermediate stage during the course of its exercise. At the stage at which it attains the nature of a quasi-judicial function the authority entrusted with that function has to comply with the rules of natural justice and give an opportunity to the party concerned of presenting his case. At p. 1510 their Lordships set out the principles for distinguishing a quasi-judicial function from one which is merely ministerial. Where there was a lis, there was prima facie in the absence of anything in the statute to the contrary the duty of the authority to act judicially and the decision of the authority was a quasi-judicial act; and (2) even if there was no lis inter partes and the contest was between the party proposing to do the act and the subject opposing it, the final determination of the authority would yet be a quasi-judicial act, provided the authority was required by the statute to act judicially. Where the statute was, however, silent, the inference whether the authority acting under the statute had, therefore, duty to act judicially had to be arrived at keeping in mind five factors laid down in the case of *Board of High School and Intermediate Education, U. P. v. Ghanshyam*, AIR 1962 SC 1110, as under :—

"(1) the express provisions of the statute read along with the nature of rights affected;

(2) the manner of disposal provided;

(3) the objective criterion if any to be adopted,

(4) the effect of the decision on the persons affected,

(5) other indicia afforded by the statute."

In *State of Assam v. Bharat Kala Bhandar Ltd.*, AIR 1967 SC 1766 at p.

1773, their Lordships held that the question whether the power under a particular provision has to be exercised purely on the subjective satisfaction of Government or other authorities or has to be exercised subject to some objective tests depends upon a number of factors. The language of the provision, the nature of the power conferred, the circumstances and the manner of exercise of power, what things are affected by such exercise and how, and other relevant factors, in the context of the particular provision, may have to be considered in determining whether the power envisaged can be exercised merely on the subjective satisfaction of Government or other authority, or there are to be some objective tests before the power can be exercised. The intention of the legislature is primarily to be gathered from the language used and where the language used is plain and unambiguous, effect must be given to it and there is nothing more to be said. But where the language is not clear, all these factors must be weighed to arrive at the final conclusion whether the power conferred depends entirely on the subjective satisfaction of the Government or the authority concerned, or there have to be some objective tests before the power can be exercised. It is on these principles that it was held while construing the relevant provisions of emergency legislation under the Defence of India, Rule 126-AA(4) giving power to the Government to regulate wages and other conditions of service, that this power could not be exercised purely on subjective satisfaction of the Government. When the effect of the order passed under sub-rule (4), can be so far-reaching and so wide in its impact on the industrial relations, this power could not be exercised merely on the subjective satisfaction of the Government, and even in the real emergency the procedure must be adopted by the Government to consult the interests concerned by giving a public notice to the particular interests affected, indicating what the Government intended to do and inviting representations and if necessary, calling for data from them and also giving oral hearing to the representatives of the interests concerned.

5. While applying these five factors, another important consideration must be borne in mind that a judicial element can be inferred from the nature of the power to determine questions which affect individual rights or when it relates solely to the treatment of a particular individual, and it is not necessary that there must be "a superadded characteristic or something more to impose a duty to act judicially". This wrong gloss of Lord Hewart C. J. on Lord Atkin's observations which was assumed even by the

Privy Council in *Nakkuda Ali v. Jayaratne* 1951 AC 66 to be "a general principle beyond dispute", contrary to all settled decisions stands now finally corrected by Lord Reid in the oft-quoted decision in *Ridge v Baldwin* (1964) AC 40 (74-79). The rule of "*audi alteram partem*" is not confined to the conduct of strictly legal tribunals, but is applicable to every tribunal or body of persons invested with authority to adjudicate upon matters involving civil consequences to individuals. As Lord Reid ably pointed out there had been a twilight of these principles of natural justice, which had only a limited application in case of modern statutes which left matters to administrative discretion on policy considerations, or under war-time legislations, and particularly, because of the said wrong gloss of Lord Hewart C J on Atkin L J's observations, due to which the Privy Council had been even under a serious misapprehension of the effect of the older authorities in *Nakkuda Ali's* case, 1951 AC 66. Lord Reid also pointed out that in modern legislations as policy played part in administrative decisions, the strict judicial process or full-fledged judicial inquiry was only inapplicable in that context, but still such administrative bodies performing quasi-judicial functions under statutes authorising administrative interference with private rights or where the administrative power related solely to the treatment of a particular individual as distinguished from a large scale exercise of power where treatment meted out to an individual was only one of many factors to be considered, at least the essentials of principles of natural justice had to be observed. These essential principles were engrafted by courts on to a host of such war-time provisions authorising such administrative interference with private rights. Besides, in war time legislations an alternative safeguard was provided, which was more practicable in war time, the objective test that the officer must have reasonable cause to believe whatever was the crucial matter. Once the erroneous gloss of Lord Hewart C J was corrected of necessity of "any superadded characteristic of a duty to act judicially," Lord Reid further corrected (at p 77) the approach of the Privy Council in *Nakkuda Ali's* case, 1951 AC 66 that reviewability was excluded even when objective existence of the reasonable grounds was a condition precedent for a valid exercise of the administrative power to interfere with private rights. He observed that when an enactment expressly required an official to have reasonable grounds for his decision, the law was not so defective that a subject could not bring up such a decision for review, however, seriously he might have been affected, and, how-

ever, obvious it might be that the official acted in breach of his statutory obligation. Following this trend started by Lord Reid, Lord Parker C. J. in *Re; K. (H)* (an infant), (1967) 1 All ER 225 (231), even when he did not, like Solomon L. J. hold the function of an immigration officer to be quasi-judicial, in terms held that *Nakkuda Ali's* case, 1951 AC 66 only intended to say that there was no duty to invoke a judicial process or to have a full scale inquiry, unless there was a duty to act judicially, and, therefore, the immigration officer must act honestly and fairly, and if he failed to do so, the Court could interfere. The duty to act fairly would imply giving an opportunity to the immigrant of satisfying the officer of the matters in the enactment and for that purpose let the immigrant know what his immediate impression was so that the immigrant could disabuse him and to that limited extent, the so-called rules of natural justice do apply. Lord Denning M. R. in the Court of Appeal, in *Hanif v Secy of State for Home*, (1968) 2 All ER 145 (151) in terms approved this approach of Lord Parker C. J. as to the extent of the power of the Court to review decisions of immigration officers, by holding that if they acted dishonestly or unfairly, the decision could be questioned by a certiorari, and if they did not inquire into matters which they ought to inquire, they could be compelled to do so by a mandamus. Therefore, from the very nature of the statutory administrative power to make a decision affecting private rights or relating solely to the treatment of an individual, it is either held to be a quasi-judicial power, or such as to imply a statutory duty to act fairly in accordance with the essential principles of justice of at least a previous notice and reasonable opportunity of being heard before an impartial authority, and a further duty to come to as honest decision on the matter statutorily left to such authority by dispassionately and fairly applying its mind to matters which it was bound to consider. These facets of the statutory administrative power so coupled with the duty would be ordinarily reviewable, unless there is a compelling necessity in the context of the statute to manifest a legislative intent to exclude all principles of natural justice and leave the entire matter to the arbitrary absolute discretion of the executive. Except the peculiar case of *Liversidge v Anderson*, 1942 AC 206 where the laws of England had to be silenced amidst the clash of arms, by holding that even the existence of reasonable grounds even need not be objective but only a mental fact, so that no facet of the administrative power was open to review and the discretion was absolute, the area left to the executive

would not be so widely interpreted as to exclude a limited application of even essential principles of natural justice as distinguished from a full-fledged judicial inquiry, and as to the objective existence of the grounds being open to judicial review, although the opinion formed by the authority would be unreviewable.

6. A third important aspect which must also be borne in mind in the context of post-constitutional enactments which bears the mandate of Article 141, Art. 19 (1) etc; as ably pointed out by Subba Rao J. (as he then was) in *Nageshwarrao v. State of Andhra Pradesh*, AIR 1959 SC 1376 (1379), is that in England the Parliament is supreme and, therefore, a statutory law, however repugnant to the principles of natural justice is valid; whereas in India the law made by the Parliament or a State Legislature should stand the test of fundamental rights declared in Part III of the Constitution. It is, therefore, a settled principle of constitution, as adopted in *Jagdish Pandey v. Chancellor, Bihar University*, AIR 1968 SC 353 (357), to read every such statute consistently with the essential principles of natural justice, as any other reading may make it unconstitutional. In *Mahammed Faruk v. State of M. P.* (1969) 1 SCC 833 (857), it was in terms held that a law providing for the grant of a license or permit, which confers a discretion upon an administrative authority regulated by rules or principles in accordance with rules of natural justice, will be presumed to impose a reasonable restriction. However, if the power is entrusted to an administrative agency to grant or withhold a license or permit in its uncontrolled discretion, the law *ex facie* infringes the fundamental rights guaranteed under Art. 19 (1). In *Purtabpore Co. v. Cane Commr. of Bihar*, (1969) 1 SCC 308 (316), the Supreme Court even made a further distinction between an order revoking or modifying a license and a decision not to grant a license by in terms holding that the question in the former case was not one of a privilege as in the later case but of a right. The Courts should adopt a presumption that prior notice and opportunity to be heard should be given before a license can be revoked, which can be rebutted only in similar circumstances to those in which the summary interference with vested rights may be permissible.

7. The law in our country has kept abreast with this trend started by Lord Reid in England. In *State of Orissa v. Binapani Dei*, AIR 1967 SC 1269 (1271), His Lordship Shah J. held:

"The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to

judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially, would, therefore, arise from the very nature of the function intended to be performed; it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case."

In *Bharat Kala Bhandar's case*, AIR 1967 SC 1766, as already considered, even the R. 126-AA (4) under the Defence of India Act, 1962, was construed even in a real emergency, not to confer an administrative power to be exercised purely on the subjective satisfaction of the Government, but only after consulting the interests affected after some kind of previous notice of what the Government intended to do and after giving an oral hearing to the interests concerned, although it was not necessary to hold a full-scale quasi-judicial enquiry. Finally, in *Rohtas Industries Ltd. v. S. D. Agarwal*, AIR 1969 SC 707 (718-19), the pertinent question, on which the learned judges were equally divided in *Barium Chemicals Ltd. v. Company Law Board*, AIR 1967 SC 295, as to the extent of reviewability of any of the facets of the discretionary power conferred under Section 237(b) of the Indian Companies Act, 1956, has been fully answered. After taking into account the fact that the statute in question was a post-constitutional statute, subject to the mandate of Art. 19(1)(g) and as this was not a war-time legislation where there would be any special necessity not to fetter the executive discretion, it was held that the statute in question must be so interpreted as to hold that no arbitrary power was conferred on the Government, and that this power must be exercised in accordance with the restrictions imposed by law. Therefore, in these circumstances the Central Government on which the discretion was conferred was not held to be the sole judge of what were its powers as well as the sole judge of what was the way in which they could be exercised. The existence of circumstances in question on the basis of which the power could be exercised was held to be open to judicial review, though the opinion formed by the Government was

not amenable to review by the Courts. Finally, in a very recent decision in *A. K. Kraipak v Union of India*, (1969) 2 SC 264 (268) His Lordship Hegde J. speaking for the Constitutional Bench completed the process started by his Lordship Shah J in *Binapani Dei's case* AIR 1967 SC 1269 (1271) by almost obliterating their dividing line between an administrative power and a quasi-judicial power. Following the trend of Lord Reid and Lord Parker C J, our Supreme Court corrected the further error in the approach committed in *Nakkuda Ali's case* 1951 AC 66 by questioning the validity of the limitation that if there was no duty to act judicially, there was no room for application of the rules of natural justice, and that consequently there was no scope for the supervisory review by a certiorari or a mandamus. At page 272 it was in terms held that the purpose of the rules of natural justice being one to prevent miscarriage of justice by supplementing the law of the land, wherever there was a duty to arrive at a just decision even in an administrative inquiry the principles of natural justice would be applicable, at least in so far as they would be necessary to arrive at a just decision on the facts of the case.

8 In view of these settled principles, it is now well settled that while applying the aforesaid five factors in question in order to find out whether the function delegated to the administrative authority is purely administrative or quasi-judicial, the very nature of the administrative power to affect private rights or relating to the sole treatment of individuals will itself imply the statutory duty, to comply with at least the essential principles of natural justice. Besides, in such a post-constitutional statute which has the mandate of Art 19(1), which is not a war-time legislation, the licensing scheme especially in the context of the power to revoke or modify a license, must be interpreted on the presumption that in exercising this discretion, the authority must act fairly at least in accordance with essential principles of natural justice of a prior notice and reasonable opportunity to be heard, and on the objective existence of the grounds on which the power is required to be exercised, and, therefore, both these facets of this discretionary power would ordinarily be reviewable, unless the scheme of this legislation compels us to hold that the Parliament intended to provide for an arbitrary power of summary interference with the vested rights of a licensee; which would ex facie amount to an unreasonable restriction on the fundamental right of the citizen to hold the fire-arm, which is a property right guaranteed to him under the Constitution.

9. We would now turn to the relevant provisions of the Act under consideration. As it is mentioned in the statement of objects and reasons, the Indian Arms Act, 1878, was intended to disarm the entire nation at the time of the British rule in the country. After independence was achieved, the Arms Act, 1959, has been enacted which has liberalised the provisions by excluding certain arms like knives, spears, bows and arrows and the like from the licensing provisions and by classifying the firearms and other dangerous weapons so as to ensure that

(1) that dangerous weapons of military patterns are not available to civilians, particularly the anti-social elements;

(2) that weapons for self-defence are available for all citizens under license unless their antecedents or propensities do not entitle them for the privilege, and

(3) that firearms required for training purposes and ordinary civilian use are made more easily available on permits,

and to co-ordinate the rights of the citizens with the necessity of maintaining law and order and avoid fifth-column activities in the country. Section 2(c) defines 'arms' to mean articles of any description designed or adapted as weapons for offence or defence and includes firearms, sharp-edged and other deadly weapons, and parts of, and machinery for manufacturing, arms but does not include articles designed solely for domestic or agricultural uses such as a lathi or an ordinary walking stick and weapons incapable of being used otherwise than as toys or of being converted into serviceable weapons. Section 3 provides for licence for acquisition and possession of firearms and ammunition and it provides that no person shall acquire, have in his possession, or carry any firearm or ammunition unless he holds in this behalf a licence issued in accordance with the provisions of the Act and the rules made thereunder. Section 4 requires a licence for acquisition and possession of arms of specified description in certain cases. Sections 13 and 14 deal with applications for grant of licence and the grounds on which they can be refused. Under Section 14(1) the licensing authority shall refuse to grant—

(a) a licence under Section 3, section 4 or section 5 where such licence is required in respect of any prohibited arms or prohibited ammunition;

(b) (i) where such licence is required by a person whom the licensing authority has reason to believe

(1) to be prohibited by this Act or by any other law for the time being in force from acquiring, having in his pos-

session or carrying any arms or ammunition, or

(2) to be of unsound mind, or

(3) to be for any reason unfit for a licence under this Act; or

(ii) where the licensing authority deems it necessary for the security of the public peace or for public safety to refuse to grant such licence,

Sub-clause (3) requires that where the licensing authority refuses to grant a licence to any person it shall record in writing the reasons for such refusal and furnish to the person on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement. Section 17(3) deals with variation, suspension and revocation of licence as under:

"(3) The licensing authority may by order in writing suspend a licence for such period as it thinks fit or revoke a licence—

(a) if the licensing authority is satisfied that the holder of the licence is prohibited by this Act or by any other law for the time being in force, from acquiring, having in his possession or carrying any arms or ammunition, or is of unsound mind, or is for any reason unfit for a licence under this Act, or

(b) if the licensing authority deems it necessary for the security of the public peace or for public safety to suspend or revoke the licence: or

(c) if the licence was obtained by the suppression of material information or on the basis of wrong information provided by the holder of the licence or any other person on his behalf at the time of applying for it; or

(d) if any of the conditions of the licence has been contravened; or

(e) if the holder of the licence has failed to comply with a notice under sub-section (1) requiring him to deliver up the licence."

Sub-clause (4) lays down that the licensing authority may also revoke a licence on the application of the holder thereof. Under sub-clause (5),

"Where the licensing authority makes an order varying a licence under sub-section (1) or an order suspending or revoking a licence under sub-section (3), it shall record in writing the reasons therefor and furnish to the holder of the licence on demand a brief statement of the same unless in any case the licensing authority is of the opinion that it will not be in the public interest to furnish such statement."

Thereafter, the sub-clause (9) confers a power on the Central Government by a gazetted order to suspend, revoke or

direct any licensing authority to suspend or revoke all or any licences granted under the Act throughout India or any part thereof. S. 18 provides for appeals. Under Section 18(1) any person aggrieved by an order of the licensing authority refusing to grant a licence or varying the conditions of a licence or by an order of the licensing authority or the authority to whom the licensing authority is subordinate, suspending or revoking a licence may prefer an appeal against that order to such authority and within such period as may be prescribed: Provided that no appeal shall lie against any order made by, or under the direction of the Government. Under clause (4) every appeal under this section shall be made by a petition in writing and shall be accompanied by a brief statement of the reasons for the order appealed against where such statement has been furnished to the appellant and by such fee as may be prescribed. Under clause (5) in disposing of an appeal the appellate authority shall follow such procedure as may be prescribed. Provided that no appeal shall be disposed of unless the appellant has been given a reasonable opportunity of being heard. Under Section 21(1) any person having in his possession any arms or ammunition the possession whereof has ceased to be lawful, shall without unnecessary delay deposit the same with the officer in charge of the nearest police station as required under that section. Section 22(1) provides that whenever any Magistrate has reason to believe that (a) any person residing within the local limits of his jurisdiction has in his possession any arms or ammunition for any unlawful purpose, (b) that such person cannot be left in the possession of any arms or ammunition without danger to the public peace or safety, the Magistrate may after recording reasons for his belief cause a search to be made of the house or premises occupied by any such person or in which the Magistrate has reason to believe that such arms or ammunition are or is to be found and may have such arms or ammunition seized and detain the same in safe custody for such period as he thinks necessary, although that person may be entitled by virtue of this Act or any other law for the time being in force to have the same in his possession. Under Section 24, the Central Government is also entitled to seizure of any arm or ammunition in possession of any person notwithstanding that such person is entitled by virtue of this Act or any other law for the time being in force to have the same in his possession, and may detain the same for such period as it thinks necessary for the public peace and safety.

10. As far as the Arms Rules, 1962, are concerned, R 6 provides that where a licensing authority is of the opinion that it will not be in the public interest to furnish reasons for the refusal, renewal, variation of conditions, revocation or suspension of a licence, to the applicant, the recorded reasons thereof and the facts of the case shall be communicated by him to the appellate authority. Under Rules 51 and 52 the application for licence and the form of licence are provided. Under Rule 51 Proviso (u) the licensing authority may in respect of all or any class of firearms require the personal attendance of the applicant before granting or renewing the licence applied for. Under rule 56 the procedure is prescribed to be followed by the appellate authority as under :—

"On receipt of an appeal, the appellate authority may call for the records of the case from the authority who passed the order appealed against and after giving the appellant a reasonable opportunity of being heard pass final orders".

11. From the aforesaid scheme of the Act and the Rules, it is clear that for a firearm as in this case, licence under Section 3 is necessary for its acquisition and possession. Even at the time when the licence is granted under Sections 13 and 14, the authority can refuse to grant licence if he has reason to believe that it was required by a person who was under some legal prohibition from acquiring or having in his possession or carrying an arm or was of unsound mind or was for any reasons unfit for a licence or where the licensing authority deems it necessary for the security of public peace or for public safety to refuse to grant such licence. When a licence is refused reasons are to be recorded and the order is an appealable order under Section 18. Even where the licence is to be revoked or suspended under Section 17(3), the same two grounds which were to be taken into account at the time of refusal of initial licence are specified, viz., as to the unfitness of the person for a licence and because the licensing authority deems it necessary for the security of the public peace or for public safety. Three other grounds are also mentioned in Section 17 (3) of the licence being obtained by suppression of material information or on the basis of wrong information or if the conditions of the licence have been contravened or the holder has failed to comply with the notice requiring him to deliver up the licence. Therefore, it is obvious that the discretion which is vested in the licensing authority to suspend or revoke a licence can be exercised even on those three specific grounds mentioned

In Section 17 (3) (c) (d) and (e), all of which are grounds which can be objectively demonstrated and they do not depend on the subjective opinion or subjective belief of the licensing authority. Even as to the other two grounds, as to the unfitness of the person and the necessity for securing public peace or for public safety, those circumstances can exist objectively and the authority would have to exercise only a judicial discretion to find out whether these grounds which are mentioned in Section 17(3) were established. In fact, the licensing authority is expected to record his reasons. It is true that under section 17(5), he is to furnish a brief statement thereof to the licensee on demand unless he is of the opinion that it would not be in the public interest to furnish such statement. But even in that contingency he is bound to record his reasons and make them available under rule 6 for perusal by the appellate authority. It is this reasoned order read with the right of appeal under Section 18 which makes these restrictions in the licensing scheme reasonable restrictions on the fundamental rights of a citizen to hold a firearm. Both in the provisions regarding the grant of licence and particularly, in the provisions regarding suspension or revocation of a licence, we find no indication whatever that the legislature wanted to depart from the essential principles of natural justice. The discretion which is vested in the licensing authority to refuse a licence or to suspend or revoke a licence cannot therefore be interpreted to be an arbitrary discretion which is not reviewable in any of its facets. In such a context the discretion must be a judicial discretion to be exercised fairly and honestly in accordance with the essential principles of natural justice and on the objective existence of the grounds or circumstances envisaged in the relevant section, which are to be set out in the speaking order of the licensing authority.

12. Unless, therefore, the concerned licensee is informed of the proposed grounds on which the licensing authority wants to exercise its power, he would not be in a position to render any explanation. If he is not given this notice or opportunity, the two salutary safeguards of a speaking order and of an appeal provided by the legislature would be completely illusory. Unless the licensee gets an opportunity to bring materials in his favour to satisfy the officer or to convince him of the non-existence of the grounds, these provisions would be meaningless as he would be hardly able to convince the appellate authority, when there is nothing on the record in his favour, even if such record would be called for by the appellate authority for its perusal under the rele-

vant rules. Besides, the very fact that all the five grounds in clauses (a) to (e) are lumped together in section 17(3), some of which are clearly capable of demonstration, would show in the light of this statutory scheme that the legislature intended that this discretion should be exercised only on all objective existence of all these grounds and, therefore, even though the opinion formed as to the suitability of the person may not be reviewable the existence of the grounds and the procedure of prior notice and opportunity of hearing being given being complied with in accordance with elementary principles of natural justice would always be open to review. As the other two safeguards become illusory this is the only safeguard which would make such restriction a reasonable restriction maintaining a just balance between the Governmental interest and the citizen's fundamental right which would be affected to a minimal extent. Miss Dabu had in this context vehemently argued on behalf of the State that looking to the nature of the lethal weapons in respect of which the fundamental rights were sought to be restricted and the necessity of wide powers which must vest in the executive in the interest of maintenance of law and order and for securing public peace or public safety, on the doctrine of executive necessity a departure from the principles of natural justice should be implicit and no facet of this power vested in the licensing authority should be held to be justiciable. At first blush the argument is attractive. But we find no substance in the argument if we look to the provisions of the Act in which the legislature has provided ample safeguards to deal promptly and efficiently with such emergencies. Under Section 22 the Magistrate is empowered to search and seize arms if he has reason to believe that they are in possession of any person for any unlawful purpose or that they cannot be left in his possession without danger to the public peace or safety. The Magistrate can exercise his power whenever he has reason to believe that the grounds exist for exercise of the power and he can detain the arm in question from any person who was otherwise entitled to keep it in possession. Besides, there is a general power vested in the Central Government under Section 24 for seizure of any arms or ammunition in possession of any person if it thinks necessary for the public peace and safety. Section 17(9) also empowers the Central Government to suspend or revoke or direct any licensing authority to suspend or revoke all or any licences granted under this Act throughout India or any part thereof. The Legislature has thus provided various provisions to deal promptly and efficiently with any emer-

gency without losing any time. Even individual cases can be dealt with under Section 22 by the order of the Magistrate or by the order of the Central Government. In view of these special provisions, it would not be proper to give such a wide construction to the discretion left with the licensing authority under the licensing provisions so as to make it the sole judge of the extent of its powers and also of the way in which it is to be exercised, with the result that the fundamental rights would be at the mercy of arbitrary discretion of the executive. There is nothing compelling in the context of this post-independence legislation which necessitates such unfettered discretion with the executive on the analogy of war-time measures by holding that the discretion vested in the licensing authority is not a judicial or a quasi-judicial discretion but purely an arbitrary, absolute discretion. Miss Dabu had in this connection vehemently relied upon the decision of the Supreme Court in *Virendra v. State of Punjab*, AIR 1957 SC 896(901), where in the context of restrictions on the freedom of speech it was held that wide preventive powers must be left to the discretion of the State Government charged with maintenance of law and order or to its delegate to be exercised on their subjective satisfaction. To make exercise of the power justiciable and subject to judicial scrutiny would be to defeat the purpose of the enactment. This decision would not be helpful for, as I have already pointed out, when any expediency arises the Legislature has made another provisions in the Act and there is no compelling necessity in this statute to sanction departure from the principles of natural justice. Miss Dabu also relied upon the decision in *Kishan-chand v. Commr. of Police*, AIR 1961 SC 705, where the question was regarding the licence for conducting a tea house under the Calcutta Police Act, 1866. The majority decision at page 708 in terms lays down that if guidance for exercise of discretion to grant the privilege of a license could be found on a fair reading of the section, there would be no reason for striking it down simply because it has not been worded in a manner which would show immediately that the considerations arising from the provisions of Art. 19(1)(g) and Art. 19(6) were in mind, as naturally those considerations could not be in the mind of legislature in 1866. Besides, the decision in 1951 AC 66 which proceeded on a misconception of law, as already stated was heavily drawn upon for holding that the authority had no duty to act judicially, although it must act fairly. Their Lordships, however, pointed out that each statute had to be examined in its own setting and no general principles could be laid down.

This decision was followed by our Division Bench in *Jamnadas v. Ram Aiyar*, 4 Guj LR 897 = (AIR 1964 Guj 102), in the context of renewal of licence under the Bombay Police Act, 1951, when that function was held to be purely an administrative one where no question of compliance with principles of natural justice could arise. Such cases must now be judged in the light of the final tests which are now finally evolved by the Supreme Court after the misconception of law in *Nakkuda Ali's case*, 1951 AC 66 has been corrected, and in view of the mandate of Art 19 (1) in post-Constitutional statutes. It is, therefore, clear that in view of the mandate of Art 19 (1), this power at least of suspension or revocation of an existing licence, which solely relates to the treatment of an individual citizen, must in view of the wide impact of the decision affecting his rights, and particularly, in view of the fact that the Legislature has given a perspective by laying down the area in which the discretion could be exercised, and the additional fact that the reasons are to be recorded and the right of appeal is provided, it must be held that the area which is left to the licensing authority is not an arbitrary, uncontrolled discretion but a judicial or a quasi-judicial discretion to be exercised in accordance with essentials of principles of natural justice. Therefore, in view of the settled principles, we must come to the conclusion that the licensing authority had a judicial or a quasi-judicial discretion to be exercised on objective existence of the grounds and, therefore, it was bound to observe the essential principles of natural justice by complying with at least two minimum safeguards of a notice of the proposed grounds and of a reasonable opportunity to the concerned licensee to enable him to convince the authority of the non-existence of the grounds, and both these facets of this discretionary power were clearly reviewable.

13. Turning to some of the authorities which were cited in this connection, in *Narsumha v. District Magistrate Cudapah*, AIR 1953 Mad 476, *Subba Rao J* in terms held that the discretion to give or refuse a licence must be a judicial discretion having regard to the facts that this licensing scheme was a restriction on the fundamental right of the citizen to acquire and hold a gun which was clearly a property right. In *Jai Narain v. District Magistrate Azamgarh*, AIR 1966 All 265 the Division Bench of the Allahabad High Court also, treated the right to possess firearms as a fundamental right and held that such a finding adverse to the licensee that it was necessary to cancel his licence should not be arrived at without giving him an opportunity of showing that it was not so necessary. In

Naneppa v. Divisional Commr, AIR 1967 Mys 238, the Division Bench also took the same view in the context of revocation of a licence by holding that the licensee must be informed of the ground on which it was proposed to revoke the licence and he must be given an opportunity to show cause without which the right of appeal would be purposeless and meaningless. The Division Bench of the Madras High Court in *In re State of Madras*, AIR 1957 Mad 692, also took the same view following the earlier decision of *Subba Rao J*.

14. The other line of decisions which have taken the view that this function is in all its facets purely an administrative one is now fully considered and followed by the Full Bench of the Assam High Court in *Hasan Ali v. Commr of Plains Division*, AIR 1969 Assam & Nagaland 50. The learned Chief Justice has considered the decisions of the Madhya Pradesh High Court and the Rajasthan High Court which have been mentioned by him which support this view. The learned Chief Justice based his decision on the ground that the discretion of the authority was controlled in two ways, as reasons were to be recorded and because an appeal lay, but otherwise it was to be exercised on the overall necessity of public security and maintenance of public order on the purely subjective satisfaction or opinion of the licensing authority. The peculiar decision of Lord Atkin in 1942 AC 206 was in terms followed for holding that in forming such subjective opinion the licensing authority did not act judicially and, therefore, there was no question of giving any opportunity of hearing before the licence was cancelled. With great respect to the learned Chief Justice Dutt C. J., I respectfully differ from this view which has also been taken in the authorities mentioned by the learned Chief Justice. These authorities proceed on the misconception found in *Nakkuda Ali's case*, 1951 AC 66 and on the analogy of *Liversidge's case*, 1942 AC 206 which was entirely in the context of a war-time measure, where departure from principles of natural justice had to be tolerated, and particularly, as the Parliament of England was also supreme, unlike our Parliament which is fettered by constitutional limitations, especially in the matter of fundamental rights where only reasonable restrictions can be imposed in public interest. Every such statute would have therefore to be read consistently with the principles of natural justice and unless there is compelling necessity to make a departure from the principles of natural justice, all attempt should be made consistently with the essential principles of natural justice to see that a just balance is struck between the Governmental in-

terest and the citizen's fundamental right by the reasonable restrictions imposed by the statute. If, therefore, such a statute could be read consistently with the principles of natural justice, that construction must be the only one in such a post-Constitutional statute, where the legislature had the mandate of Article 19(1)(g) and where there was no question of any emergency or war-time measure, so that the departure from the principles of natural justice would have to be tolerated as the price to be paid by the citizens. Therefore, on the first question it must be held that the discretion of the licensing authority when it sought to suspend the petitioner's licence was a judicial or quasi-judicial discretion, and the authority had a duty to act judicially or quasi-judicially in the sense of at least informing the concerned licensee of the proposed grounds and of giving reasonable opportunity of being heard to show cause by showing non-existence of those grounds, or that they were ultra vires the Act, or no grounds at all. Even on the other question, the petitioner's grievance must be upheld because Section 18(5) in terms provides that no appeal shall be disposed of unless the appellant has been given a reasonable opportunity of being heard. After the memorandum is received Rule 56 provides for the record being called from the authority which passed the order appealed against and the final order has to be passed after giving the appellant a reasonable opportunity of being heard. Therefore, it is futile to contend that the reading of the memo of appeal was a sufficient compliance. In *Fedco (P) Ltd. v. S. N. Bilgrami*, AIR 1960 SC 415, in the context of the cancellation of an import licence on the ground that it was obtained by fraud the Supreme Court considered the question of reasonable opportunity of being heard. At page 418 in the majority judgment it was pointed out that the requirement that a reasonable opportunity of being heard must be given has two elements:— (1) opportunity to be heard must be given and (2) this opportunity must be reasonable. Both these matters were held to be justiciable and it was for the Court to decide whether opportunity had been given and whether such an opportunity was reasonable. Subba Rao J. at page 422 in the minority opinion also pointed out that these were well known words and phrases viz. 'reasonable', 'opportunity' and 'of being heard'. They implied that when the charge was one of fraud the affected party was entitled to know the particulars of fraud alleged, to inspect the documents on the basis of which fraud is imputed to him and to a personal hearing to explain his case and to absolve himself of the charge made against him.

Without these elementary safeguards provided by the authority, the opportunity to be heard given to the licensee becomes an empty formality. Therefore, it is obvious from this settled legal position that it is not a sufficient compliance with the scheme of these provisions that the appellate authority had read the memo of appeal and the petitioner must have been heard personally and given a reasonable opportunity to convince the appellate authority.

15. Applying these principles to the facts of this case, the original show cause notice mentioned the grounds that the petitioner was carrying on a medical profession without a proper certificate. This ground was completely given up when the petitioner came out with a plea that he possessed a proper degree certificate. The other ground as regards the dacoity case against him in 1948 is also dropped. Therefore, the only ground which remained and which was mentioned in the show cause notice was the threat given to the landlord of killing him because of some dispute. When we turn to the order of the licensing authority even though this ground of the show cause notice is recited, in the preamble, there is no finding whatsoever. The order on the contrary proceeds on two new grounds:— (1) that the petitioner is a complainant in one Kagdapith Police Station No. 1090/67 and (2) that there is a chapter case against him, and, therefore, the licence was suspended till these two cases were decided. These two grounds are nowhere mentioned in the notice of proposed grounds and, therefore, the order passed by the licensing authority is wholly vitiated by contravention of essential principles of natural justice. Mr. Bhatt is also right in his argument that being a complainant in a case is no ground at all. In fact the petitioner has averred in the petition that the complaint was made because landlord had cut off water supply and the electric connection was also cut off. This allegation has not been controverted. As regards the nature of the chapter case we get nothing on the record. Not only this was the new ground but there is no indication on the record as to the nature of the chapter case. As this ground is made out for the first time, the petitioner must succeed on the ground that no opportunity was given to him to meet this ground and, therefore, it is not necessary to consider whether this can be considered as a ground at all. Miss Dabu in this connection, however, sought to connect this chapter case with the alleged threat given to the landlord. No material whatever has been pointed out either by way of affidavit or otherwise to establish any such connection. Therefore, on this short ground that no notice whatever has

been given to the petitioner of the proposed grounds on which suspension of the licence has been ordered, the order of the licensing authority must be quashed. Even the appellate order must fall through as it would be only confirming the nullity and also on the ground that admittedly no personal hearing was given and the appellate order was passed merely on reading the grounds in the memo of appeal. Therefore, both these orders in the present case of the licensing authority as well as of the appellate authority must be quashed.

16. In the result this petition succeeds and the rule is made absolute with costs by quashing both the orders of the licensing authority as well as of the appellate authority. The authorities are restrained from enforcing the said orders against the petitioner. It is needless to mention that this order will not prejudice the rights of the authorities to take a fresh action, if they are so advised.

SSG/D.V.C.

Petition allowed.

AIR 1969 GUJARAT 362 (V 56 C 61)

A. D. DESAI AND J. M. SHETH JJ.

M. B. Tharada, Petitioner v. State of Gujarat, Opponent

Criminal Revn. Appln. No. 270 of 1968, D/- 2-9-1968, against order of Spl. J., Ahmedabad (Rural) at Narol, in Spl. Case No 3 of 1968.

(A) Prevention of Corruption Act (1947), S 5-A — Power of Magistrate to grant sanction to investigate to officer below rank designated in S 5-A — Power is not dependent on availability or non-availability of officers designated in Sec. 5-A AIR 1955 SC 196 & AIR 1959 SC 707 & 1962 (1) Cri LJ 142 (Guj), Rel. on. (Para 6)

(B) T. P. Act (1882), S. 8 — Interpretation of deed — Document must be read as whole. (Para 7)

(C) Prevention of Corruption Act (1947), S 5A — By establishment of Special Branch to investigate cases relating to bribery, powers of local District Superintendent of Police are not taken away. (Para 7)

(D) Prevention of Corruption Act (1947), S. 5A — Magistrate on being satisfied about existence of prima facie case granting sanction after taking into consideration advisability to permit Police Sub-Inspector, member of Special and independent unit, to investigate on basis of administrative convenience — Held, it could not be said that Magistrate had not applied his mind or had taken into con-

sideration extraneous factors while granting permission. (Para 7)

(E) Prevention of Corruption Act (1947), S. 5A — Filing of charge-sheet and arresting accused can be said to be part of investigation. AIR 1968 SC 117 & AIR 1955 SC 196, Rel. on.

(Para 8)

(F) Prevention of Corruption Act (1947), S 5A — General sanction to investigate is not contemplated by Section — Permission to investigate crime granted to A — Held, permission could not enure to benefit of B — Provisions of S. 5A being mandatory, B had to obtain permission to investigate crime. Criminal Revn. Appln. No. 200 of 1961, D/- 30-1-1962 (Guj), Rel. on. (Para 8)

(G) Prevention of Corruption Act (1947), Section 5A — Illegal investigation does not affect jurisdiction of Court to try case (Para 9)

Cases Referred: Chronological Paras

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| (1968) AIR 1968 SC 117 (V 55) = | |
| 1968 Cri LJ 97, Abhinandan Jha v. Dinesh Misra | 8 |
| (1964) Criminal Revn. Applns. Nos 161, 167, 162 of 1964, D/- 4-8-1964 (Guj) | 7 |
| (1962) 1962 (1) Cri LJ 142 = 2 Guj LR 664, Nagulal Nandlal v State of Gujarat | 3, 4 |
| (1962) Criminal Appeal No 200 of 1961, D/- 30-1-1962 (Guj) | 3, 4, 8 |
| (1959) AIR 1959 SC 707 (V 46) = 1959 Cri LJ 920, State of M. P. v Mubarak Ali | 3, 4, 8 |
| (1955) AIR 1955 SC 196 (V 42) = 1955 Cri LJ 526, H. N. Rushbud v State of Delhi | 3, 4, 8 |

K. J. Shethna, for Petitioner. G. N. Desai, Govt. Pleader with G. T. Nana-vati, Asstt. Govt. Pleader, for Opponent.

DESAI, J. — This is a criminal revision application filed against the judgment and order passed by the Special Judge, Ahmedabad (Rural) at Narol, Shri D. J. Dave, rejecting an application of the applicant requesting the Court to order reinvestigation in the criminal case against him, on the ground that the investigation carried out by the police officers was contrary to the provisions of Section 5A of the Prevention of Corruption Act 1947 (hereinafter referred to as the Act)

2. The short facts leading to this prosecution are that the applicant in the month of July 1963 was working as a Police Head Constable at the Police Station, Dehgam. The offences punishable under Sections 419 and 420 of the Indian Penal Code were alleged to have been committed by one person. That offence was registered at the Police Station, Dehgam as criminal register No 98 of

1963. The present applicant was investigating the said offence. One Karsandas Jividas, the resident of village Motipura was suspected to have committed this offence. Karsandas is brother-in-law of Kalidas Khodidas Patel. The present applicant in his capacity as a public servant was alleged to have made a demand of illegal gratification of an amount of Rs. 300 from Kalidas Khodidas Patel as a motive or a reward from forbearing to do an official act i. e. for not pressing the case or showing favour in the case which he was investigating against Karsandas. Some amount was alleged to have been already paid to the applicant by Kalidas Khodidas Patel towards the said demand of the illegal gratification. On July 21, 1963, Kalidas Khodidas Patel approached Police Sub-Inspector Erulkar, Anti-Corruption Branch and informed him that the applicant demanded illegal gratification and the last instalment of the illegal gratification was to be paid to him on that day. Police Sub Inspector Erulkar recorded his complaint. Thereafter Police Sub Inspector Erulkar submitted an application to the Judicial Magistrate, First Class, Ahmedabad (Rural) at Narol for permission to investigate into the offence. The learned Judicial Magistrate, First Class, granted the permission under Section 5A of the Act. Police Sub Inspector Erulkar thereafter lodged a trap and carried out further investigation into the case. On the completion of the investigation he obtained sanction to prosecute the applicant and filed a charge-sheet in the Court of the Special Judge, Ahmedabad (Rural) at Narol. The case was numbered as Special Case No. 2 of 1964. In that case the applicant gave an application stating that the prosecution against him for offences under Section 161 of the Indian Penal Code and Section 5 of the Prevention of Corruption Act was barred by limitation in view of the provisions of Section 161 of the Bombay Police Act, 1951. The learned Special Judge accepted the contention and passed an order discharging the applicant. The State of Gujarat preferred criminal Revision Application No. 449 of 1965 in this Court against the said order. The said application came for hearing before my brother Sheth J. on August 10, 1967 who took the view that the proceedings were not barred by limitation and remanded the case for trial before the Special Judge. In the said case the applicant again filed another application contending that a proper sanction to prosecute was not obtained and the Court of the Special Judge had no jurisdiction to take cognizance of the case in view of the provisions of Section 6 of the Act. The learned Special Judge rejected the said application. The applicant being aggrieved by the said judgment filed Crimi-

nal Revision Application No. 405 of 1967 in this Court. The said criminal revision application was heard by Shelat J. who held that the sanction to prosecute was not legal and, therefore, passed an order dropping the prosecution. Thereafter Police Sub Inspector Zala Anti-Corruption Branch took charge of the investigation of the case against the accused. Police Sub Inspector Zala went through the record of investigation carried out by Mr. Erulkar obtained the permission to prosecute the accused from Inspector General of Police and ultimately filed a charge sheet in the Court of the Special Judge, Ahmedabad (Rural) at Narol. This case was numbered as Special Case No. 3 of 1968. In this case the applicant filed an application contending that the investigation carried out by Police Sub Inspector Erulkar and Police Sub Inspector Zala was in contravention of the provisions of Section 5A of the Act and, therefore, illegal, and requesting the Court to order re-investigation into the case. The application was rejected by the learned Special Judge holding that the permission granted by the Judicial Magistrate, First Class, to Police Sub Inspector Erulkar to investigate in the case was valid one and that the investigation carried on by Mr. Zala was only formal and there was no contravention of the provisions of Section 5A of the Act. It is against this judgment and order that the applicant has filed this Criminal Revision Application No. 270 of 1968 in this Court. The revision application came up for hearing before Thakor J. who referred the matter to Division Bench and it has now reached hearing before us.

3. Mr. Shethna appearing for the applicant contended that the investigation carried out by Police Sub Inspector Erulkar and Police Sub Inspector Zala was not in accordance with the provisions of Section 5A of the Act and, therefore, a fresh investigation of the case should have been ordered by the trial Court before the commencement of the trial. The argument advanced is thus two-fold. The investigation carried out by Police Sub Inspector Erulkar was illegal, submitted Mr. Shethna, because no valid sanction to investigate as required under Section 5A of the Act was obtained by the officer. The argument was that the provisions of Section 5A of the Act are mandatory and the Magistrate before he granted the permission to investigate as required by the provisions of the section had to apply his mind and satisfy himself that there was a prima facie case against the accused, in other words, (1) the case against the accused was not vexatious or frivolous and (2) that there were circumstances which satisfied him that this was a case wherein he should have

given permission to Police Sub Inspector Erulkar to carry out the investigation in the case Section 5A of the Act, so far is relevant to our case, provides that notwithstanding anything contained in the Code of Criminal Procedure, no police officer below the rank of Deputy Superintendent of Police shall investigate any offence punishable under Section 161, Section 165 or Section 165A of the Indian Penal Code or Section 5 of the Act, without the order of the Magistrate of the First Class. In the present case the investigation was to be carried out by Police Sub Inspector Erulkar and, therefore, he had made an application to the learned Judicial Magistrate, First Class, Ahmedabad (Rural) to obtain permission to investigate as required by law. It was contended by Mr. Shethna that the learned Magistrate passed an order granting permission under Section 5-A of the Act and this order *ex facie* did not mention any reason why the learned Magistrate granted the permission to Police Sub Inspector Erulkar to investigate the offence. The order *prima facie* indicated that the learned Magistrate had not applied his mind while granting the permission to investigate and, therefore, the investigation carried out by Police Sub Inspector Erulkar was in contravention of the provisions of S 5A of the Act. In support of this argument the learned advocate relied on the two decisions of the Supreme Court. The decisions relied upon are *H. N. Rishbud v. State of Delhi*, AIR 1955 SC 196 and *State of Madhya Pradesh v. Mubarak Ali*, AIR 1959 SC 707. Mr. Shethna also relied on two decisions of this Court and they are *Naginlal Nandlal v. State of Gujarat*, 2 Guj LR 664=(1962) (1) Cri LJ 142 and the decision in Criminal Appeal No 200 of 1961 (Guj) delivered by J. N. Shelat (as he then was) and Bakshi JJ. on January 30, 1962. The argument of Mr. Shethna, so far as the investigation carried out by Mr. Zala, was that he had not obtained any permission as required under Section 5A of the Act. Mr. Zala had carried out the investigation viz. formation of opinion that the accused had committed the offences on the basis of the materials collected by Police Sub Inspector Erulkar, of filing a charge-sheet in the Court against the accused and arresting the accused during the course of the investigation. Thus the investigation carried out by Mr. Zala was in contravention of the provisions of section 5A of the Act.

4. In order to understand the argument of Mr. Shethna, it is necessary to refer the judgment of the Supreme Court in *Rishbud's* case, AIR 1955 SC 196 wherein their Lordships examined and considered in details all the provisions

of Section 5A of the Act. The relevant observations are as under:

"To appreciate that policy it is relevant to observe that under the Code of Criminal Procedure most of the offences relating to public servants as such, are non-cognizable. A cursory perusal of Schedule II of the Criminal Procedure Code discloses that almost all the offences which may be alleged to have been committed by a public servant, fall within two chapters, Chapter IX 'offences by or relating to public servants', and Chapter 11 'offences against public justice' and that each one of them is non-cognizable. (Vide entries in Schedule II under Sections 161 to 169, 217 to 233, 225-A as also 128 and 129).

The underlying policy in making these offences by public servants non-cognizable appears to be that public servants who have to discharge their functions — often enough in difficult circumstances—should not be exposed to the harassment of investigation against them on information levelled, possibly, by persons affected by their official acts, unless a Magistrate is satisfied that an investigation is called for, and on such satisfaction authorises the same. This is meant to ensure the diligent discharge of their official functions by public servants, without fear or favour,

When, therefore, the Legislature thought fit to remove the protection from the public servants, in so far as it relates to the investigation of the offences of corruption comprised in the Act, by making them cognizable, it may be presumed that it was considered necessary to provide a substituted safeguard from undue harassment by requiring that the investigation is to be conducted normally by a Police Officer of a designated high rank. Having regard therefore to the peremptory language of sub-section (4) of Section 5 of the Act as well as to the policy apparently underlying it, it is reasonably clear that the said provision must be taken to be mandatory."

In case of AIR 1959 SC 707, the Supreme Court observed as under:—

"While in the case of an officer of assured status and rank, the legislature was prepared to believe them implicitly, it prescribed an additional guarantee in the case of police officers below that rank, namely, the previous order of a Presidency Magistrate or a Magistrate of the First Class, as the case may be. The Magistrate's status gives assurance to the bona fides of the investigation. In such circumstances, it is self-evident that a Magistrate cannot surrender his discretion to a police officer but must exercise it having regard to the relevant

material made available to him at that stage."

The decisions in Naginlal's case, 2 Guj LR 664=(1962 (1) Cri LJ 142) and in Criminal Appeal No. 200 of 1961 (Guj) also emphasise the same propositions.

5. Thus it is clear that the provisions of Section 5A are mandatory and they lay down that no offences under Sections 161, 165 and 165-A of the Indian Penal Code and Section 5A of the Prevention of Corruption Act be investigated by a police officer below the designated rank unless a permission to investigate is obtained from the Magistrate. It is also evident from the observations made in the aforesaid authorities that the Magistrate before he grants the sanction has to apply his mind and come to a conclusion that a prima facie case is made out against the accused and that there are circumstances in the case which satisfy him that there is a case wherein he should grant permission to the officer below the designated rank to investigate the case.

6. The question is whether in the present case the provisions of Section 5A of the Act have been complied with. It was argued by Mr. Shethna that under the provisions of Section 5A of the Act officers have been designated who could investigate cases relating to bribery. Therefore, as long as the said designated officers are available to investigate the crime, the officers below the designated rank cannot investigate into the offences and the Magistrate has no authority or power to give sanction to investigate the crime to an officer below the designated rank. The argument was that in the present case, local District Superintendents of Police, were available to investigate the offence and, therefore, the sanction granted by the learned Magistrate to Police Sub Inspector Erulkar to investigate the offence alleged to have been committed by the accused, was illegal. The argument cannot be accepted. The Legislature has made offences, punishable under Section 161 of the Indian Penal Code and Section 5A of the Act, cognizable. As these offences are made cognizable ordinarily Police Station Officer, who is generally a Police Sub Inspector, can investigate the offences. In order to see that public servants are not unnecessarily harassed the legislature enacted Section 5A of the Act and provided that an officer of the designated rank can investigate into the offences and the officers below the designated rank can investigate the offences only on obtaining a permission to do so from the Judicial Magistrate. Thus under the provisions of Section 5A of the Act, the officers of the rank designated therein and officers below that rank, provided they had obtained permission of the Magistrate, can in-

vestigate the offence of bribery. The rights and power to investigate which is confirmed by the Criminal Procedure Code on the officer in charge of Police Station to investigate a cognizable case are restricted by the provisions of Section 5A of the Act. The said provisions are of a disabling nature so far as the officers in charge of the Police Stations are concerned. It puts a limitation on their power to investigate the offence of bribery, even though the said offence is made cognizable. The provisions of the section empower a Magistrate to authorise an officer below the designated rank, to investigate the offence. The power or authority of the Magistrate to grant sanction to investigate to an officer below the rank designated in the section, is thus, not absolutely dependent on the availability or non-availability of the officers whose authority to investigate is recognised by the provisions of the section. The Magistrate when he considers the question of granting permission to investigate has to satisfy himself that a prima facie case exists and there are circumstances in the case which would justify him to grant a permission to an officer below the designated rank to investigate the offence of bribery. If the intention of Legislature was to restrict the power of the Magistrate in granting the sanction to investigate the offence to the availability or non-availability of officers of the designated rank, different expression would have been used by the Legislature to carry out the said intention. In our opinion the provisions of section 5A of the Act enable either an officer of the designated rank to investigate the offence of the bribery or an officer below the designated rank to do so provided he obtains the permission of the Magistrate to investigate the offence. The provisions of the section do not provide that the Magistrate shall not grant a permission to investigate the offence to an officer below the rank designated in the section because the officers designated in the section are available to investigate the crime.

7. Mr. Shethna then argued that the order of the learned Magistrate permitting Police Sub-Inspector Erulkar to investigate into the offence does not ex facie contain any reasons for granting the permission and, therefore, was illegal or invalid. It is true that the order itself does not contain any reasons but it is a fundamental rule of construction that the document must be read as a whole. Applying the principle to the present case, the order granting permission to investigate to Mr. Erulkar is passed on the application presented by Mr. Erulkar to the Magistrate for obtaining sanction

under Section 5A of the Act. In the application Mr. Erulkar had given reasons why he should be entrusted with the investigation of the crime and, to quote his very words:

"The sanction is sought because by Dy. S. P. Anti Corruption Branch, Ahmedabad is not available for working out this case and our Branch being an independent Unit, this investigation cannot be entrusted to any other local Dy S P of the Executive Force. It is, therefore, requested to kindly grant me the sanction under Section 5A Prevention of Corruption Act"

It is thus clear that two reasons have been given by the Police Sub Inspector as to why he should be given the permission to investigate the offence. The first is that the Deputy Superintendent of Police, Anti Corruption Branch, Ahmedabad was not available to work out the case. There is nothing on the record to show that this statement is incorrect. It is thus apparent that when the learned Magistrate granted the permission to investigate, he took this circumstance into consideration. So far as the second ground mentioned in the application is concerned, the argument of Mr. Shethna was that this ground clearly indicated that the Police Sub Inspector believed that the local Deputy Superintendent of Police of the Executive Force could not be entrusted with the investigation of the case because a Special Branch was established by the State Government to carry out the investigation into the offence. The argument was that provisions of section 5A of the Act recognised the power of certain officers designated thereunder to investigate the offence and further provided that the officers below the designated rank should obtain previous sanction to investigate the offence. The section, argued Mr. Shethna did not lay down that only officers of the Anti Corruption Branch could carry out the investigation into the offence of bribery. The State Government has established a special unit of the State Police Force to investigate the offence and the effect of this is that the local District Superintendents of Police cannot be entrusted with the investigation of the crime and are disabled to do so. The argument cannot be accepted. The object of enacting the provisions of the Prevention of Corruption Act was to eradicate corruption and to achieve the object, the State Government established an independent unit known as Anti Corruption Branch so that the offences relating to bribery could be investigated expeditiously and with secrecy. By the establishment of the Special Branch to investigate the cases relating to bribery, the powers of the local District Superintendent of Police are not taken away. In

the present case Police Sub Inspector Erulkar brought to the notice of the learned Magistrate, from whom he had to take the permission to investigate the crime, the fact that the State had established a special independent unit to investigate such crime, that he was an officer of such special unit and thus suitable to investigate the crime. He also brought to the notice of the learned Magistrate that he had verified the facts of the complaint and satisfied himself that the same was genuine. It was emphasized by Police Sub Inspector Erulkar in his letter for obtaining the sanction to investigate that the State had established a special unit to investigate the case, that he was officer of that unit and thus the case could be investigated expeditiously and with secrecy. It is important to note that no legal matter by virtue of any provision of law, was suggested by the Police Sub Inspector on the powers of Deputy Superintendent of Police to investigate the crime. The application was made by the Police Sub Inspector to obtain an authority to investigate the bribery case and, therefore, he emphasized on the fact of the establishment of a Special Branch and that he was a member of the Branch. There is nothing in the application to show that he had negatived the powers or authority of the local District Superintendent of Police to investigate such offences. He had merely stated therein that the investigation could not be entrusted to the local District Superintendent of Police, meaning — if these words are read in context with what precedes and not divorced from it — that such officers might not investigate the case as a special branch has been established by the State Government for the purpose of investigating such offences. He emphasized that it would be expedient to entrust him with the investigation of the case, he being a member of the independent unit established by the State for the purpose of investigating bribery cases. The learned Magistrate, it appears has taken into consideration while granting the permission to the Police Sub Inspector to investigate, the fact of establishment of a special independent unit set up by the State for the investigation of bribery cases, the circumstance that Police Sub Inspector Erulkar was a member of that unit and being satisfied that a prima facie case was made out for the purpose of investigation, granted the permission to Police Sub Inspector Erulkar. It cannot, therefore, be said that he had not applied his mind or had taken into consideration extraneous factors while granting the permission to Police Sub Inspector Erulkar to investigate the offence. The learned Magistrate while granting the sanction to investigate had taken into

consideration the advisability to permit the Police Sub Inspector who was a member of the special and independent unit to investigate the crime and thus granted the permission to investigate the same on the basis of administrative convenience. This circumstance cannot be said to be extraneous or irrelevant. The same view has been taken by Mehta J. in Criminal Revn. Applns. Nos. 161, 167 and 162 of 1964, D/- 4-8-1964 (Guj). The learned Magistrate on being satisfied about the existence of a prima facie case against the applicant and the circumstances why he should grant the permission to investigate to Police Sub Inspector Erulkar, granted the permission to investigate to him and we see no ground to hold that such permission was not validly granted. The result is that the investigation carried out by Mr. Erulkar cannot be said to be in contravention of provisions of Section 5A of the Act.

8. We next come to investigation carried out by Mr. Zala. The learned Special Judge came to the conclusion that the filing of the charge sheet, and arresting the accused cannot be said to be a part of investigation but they were formal and routine acts and, therefore, held that the investigation carried out by Mr. Zala was a legal one. The learned Government Pleader also argued that the filing of a charge sheet and arresting the accused cannot be said to be a part of the investigation and, therefore, the investigation carried out by Mr. Zala was not in contravention of the provisions of Section 5A of the Act. Now it is clear that on the completion of the investigation, Section 172 of the Criminal Procedure Code requires an investigating officer to file a report. This report consists of formation of opinion as to whether on the materials collected, there is a case to place the accused before the Court of the Magistrate for a trial or not. This is an important step in the course of investigation. It has been held by the Supreme Court in Rishbud's case, AIR 1955 SC 196 (supra) that the formation of opinion by the police officer on the materials collected by him is an integral part of the investigation. The same view was taken in AIR 1959 SC 707 (supra). The Supreme Court in the case of Abhinandan Jha v. Dinesh Mishra, AIR 1968 SC 117 has observed that:

"The investigation under the Code, takes in several aspects, and stages ending ultimately with the formation of an opinion by the police as to whether, on the material covered and collected, a case is made out to place the accused before the Magistrate for trial, and the submission of either a charge-sheet, or a final report is dependent on the nature of the opinion, so formed. The forma-

tion of the said opinion, by the police, is the final step in the investigation, and that final step is to be taken only by the police and by no other authority."

Thus it is clear that the filing of a charge-sheet and arresting the accused by Mr. Zala formed a part of the investigation and it was necessary for Mr. Zala to obtain sanction under the provisions of Section 5A of the Act. It was then contended by the learned Government Pleader that in this case permission granted by the learned Magistrate to Mr. Erulkar to investigate the case was a general one, could be taken advantage of by Mr. Zala and it was not necessary for Mr. Zala to obtain a fresh permission to investigate the crime. A prima facie reading of the application shows that the officer was asking for himself a permission to investigate the crime. The provisions of Section 5A of the Act also indicate that the Magistrate has to apply his mind before he grants a permission to investigate to an officer below the designated rank. The learned Magistrate has, therefore, to take into consideration the factors personal to the individual who makes an application to obtain an authority to investigate the crime. The provisions of the section indicate that a general sanction to the investigation is not contemplated by it. The same view was taken by the Division Bench of this Court in Criminal Revn. Appln. No. 200 of 1961 (Guj) (supra) wherein it has been observed as under:

"The observations made in Rishbud's case AIR 1955 SC 196 as also in Mubarak Ali's case, AIR 1959 SC 707 would seem to indicate that when a permission is granted by a Magistrate to a particular officer of the lower rank to conduct the investigation, such permission would not extend to another officer even though such an officer may belong to the same Police Station. It is to the officer who makes an application for permission that the learned Magistrate grants permission on being satisfied that he is a proper officer to carry out the investigation. In that view it would not be permissible to another police officer to conduct the investigation, taking advantage of the permission granted to another officer."

Thus the permission to investigate the crime granted to Mr. Erulkar cannot enure for the benefit of Mr. Zala. The provisions of Section 5A are mandatory and it was incumbent on Police Sub Inspector Zala to obtain a permission to investigate the crime.

9. There is no dispute that Police Sub Inspector Zala had not obtained permission to investigate the crime under Section 5A of the Act. It is, therefore, clear

that the investigation carried out by him was not in accordance with the provisions of Section 5A of the Act. It is to be noted that an illegal investigation does not affect the jurisdiction of the Court to try the case. The result is that the investigation carried out by Police Sub-Inspector Erulkar was valid and legal and the investigation carried out by the Police Sub Inspector Zala was in contravention of the provisions of Section 5A of the Act. That being the position in our view it would be proper in the interest of justice and fairness that the

case should be remanded to the trial Court for ordering a reinvestigation of the case in accordance with the provisions of Section 5A of the Act from the stage at which Mr Erulkar had left and Mr Zala commenced the investigation and thereafter to proceed with the trial of the case in accordance with law.

10 Criminal Revision allowed.

MBR/D.V.C.

Revision allowed.

E N D

toms Act read with S. 167 (8) of Sea Customs Act, such an act of seizure did not arise out of any contract; it was not authorised by law as it was an act committed by the Land Customs officers beyond the scope of the law and it had inflicted injury on the plaintiff, in the shape of deprivation of the goods belonging to the plaintiffs. The goods so seized having been converted into money and the sale proceeds laying with Union of India, the plaintiffs were entitled to refund of this amount.

(Paras 3, 4)

(B) Tort — Goods seized maliciously and without sufficient cause by Land Customs authorities — Suit for damages — Plaintiff claiming expenses incurred by him in proceedings before concerned authorities and the amount levied by them as penalty — Civil Court is not competent to grant relief for such claim — Civil P. C. (1908), S. 9. (Para 4)

(C) Limitation Act (1908), Arts. 2, 14 — Goods of plaintiff seized maliciously and without sufficient cause by Land Customs authorities on 23-6-1960—Final order passed by Ministry of Finance on 15-12-1962 — Suit for return of goods or for price thereof filed on 2-11-1963—Suit is not barred by limitation—Art. 14 is applicable and not Art. 2. (Para 5)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 1039 (V 52)=
1965 (2) Cri LJ 144, Kasturi Lal
Ralia Ram Jain v. State of
U. P. 4, 9, 13

(1961) AIR 1961 Madh Pra 316
(V 48) = 1961 Jab LJ 601, State
of Madh. Pra. v. Singhai Kapur-
chand 4

(1961) AIR 1961 Raj 64 (V 48)=
ILR (1960) 10 Raj 784, Suraj
Kunwar v. Champalal 4

(1932) AIR 1932 All 16 (V 19)=
1931 All LJ 858, Shariful
Hasan v. Lachmi Narain 5

(1928) AIR 1928 PC 261 (V 15)=
29 Mad LW 72, Tom Boerey
Barrett v. African Products Ltd. 10
Anildev Singh, for Appellant; I. D.
Grover, for Respondent.

BHAT, J.: This is a first appeal against the decree passed by the Sub Judge Rajouri dated 30-4-1966 whereby he has passed a decree for Rs. 4,999/- and costs in favour of the plaintiffs against the Union of India. The facts giving rise to this suit are as under:

The plaintiff is a firm which carries on business in village Cumbhir Tehsil Rajouri. They had ordered some bales of cloth from Amritsar, which were lying with M/S Suraj Transport Company. On 23-6-1960, while the goods were in transit with the transport company, they were seized by the Land Customs Authorities as it was suspected that these

goods were going to be smuggled to Pakistan. A show cause memo was issued to the plaintiffs by the Assistant Collector Land Customs Central Revenue Amritsar why action should not be taken u/s 7 of the Land Customs Act read with section 167 (8) of the Sea Customs Act by confiscation of goods and imposition of penalty. The goods were worth Rupees 4,324/5/3. In pursuance of the show cause notice on 16-6-1961 the goods were confiscated by the Assistant Collector Land Customs and a penalty of Rs. 500/- was imposed on the plaintiffs. The plaintiffs went in appeal and revision even upto the Ministry of Finance and the last order was passed by the Ministry of Finance against the plaintiffs on 15-12-1962.

According to the plaintiffs the goods were illegally and maliciously seized. There was no question of the goods being smuggled to Pakistan. The plaintiffs had a bona fide business concern at Cumbhir. The plaintiffs claim Rupees 4,990/-, claiming refund of Rs. 4,324/5/3 as the price of goods plus a penalty of Rs. 500/- recovered from them and an expenditure of Rs. 1300/- incurred by the plaintiffs in defending the action before the Customs authorities. The plaintiffs gave up the amount in excess of the amount claimed. The suit was brought against the Union of India. The defence on behalf of the defendant was that no such suit lies in a Civil Court. The Civil Court had no jurisdiction. No notice u/s 80 C. P. Code was given. The Court at Rajouri had no jurisdiction. The Land Customs authorities had every reason to believe that the goods were being smuggled to Pakistan. The plaintiffs had committed such acts of smuggling before also for which they had been punished; so on and so forth. A complete narration of the defence is not necessary. The Sub Judge who heard the suit initially framed the following issues:

1. Whether this court has got jurisdiction to try the suit? O.P.P.

2. Whether notice u/s 80 C. P. C. and Sea Customs Act was necessary? O.P.D.

3. Whether the suit is not maintainable in the present form? O.P.D.

4. Whether the civil court has no jurisdiction to set aside the decision of Customs authorities on merits? O.P.D.

5. Whether the suit is within time? O.P.P.

The Sub Judge however, found that the Civil Court had no jurisdiction to hear the suit and, therefore, dismissed the suit on 25-6-1964. An appeal was preferred before this court against the order of dismissal and a Division Bench of this court by means of its order dated 26-4-1965 set aside the order of dismissal and remanded the case to the trial court for trial of the remaining

issues. The Sub Judge who dismissed the suit was succeeded by another Sub Judge at Rajouri. The successor Sub-Judge recorded the evidence of the parties and ultimately decreed the suit by means of his order under appeal dated 30-4-1966.

2. When this appeal came up for arguments last year, the learned counsel appearing for the appellant wanted to add one more ground to his memo of appeal to the effect that Union of India was not liable for the acts of its officers committed by them in the discharge of statutory functions which were ultimately based on the delegation of sovereign power of the State to such public servants. Further that the customs authorities were protected under the Judicial Officers Protection Act for this action of theirs, if it was held to be illegal.

3. We have heard the learned counsel for the parties. Only two points have been argued before us. The findings of fact that the goods were seized by the Land Customs authorities maliciously and without any sufficient cause have not been challenged before us. The learned counsel for the appellant has laid stress on the fact that even if the action of the Customs Officers in seizing these goods was unjustified and tortious, the Union of India would not be liable for damages. Secondly, it was argued that the suit was time barred. Mr. Inder Dass, the learned counsel for the respondent however stated that this was not a suit for torts. Therefore, the argument of the learned counsel for the appellant that Union of India was not liable for tortious acts of its officers was not right. We do not accept this argument of Mr. Inder Dass that the present suit is not an action under torts.

The word tort has been differently defined by different authors. The word 'tort' is of French origin. It is equivalent to the English word 'wrong'. It is derived from the latin term 'tortum' which means twist and implies twisted or tortious conduct. Different authors like Clerk, Lindsell, Winfield, and Underhill among the English authors have defined it differently. Ramaswamy Iyer in his book 'Law of Torts' and Anand and Shastri in their books 'Law of Torts' have also defined the word. Without going into or quoting the different definitions of the different authors, but considering all these definitions, it can safely be said that the essentials of tort are the following—

(i) There must be some act of omission on the part of the defendant, not being a breach of some duty undertaken by contract.

(ii) The act or omission complained of must not be authorised by law.

(iii) The wrongful act or omission complained of must inflict injury special,

private and peculiar to the plaintiffs.

Applying these tests to the facts of the present case the act complained of does not arise out of any contract, it is not authorised by law as it has been held to be an act committed by the Land Customs Officers beyond the scope of the law and it has inflicted injury on the plaintiffs, in the shape of deprivation of the goods belonging to the plaintiffs. Therefore, this argument of Mr. Grover does not help him.

4. Mr. Anil Dev's argument is that the Union of India is not at all liable for the illegal, mala fide and unwarranted actions of the Land Customs authorities. He has cited some authorities in support of his contention which may be mentioned as AIR 1961 Raj 64, AIR 1961 Madh Pra 316 and AIR 1965 SC 1039. We need not discuss the earlier authorities of Rajasthan and Madhya Pradesh because the law is very clearly laid down in the Supreme Court authority above mentioned i.e. AIR 1965 SC 1039. In that case some gold was seized by a police party from the plaintiff. It was kept in the Malkhanna. The Head-Constable in-charge of the Malkhanna ran away with the gold. The plaintiff brought a suit for the price of the gold wrongfully seized from him. The Supreme Court held that the manner in which the gold was seized had been dealt with at the Malkhanna showed a gross negligence on the part of the police officers and that the loss suffered by the plaintiff was due to the negligence of police officers of the State. Their Lordships further held that—

"that the act of negligence was committed by the police officers while dealing with the property of the plaintiff which they had seized in exercise of their statutory powers. The power to arrest a person, to search him, and to seize property found with him, are powers conferred on the specified officers by statute and in the last analysis, they are powers which can be properly characterised as sovereign powers and so the act which gave rise to the present claim for damages had been committed by the employees of the State during the course of its employment but the employment in question being of the category which can claim the special characteristic of sovereign power"

The suit of the plaintiff was dismissed. We have given out careful consideration to the argument of the learned counsel for the appellant. But we do not wholly agree with him. We have already stated that the finding of fact that the goods were wrongfully seized from the plaintiffs has not been challenged in this appeal. Accepting that finding as correct, we have to come to this irresistible conclusion that the goods having been wrongfully seized

from the plaintiffs, the plaintiffs are entitled to the restitution of those goods wherever or in whosesoever possession they are. The Supreme Court authority on which reliance is placed by Mr. Anildev Singh is clearly distinguishable and cannot apply to this case. In that case the gold seized was carried away by the Head constable who had run away with the same to Pakistan. The gold was not in the Malkhanna of the Government. Here the goods or the money equivalent is in the coffers of the Union of India. It is the property of the plaintiffs and has been illegally seized. The price of the goods at Rs. 4324-5-3 is not disputed. If the cloth were not converted into money, on this finding of fact the retention of the cloth either by the Union of India or by any of its servants would be wrongful and the plaintiffs would be entitled to get back their goods; the goods have been converted into money and the sale proceeds are lying with the Union of India. Therefore, the plaintiffs in our opinion, are clearly entitled to the refund of this amount which is lying with the defendant.

We agree with the contention of the learned counsel for the appellant that a claim for damages that the plaintiffs would think themselves entitled to on account of the wrongful acts of the Land Customs authorities would not lie against the Union of India on the basis of the Supreme Court authority. But the plaintiffs would be clearly entitled to the restitution of the property or its money equivalent because that property no more exists. In this case the plaintiffs have claimed Rs. 1300/- as expenses incurred by them as well as Rs. 500/- levied as penalty by the Land Customs authorities. The levy of penalty is a power vested in the Land Customs Officers under the statute and would be deemed to be a statutory power vested in them. Therefore, that cannot be questioned in that suit and the civil court will not be competent to grant any relief for the refund of this money to the plaintiff. Similarly the Union of India cannot be liable for Rs. 1300/-, alleged to have been incurred by the plaintiffs in defending the action against the Land Customs authorities, before the concerned authorities upto the Ministry of finance. To that extent the Supreme Court authority would give immunity to the Union of India; but it could not give any protection to the Union of India to retain the actual property i.e., the cloth seized in this case or its money equivalent because it was wrongfully and maliciously seized by the Land Customs authorities. Therefore, in our opinion the plaintiffs are entitled to this amount of Rs. 4,324.33 paise. To that extent the decree of the trial court would be upheld.

5. Mr. Anil Dev argued that the suit of the plaintiffs would be covered by Article 2 to Schedule 1 of the Limitation Act. He bases his argument on AIR 1932 All 16. We do not think that authority has any application to this case. Art. 2 refers to cases for compensation for doing or for omitting to do any act alleged to be in pursuance of any enactment in force for the time being in the State. When the case was first argued before the Sub-Judge, who ultimately dismissed the suit, the learned Counsel for the defendant relied on Article 14 which is in the following words:—

"To set aside any act or order of any officer of Government in his official capacity, not herein otherwise expressly provided for."

The then Sub-Judge held the suit within time. When the appeal was preferred before this Court, which was disposed of on 26-4-1965, the point of limitation was not at all pressed. Even if we apply Article 14 the suit is within time. The final order passed in this case by the Ministry of Finance was on 15-12-1962. The suit was brought on 2-11-1963 i.e., within one year of the final order. Therefore, Article 2 not being applicable, even if we apply Article 14 as pressed for by the learned counsel for the appellant at the initial stage, the suit is clearly within time. We therefore, do not find that the suit is barred by limitation.

6. Some authorities about the distinction between attempt and preparation were argued at the bar but in view of the fact that the finding of fact as arrived by the trial Court not having been challenged before us, we need not go into those authorities.

7. The result is that the decree of the trial court is upheld to the extent of Rs. 4,324.33 paise. In the circumstances of the case, the parties will bear their own costs in this appeal.

8. ALI C. J.:— I agree with my learned brother Bhat J. but would like to add a few lines of my own.

9. To begin with I had a little hesitation in agreeing with the view taken by Bhat J. because of the pronouncement of the Supreme Court in AIR 1965 SC 1039, but on a closer scrutiny of the various aspects of the matter I find myself ultimately in complete agreement with the view taken by my learned brother. It has rightly been pointed out by my learned brother that the part of the suit that can be decreed by us would be only that part which relates to the pure and simple recovery of the money equivalent of the goods of the plaintiff lying with the Union of India and which had been seized by the Customs authorities without any lawful cause, as held by the trial court. Apart from the question of torti-

ous liability the simple point which falls for determination in this case is. Can the plaintiff ask the Union of India to return a sum of money which is lying with it and to which the plaintiff has got title and which is being unlawfully retained by the Union of India? The answer to such a question must necessarily be in the affirmative.

The claim of the plaintiff which we are decreeing is not for damages on account of the tortious or the negligent act of the employees of the Union of India. Nor is a decree being passed in this appeal on the basis of the vicarious liability of the defendant. In fact we would be fully justified in invoking the principle contained in Section 70 of the Contract Act for restituting the benefit which the Union of India has derived by keeping the money of the plaintiff in its custody for some time. It is manifest that if the goods of the plaintiff were not seized then the plaintiff would have earned profits on those goods or even if those goods were sold in open market, the plaintiff could have earned interest on the aforesaid amount of money.

10. In the instant case it is not disputed that the goods confiscated by the Customs authority were finally auctioned for a sum of Rs 4324 53. It is also not disputed that this amount has ever since the date of the auction been in the coffers of the Union of India. Thus the question arises as to whether or not the plaintiffs are entitled to ask for a refund of the money which belonged to the plaintiffs and was wrongfully seized and which is in fact lying with the defendant. In AIR 1928 PC 261 it was clearly held that where a contract is found to have been entered under a mistake of both the parties the money paid under such mistake can be recovered as money had and received. In this connection their Lordships of the Privy Council observed as follows—

"It follows that in the absence of such proof, the payment made to the appellant in respect of the 1000 shares was on the interpretation of the facts most favourable to himself, a payment made under a mistake of fact common to himself and the company, viz., that he was a shareholder for 1,000 shares when in truth he was not, and money so paid can be recovered as money had and received to the use of the company and this was the form of the action."

11. The same principle, in my opinion, applies to the facts of the present case. Here also the Customs authorities unlawfully seized the goods belonging to the plaintiffs believing that the same were going to be smuggled. The goods were therefore, put to auction and retained by the

Union of India in its custody under a mistaken impression that the money was the sale proceeds of the goods which were lawfully seized.

12. On the findings of fact by the trial court which have not been disputed before us it is manifest that both the parties were under a mistaken notion. The goods, according to the trial court, were not at all meant for smuggling and were therefore, wrongfully seized. Similarly the retention of the money by the Union of India under the belief that the money was the sale proceeds of the smuggled goods was mistaken. On this point also there can be no doubt that the plaintiffs would be entitled to the recovery of the bare amount representing the price of the goods lying in the coffers of the Union of India.

13. Finally the case in AIR 1965 SC 1039 (supra) is clearly distinguishable from the facts of the present case. In that case the money was not in the custody of the Union of India but was actually taken away by a head-constable and had been misappropriated by him or converted to his own use. Thus the Union of India could be made to pay the money only if it was found to be vicariously liable. Since, however, the money was taken away due to the negligence of an officer in the exercise of his statutory or sovereign powers, the immunity of the Union of India was both full and complete.

14. In the present case the money equivalent of the goods auctioned continues to be in the custody of the Government of India and therefore, there is no reason why the Union of India should not be asked to pay back the money which belongs to the plaintiff and to which the Union of India has no title.

15. I, therefore, agree that appeal be dismissed, with the modification indicated by my brother Bhat J, but in the circumstances we leave the parties to bear their own costs.

SSG/D.V.C.

Appeal partly allowed.

AIR 1969 JAMMU AND KASHMIR 132
(V 56 C 28)

JASWANT SINGH, J.

Mangat Ram, Applicant v. Babu Ram, Respondent.

Criminal Appn. No. 1 of 1968
D/- 15-11-1968.

Criminal P. C. (1898), S. 561-A — Order under section should only be passed where there is glaring defect on face of proceedings making prosecution untenable and where there is no reasonable chance of accused being convicted: AIR 1960 SC 866 Fol.

(Para 4)

CM/EM/A981/69

Cases Referred: Chronological Paras

- (1960) AIR 1960 SC 866 (V 47)=
1960 Cri LJ 1239, R. P. Kapur v.
State of Punjab 6
- (1954) AIR 1954 Punj 193 (V 41)=
56 Pun LR 54=1954 Cri LJ 1393,
Dr. Shankar Singh v. State of
Punjab 6
- (1928) AIR 1928 Bom 184 (V 15)=
29 Cri LJ 317, In re, Shripad G.
Chandavarkar 6
- (1925) AIR 1925 Mad 39 (V 12)=
ILR 47 Mad 722=25 Cri LJ 1009,
Ramanathan Chettiar v. Sivarama
Subramania 6
- (1924) AIR 1924 Cal 1018 (V 11)=
25 Cri LJ 1258, Nripendra
Bhusan Roy v. Gobinda Bandhu
Majumdar 6
- (1899) ILR 26 Cal 786=3 Cal WN
491, Jagat Chandra Mozumdar
v. Queen Empress 6
- H. L. Wazir, for Applicant; I. K. Kotwal,
for Respondent.

ORDER:— This is an application under Section 561-A Cr. P. C. praying that the proceedings pending against the applicant under Section 406 R. P. C. in the Court of the Sub-Registrar, Magistrate, Ist Class, Srinagar, be quashed.

2. Shri Hira Lal Wazir, appearing in support of the application has submitted that his client has never been to Srinagar, and has never met the respondent there, that the complaint against him is false and frivolous and that in any case the ingredients of the offence namely entrustment of the amount and its criminal misappropriation or retention or its dishonest conversion to his own use by his client are not made out. He has also drawn my attention to a few authorities but they have little bearing on the matter in question.

3. Mr. I. K. Kotwal, has on the other hand, submitted that the High Court cannot interfere with the criminal proceedings at their interlocutory stage unless the case is of an exceptional nature.

4. It is well settled that the inherent power possessed by the High Court to quash criminal proceedings is to be exercised in exceptional cases to prevent the abuse of the process of the Court or to secure the ends of justice. In other words an order under Section 561-A Cr. P. C., should only be passed where there is a glaring defect on the face of the proceedings which makes the prosecution untenable and where there is no reasonable chance of the accused being convicted.

5. In the instant case the proceedings are still at an initial stage and it is difficult to say at this stage that the prosecution has been launched to harass the petitioner or that the ingredients of the offence are not made out.

6. The nature and scope of inherent power of the High Court to make such orders as may be necessary to give effect to any order under the Criminal Procedure Code or to prevent abuse of the process of the court or otherwise to secure the ends of justice, was considered in R. P. Kapur v. State of Punjab, AIR 1960 SC 866, where the Hon'ble Gajendragadkar J., speaking for the court observed as follows:—

"It is well established that the inherent jurisdiction of the High Court can be exercised to quash proceedings in a proper case either to prevent the abuse of the process of the court or otherwise to secure the ends of justice. Ordinarily criminal proceedings instituted against an accused person must be tried under the provisions of the Code, and the High Court would be reluctant to interfere with the said proceedings at an interlocutory stage. It is not possible, desirable, or expedient to lay down any inflexible rule which would govern the exercise of this inherent jurisdiction. However, we may indicate some categories of cases where the inherent jurisdiction can and should be exercised for quashing the proceedings. There may be cases where it may be possible for the High Court to take the view that the institution or continuance of criminal proceedings against an accused person may amount to the abuse of the process of the court or that the quashing of the impugned proceedings would secure the ends of the justice. If the criminal proceeding in question is in respect of an offence alleged to have been committed by an accused person and it manifestly appears that there is a legal bar against the institution or continuance of the said proceedings the High Court would be justified in quashing the proceeding on that ground. Absence of the requisite sanction may, for instance furnish cases under this category. Cases may also arise where the allegations in the first information report or the complaint even if they are taken at their face value and accepted in their entirety do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not. In such cases it would be legitimate for the High Court to hold that it would be manifestly unjust to allow the process of the criminal court to be issued against the accused person. A third category of cases in which the inherent jurisdiction of the High Court can be successfully invoked may also arise. In cases falling under this category the allegations made against the accused person do constitute an offence alleged but there is either no

legal evidence adduced in support of the case or evidence adduced clearly or manifestly fails to prove the charge. In dealing with this class of case it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation in question. In exercising its jurisdiction under S 561-A Cr P C., the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of the evidence the accusation made against the accused would not be sustained. Broadly stated that is the nature and scope of the inherent jurisdiction of the High Court under Section 561-A Cr P C., in the matter of quashing criminal proceedings and this is the effect of the judicial decisions on the point (Vide *In Re Shripad G Chandavarkar*, AIR 1928 Bom 184, *Jagat Chandra Mozumdar v Queen Empress* (1899) ILR 26 Cal 786, *Dr. Shankar Singh v State of Punjab*, 56 Pun LR 54 AIR 1954 Puni 193, *Nripendra Bhusan Roy v Gobinda Bandhu Majumdar* AIR 1924 Cal 1018 and *Ramanathan Chettiyar v Sivarama Subramania* ILR 47 Mad 722 AIR 1925 Mad 39")

Keeping in view the principles deducible from the aforesaid ruling of the Supreme Court, I do not think it is a case in which extraordinary powers of the High Court should be used to quash the criminal proceedings at their present stage.

7. For the foregoing reasons the petition is dismissed. The observations made herein are purely for the purpose of this petition and shall not be construed by the trial magistrate as preventing him to let off the accused if after taking the evidence led in the case he comes to the conclusion that no case under Section 406 R P C is made out against the applicant MBR/DVC. Petition dismissed.

AIR 1969 JAMMU AND KASHMIR 134
(V 56 C 29)

JASWANT SINGH, J.

Om Parkash, Petitioner v. Sardar Kulbir Singh, Respondent.

Criminal Appln. No 18 of 1968,
D/- 19-12-1968

(A) Criminal P. C. (1898), S 561-A —
Powers under section have to be exercised

CM/EM/A985/69

ed with great care and circumspection and High Court does not ordinarily interfere at interlocutory stage of criminal proceedings in subordinate court. AIR 1960 SC 866, Foll.; AIR 1963 All 33 Rel. on

(Para 6)

(B) Criminal P. C. (1898), S 1 — Existence of civil remedy does not exclude trial by criminal court of offence — Fact that complainant is entitled to both civil and criminal remedies does not disentitle him to take recourse to criminal remedy.

(Para 7)

Cases Referred Chronological Paras
(1963) AIR 1963 All 33 (V 50) =

1963 (1) Cri LJ 38, Sonexa v
State of U P

(1960) AIR 1960 SC 866 (V 47) =

1960 Cri LJ 1239, R. P. Kapur
v State of Punjab

J L Sehgal, for Petitioner; S D.
Sharma, for Respondent

ORDER.— This is an application under Section 561-A Cr P C praying that criminal proceedings under Section 420 R P C pending against the petitioners in the court of the Munsiff Magistrate Ist Class, Nowshera be quashed or in the alternative be transferred to some other court of competent jurisdiction at Jammu.

2. The facts giving rise to this application are —

The respondent Kulbir Singh lodged a complaint under Section 420 R P C in the court of Munsiff Magistrate Ist Class, Nowshera, on 1-9-1966 with the allegations that he was a retail dealer of cloth at Nowshera, that for carrying on his business he has to import cloth from outside that on 23-7-1966 petitioner No 3 herein, who is an agent of the firm M/s Progressive Handloom Industries, Gaziaabad, came to his shop and showed him certain samples of cloth, that acting on the representation of the said petitioner that supplies would be made according to the samples he placed an order for supply of some cloth, that the representation made by the petitioner No 3 was fraudulent that on receipt of intimation about the arrival of the consignment note he got the same i.e., the consignment note released from the post office Nowshera on payment of Rs 353.42 plus the consignment charges amounting to Rs 30.75, that on taking delivery of the consignment and seeing its small size he got suspicious as before the arrival of the consignment M/s Des Raj Munshi Ram had also received some goods from the aforesaid firm which did not correspond to the samples shown and exhibited to them that he accordingly had the consignment opened before the Tehsildar Magistrate Nowshera, that on opening the consignment before the Tehsildar Magistrate, it was discovered that the goods despatched by the petitioners were not in

accordance with the samples shown to him and were inferior in make and quality and did not exceed Rs. 90/- in value, that he had the consignment sealed in presence of the Tehsildar Magistrate, that as the accused i.e., the petitioner herein had not supplied the goods and had acted fraudulently they were liable to be dealt with under Section 420 R. P. C.

3. After recording the statement of the complainant and his witness Munshi Ram and being of the opinion that a prima facie case under Section 420 R. P. C. has been disclosed against the petitioners herein, the Munsiff Magistrate issued bailable warrants to secure their attendance. Thereafter several attempts were made to procure the attendance of the accused but all of them proved abortive.

The accused instead of putting in appearance before the trial magistrate have approached this court by means of an application under Section 561-A Cr. P. C., as stated above.

4. Mr. J. L. Sehgal appearing in support of the application has urged that even assuming the allegations made in the complaint to be correct, no offence appears to have been made out against the accused, that the complaint does not either allege that the accused had no intention of executing the order from the very commencement or had no intention of executing the order in the manner they were expected to do, that subsequent dishonest intention as alleged in the complaint would not bring the matter within the mischief of Section 420 R. P. C. and that in any case, the case is of a civil nature.

5. Mr. Sharma appearing for the respondent has on the other hand urged that the complaint does prima facie disclose the commission of offence under Section 420 R. P. C. by the accused, that the criminal proceedings had been appropriately taken against the petitioners and that is not a case in which the High Court should interfere in exercise of its extraordinary jurisdiction.

6. It cannot be gainsaid that the High Court is invested with plenary powers to quash criminal proceedings pending in a subordinate Court, but those powers, it is also well settled, have to be exercised with great care and circumspection, and the High Court does not ordinarily interfere at an interlocutory stage of criminal proceedings in a subordinate court.

7. The Supreme Court has in R. P. Kapur v. State of the Punjab, AIR 1960 SC 866, laid down certain guide lines for exercise of the inherent power under Section 561-A of the Criminal Procedure Code. According to the observations of their Lordships of the Supreme Court, the inherent power is to be exercised in the following category of cases.

"i. Where it manifestly appears that there is a legal bar against the institution or continuance of the criminal proceeding in respect of the offence alleged. Absence of the requisite sanction may for instance furnish cases under this category.

ii. Where the allegations in the first information report or the complaint even if they are taken at their face value and accepted in their entirety do not constitute the offence alleged; in such cases no question of appreciating evidence arises; it is a matter merely of looking at the complaint or the first information report to decide whether the offence alleged is disclosed or not.

iii. Where the allegations made against the accused person do constitute an offence alleged but there is either no legal evidence adduced clearly or manifestly fail to prove the charge. In dealing with this class of cases, it is important to bear in mind the distinction between a case where there is no legal evidence or where there is evidence which is manifestly and clearly inconsistent with the accusation made and cases where there is legal evidence which on its appreciation may or may not support the accusation, in question. In exercising its jurisdiction under S. 561-A Cr. P. C. the High Court would not embark upon an enquiry as to whether the evidence in question is reliable or not. That is the function of the trial magistrate and ordinarily it would not be open to any party to invoke the High Court's inherent jurisdiction and contend that on a reasonable appreciation of evidence the accusation made against the accused would not be sustained."

Again in AIR 1963 All 33, it has been held:

"The inherent powers of the High Court under Section 561-A of the Cr. P. C. are very wide but on account of this very reason they are to be applied in a very careful manner and should be used only in extraordinary cases. Section 561-A is not an instrument handed over to an accused person to short-circuit a prosecution and bring about its sudden death, whenever his counsel feels that the prosecution is not likely to succeed. The High Court should normally refrain from giving a premature decision in a case whose picture is extremely incomplete and hazy as the evidence has not been produced and the issues involved whether factual or legal cannot be seen in their true perspective. It is only where the High Court is satisfied that it amounts to an abuse of a process of law or that it amounts to a persecution of an accused person or that there is no reasonable possibility of the prosecution succeeding in the case or some similar reason that relief is granted under Section 561-A Cr. P. C."

I have carefully perused the allegations made in the complaint and I am of the

opinion that the present case does not fall within the categories enumerated in the above rulings

The contention of the learned counsel for the petitioners that since the complainant has a civil remedy open to him, he should not be permitted to resort to criminal proceedings cannot also be allowed to prevail for it is also well settled that the existence of civil remedy does not exclude trial by a criminal court of an offence and the fact that a complainant is entitled to both civil and criminal remedies does not disentitle him to take recourse to the criminal remedy

8. As the instant case is still at an interlocutory stage and no evidence has so far been recorded in the presence of the accused. It is difficult to get a clear picture of the true state of affairs bearing in mind therefore, the principles enunciated in the above-mentioned rulings, I am unable to accede to the submission of the learned counsel for the petitioners to quash the proceedings

9. Let me now advert to the prayer of the petitioners for transfer of the proceedings from the court of the Munsiff magistrate Nowshera to some court at Jammu. This prayer also cannot be granted because the main ground for transfer that the Tehsildar Magistrate Nowshera in whose presence the consignment received from the petitioners is alleged to have been opened is likely to influence the Munsiff magistrate, apart from being imaginary and fanciful has ceased to exist as the learned counsel for the petitioners himself admits that the said gentleman has already been transferred from Nowshera.

No other good ground for transfer of the case has been made out.

10. For the foregoing reasons, there is no substance in this application which is dismissed.

MBR/ D.V.C. Application dismissed.

AIR 1969 JAMMU AND KASHMIR 136
(V 56 C 30)
JASWANT SINGH, J.

Kushma Joshi and another, Petitioners v Pro-Vice-Chancellor Jammu and Kashmir University and Others, Respondents.
Writ Petn. Nos 99 and 120 of 1968, D/- 3-1-1969

Constitution of India, Arts 14, 29 (2) — Reasonable classification based on intelligent differentia for purpose of special treatment is not prohibited — Admission to University Classes — Reservation made for children of ex-servicemen and service-men proceeds on reasonable basis and such classification is permissible under Art. 14. AIR 1958 SC 538 & AIR

1966 Mys 40 Rel. on; AIR 1964 Ker 39 Disting; AIR 1968 Pat 3 (FB) Ref.

(Para 13)

Cases Referred: Chronological Paras
(1968) AIR 1968 Andh Pra 165
(V 55) = (1968) 1 Andh WR 116,
P. Sagar v. State of A. P. 13
(1968) AIR 1968 Pat 3 (V 55) =
ILR 46 Pat 616 (FB), Umesh
Chandra Sinha v. V. N. Singh 13, 15
(1964) AIR 1964 Ker 39 (V 51) =
1963 Ker LJ 820, Jacob Mathew
v State of Kerala 9, 13
(1966) AIR 1966 Mys 40 (V 53) =
(1965) 2 Mys LJ 571, Subhashini
v State of Mysore 13
(1958) AIR 1958 SC 538 (V 45) =
1959 SCR 279, Ram Krishna
Dalmia v. S. R. Tendolkar 13
R. N. Bhalgotra and Joginder Singh, for
Petitioners; D. D. Thakur and R. P. Sethi,
for Respondents

ORDER:— These two petitions Nos 99 and 120 under Section 103 of the Constitution of Jammu and Kashmir are by Kushma Joshi and Vedh Prakash respectively who sought but have been denied admission to the MSc. Chemistry class of the Jammu and Kashmir University. The petitioners pray that by issue of a writ of Certiorari the order of respondent No. 1 (Pro Vice-Chancellor of the Jammu and Kashmir University) whereby Baldev Chand Katoch, a respondent in both the petitions, has been admitted to the said class be quashed and by a writ of Mandamus or other appropriate writ the respondent No. 1 be directed to admit the petitioners to the said class in the current session.

2. As these petitions seek the cancellation of admission of one and the same respondent namely Baldev Chand Katoch to the MSc. Chemistry class of the Jammu and Kashmir University and raise identical points, it would be convenient to dispose them together by this judgment.

3. In petition No. 99 of 1968 the petitioner's case is that she passed the BSc. examination of the Punjab University securing 249 out of 500 marks, that she is a daughter of ex-serviceman who had after retirement been re-employed in the Military and stationed in the State, that she applied for admission to the MSc. Chemistry class of Jammu and Kashmir University on the basis of her being the daughter of an ex-serviceman, that respondent No. 2 i.e. Baldev Chand Katoch who is not a son of an ex-serviceman and who passed the BSc. examination of the Punjab University in the 3rd division and had obtained 43 percent marks in Chemistry as against the petitioner who had secured 2nd division and obtained 50 percent marks in the subject has secured admission to the said class by cheating the University and by keeping the autho-

rities in dark by not mentioning his parentage and by representing himself to be the ward of an ex-serviceman, that interview for the purpose of selecting candidates for admission to the said class was held and after the interview a merit list was prepared wherein she was shown at serial No. 64 and respondent No. 2 at Serial No. 82, that in view of her merit position she was recommended by the Head of the department for admission to the said class but respondent No. 2 was unduly favoured, that a copy of merit list prepared for admission to the said class and of the admission form of Baldev Chand for the said class as also of his B.Sc. certificate were denied to her in spite of a written request made by her in that behalf, that selection of the respondent No. 2 as against her is discriminatory and infringes Article 16 of the Constitution of India as applied to the State of Jammu and Kashmir, and that the order of respondent No. 1 granting admission to the respondent No. 2 is also bad as a seat reserved for children of ex-serviceman has been given to respondent No. 2 who does not belong to that category.

4. This petition has been resisted by respondent No. 1 inter alia on the grounds that the father of the petitioner being still in service of the Army, he cannot be treated as an ex-serviceman for the purpose of the Government order, that a seat was reserved for the wards of ex-serviceman in the M.Sc. Chemistry class of the Jammu and Kashmir University, that both the petitioner and respondent No. 2 were the wards of ex-servicemen but as the petitioner was not a State subject, her case was not considered for admission to the said class, that the father of respondent No. 2 is dead and his brother also died while fighting on the front, that there being no major difference in the comparative merits of the petitioner and the respondent No. 2 admission was granted to the latter against the seat reserved for a ward of an ex-serviceman, that respondent No. 2 is the son of an ex-serviceman whose guardian also died while fighting on the front, and that while the petitioner had secured 50% marks in Chemistry respondent No. 2 had secured 54% marks in the said subject. It is not, however, denied that the petitioner had passed the B.Sc. examination in 2nd division and respondent No. 2 in the third division. It has also not been denied that in the merit list prepared in connection with the selection of candidates for admission the petitioner's name appeared at Serial No. 64 and respondent's name appeared at Serial No. 82. By way of postscript it has been submitted that the Deputy Secretary to Government General Department had, vide his No. TRB-Res/67 dated 28-7-1967, communicated to the Registrar

of the University that the Government had, vide Government order No. 381 of 1967 dated 6-7-1967, made reservations for the sons (children) of ex-servicemen and servicemen belonging to J & K State.

5. It may be stated that no affidavit in support of his assertions has been filed in this case on behalf of respondent No. 1, nor has it been anywhere averred on his behalf that Baldev Chand respondent or his father belonged to the State. On the other hand, it appears from the merit list produced before me by the learned counsel for the respondent No. 1 that respondent No. 2 is a non-State subject.

6. In the course of the objections filed by respondent No. 2 he has also stated that he is son of an ex-serviceman, that his whole family has dedicated itself to the service of the country, that he is a son of late Subedar Sant Singh Katoch who served in the 8/14 Punjab Regiment and the real brother of the late Naib Subedar Amin Chand Katoch, and that after the death of his father and his real brother he has been living under the guardianship of his uncle Subedar Milap Chand. The respondent has also averred that he had secured 54% marks in Chemistry in the B.Sc. examination.

7. In petition No. 120 of 1968 the petitioner has stated that he passed the B.Sc. examination in high second division securing 382 marks, that he along with other candidates applied for admission to the M.Sc. Chemistry class of the Jammu and Kashmir University, that he was also interviewed, that he secured 25th position in the order of merit and was entitled to be admitted against one of the 30 seats available for admission to the said class, that under the policy and circular of the Department of Education Government of Jammu and Kashmir as also of the Ministry of Education, Government of India, six seats were reserved on the basis of merit for sportsmen that among the six sportsmen who were candidates to the said class the petitioner was selected as No. 1 and recommended by the Physical Director who was authorised to make the selection of sportsmen, that under rules candidates were to be selected and admitted to the said class strictly according to merit and position obtained on the basis of marks obtained in the university examination and at the interview, that Baldev Chand respondent No. 4 who had obtained only 326 marks and a number of other candidates who had obtained much lesser marks than him have been admitted to the said class in violation of the rules, that he approached the Pro-Vice-Chancellor requesting him to direct the Head of the Faculty to admit him to the said class, that in spite of the telephonic order of respondent No. 1

he was not admitted, that the admission of respondent No. 4 has been made against the provisions of Sections 26, 28 and 29 of the University Act and that by not admitting him the Statutes and Regulations made under the University Act have been violated. This petition has also been resisted by respondent No. 1 who in the course of his objections has stated that there were only 30 seats available for the M.Sc. Chemistry class, that position of the petitioner is 41st in the merit list, that recommendation, if any, of the Physical Director has no meaning, that Baldev Chand respondent is the only exception to the general rule of merit, that he has been given admission on the ground of his being a ward of an ex-serviceman, that there was nothing like policy or circular of the Ministry of Education, Government of India, or the State Government reserving seats for sportsmen, that Section 26 of the University Act provides only for matters in respect of which the Statutes can be framed, that the said section does not relate to admission and has no bearing on the matter, and that there has been no violation of any Statute, Regulation or Act.

8. Shri R. N. Bhalgotra appearing in support of the petition No. 99 of 1968 has submitted that his client has been illegally discriminated against, that she being admittedly the daughter of an ex-serviceman and being higher in order of merit in that category was entitled to be admitted against a seat reserved for the children of ex-servicemen.

9. Sardar Joginder Singh appearing in support of petition No. 120 has submitted that his client having secured 25th position in order of merit as a result of the interview was entitled to be admitted against one of the 30 seats available for the purpose, and that in any case he should have been admitted against one of the seats reserved for sportsmen. Lastly he has contended that reservation made for the wards of children of ex-servicemen is unconstitutional and invalid. He has in support of his contentions drawn my attention to the decision of the Kerala High Court reported in AIR 1964 Ker 39.

10. Mr. D. D. Thakur appearing for the respondent No. 1 has, however, contended that reservation of seats for children of ex-servicemen does not violate the provisions of law or of the Constitution.

11. I have given my very anxious consideration to the submissions made by the learned counsel for the parties and have also carefully studied the law including some decided cases bearing on the matter.

12. For a proper appreciation of the rival contentions of the learned counsel for the parties, it will be convenient at

this stage to refer to Articles 14, 15, 16 and 29 of the Constitution of India as applied to the State of Jammu and Kashmir which run as under:—

"Article 14 The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

"Article 15 (1) The State shall not discriminate against any citizen on grounds only of religion race, caste, sex, place of birth or any of them.

x	x	x
x	x	x

(4) Nothing in this Article or in clause (2) of Article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes."

"Article 16. There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State

x	x	x
x	x	x

(4) Nothing in this Article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which in the opinion of the State is not adequately represented in the services under the State

x	x	x
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"Article 29(1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them."

13. The scope of Article 14 as also the other Articles of the Constitution reproduced above has been explained in a number of rulings of the Supreme Court and of other courts in the country and it is unnecessary to refer to them here. Suffice to say that although the Constitution of India forbids discrimination, it does not prohibit reasonable classification based on intelligent differentia for the purpose of special treatment. Reference in this connection may be made to *Ram Krishna Dalmia's case*, 1959 SCR 279 = (AIR 1958 SC 538). According to this judgment the test of reasonableness is (1) whether the classification is rational and based on intelligible differentia which distinguishes the persons or things that are grouped together from others that are left out from the group and (2) whether the basis of differentiation has

any rational nexus or relation with the policy or objects of the law. It would thus be clear that besides the reservations which are specifically provided for in Articles 15(3) and (4) and 16 (4) of the Constitution of India, reservations on the basis of reasonable classification under Article 14 of the Constitution can be made. I am fortified in this view by a direct authority of the Mysore High Court reported in AIR 1966 Mys 40 where a division bench of the court upheld the reservations of seats in the Medical Colleges under the management of the Government for the children or wards of the men in armed services, and ex-servicemen including those who were in the armed services, during the Second World War. This judgment appears to have been noticed in (1966) 1 Andh WR 294 and AIR 1968 Andh-Pra 165, but the aforesaid reservation has not been held to infringe any constitutional inhibition.

The decision of Kerala High Court reported in AIR 1964 Ker 39 on which reliance has been placed by Shri Joginder Singh is clearly distinguishable. In that case challenge to the reservation of two seats for children of Registered Medical Practitioners and one seat for a sportsman student was upheld on the ground that there was no legal basis for such reservation in professional Colleges. The reservation made, however, on the basis of classification of the kind as in the present case is rational and reasonable. It is well known that the armed forces have rendered meritorious service ever since India became free and the reservation of seats for children of ex-servicemen and of the men in armed forces cannot but be deemed to be in national interest. Even in the judgment reported in AIR 1968 Pat 3 (FB) where the Ordinance reserving seats in Medical Colleges for children of university employees on ground of their extreme pecuniary difficulties and for rendering meritorious services to the university was struck down as discriminatory and it was held that there was no reasonable nexus between the object intended to be achieved by the Ordinance on the one hand and the principle on which the children of the employees of the University were selected for preferential treatment on the other, the decision reported in AIR 1966 Mys 40 though noticed was not disapproved. I am, therefore, clearly of the view that the reservation made for the children of ex-servicemen and servicemen proceeds on a reasonable basis and is not hit by the provision of the Constitution. On the contrary, such a classification is permissible under Article 14 of the Constitution. For the foregoing reasons, I find myself unable to accede to the contention of Sardar Joginder Singh that no reservations could be made for the children of ex-servicemen and servicemen.

14. The other contentions of Shri Joginder Singh are also without any substance. According to the merit list produced before me on behalf of the University, the position of Shri Ved Prakash petitioner is 41st in the order of merit and not 25th as contended by him. He had, therefore, no claim to be admitted on the basis of his merit. His contention that he ought to have been accommodated against one of the seats reserved for sportsmen is also without any foundation as according to the affidavit of Shri M. A. Chisti, Joint-Registrar of the University, filed in reply to his petition, no such reservation had been made. The petition of Shri Ved Prakash, therefore, fails and is hereby dismissed.

15. Let me now examine as to whether Kushma Joshi petitioner has been illegally discriminated against or not. From the statement at page 27 of the file, produced before me by Shri D. D. Thakur, it appears that there were only three applicants who sought admission to M.Sc. Chemistry class on the basis of their being children of ex-servicemen. Out of the three applicants namely Baldev Chand respondent, Kushma Joshi petitioner, and Rajinder Singh Sambria, the last one does not appear to have presented himself for interview. As such Baldev Chand and Kushma Joshi were the only two contestants for the reserved seat. It is well settled that even in case of a reserved seat the best available candidate has to be selected. It is not denied before me that both Baldev Chand and Kushma Joshi belonged to the category for which the reservation had been made. It has also not been denied that Kushma Joshi Petitioner's position in the category of the children of ex-servicemen and servicemen as regards merit is higher than that of Baldev Chand respondent. Her preferential claim for admission to M.Sc. Chemistry class could not, therefore, have been ignored by the University authorities. The averment in the objections filed on behalf of respondent No. 1 in petition No. 99 of 1968, that the case of Kushma Joshi was not considered as she was not a State subject also does not appeal to me in view of the fact that in the merit list produced for my perusal on behalf of respondent No. 1 even Baldev Chand respondent has been shown as a non-State subject. It is, I think, because of all these reasons that Shri D. D. Thakur has not made any serious attempt to justify the selection of Shri Baldev Chand respondent. Thus Kushma Joshi being decidedly higher in order of merit was entitled to be preferred to Baldev Chand and has been unjustly discriminated against in the matter of admission to M.Sc. Chemistry class of Jammu and Kashmir University for the session 1968-69. Her claim cannot, therefore, be ignor-

ed. The contention of Shri Devi Das that Kushma Joshi even if admitted at this stage will not be able to make up her attendance cannot be countenanced. A similar contention was advanced in the case reported in AIR 1963 Pat 3 (FB) (supra) but was repelled.

16. Now remains the question of the relief to be granted to the petitioner, Kushma Joshi. As Baldev Chand respondent is stated to have been studying in the M.Sc. class for a considerable length of time i.e. for nearly five months it might cause hardship to him if his admission is disturbed at this stage I would, therefore, direct the respondent No 1 to take steps to admit the petitioner Kushma Joshi to the M. Sc. Chemistry class for the session 1968-69 by providing an additional seat for her. In case the creation of an additional seat be not possible for any reason, Baldev Chand respondent shall have to make way for Kushma Joshi who would in that event be admitted in his place. As the matter has already been delayed due to circumstances beyond the control of the petitioner, I cannot give more than week's time to the respondent to implement this order.

17. In the result the petition No 99 succeeds and the petition No 120 of 1968 filed by Ved Prakash fails and is hereby dismissed. In the circumstances of the case, there will be no order as to costs.

MBR/D.V.C. Order accordingly.

AIR 1969 JAMMU AND KASHMIR 140
(V 56 C 31)

JASWANT SINGH, J.

Durga Dass, Defendant-Appellant v.
Amar Nath, Plaintiff-Respondent.

Second Appeal No 130 of 1966,
D/- 20-4-1967 from judgment of Dist. J.,
Udhampur D/- 30-11-1965.

Limitation Act (1908), S. 23, Arts. 113,
120 — Suit for perpetual injunction for
prevention of wrong — Maintainability —
Suit land purchased by A on 23-1-2006
(BK) from B and C — B and C undertaking
to close door and window of the house
opening on suit land — Subsequently B &
C selling their house to D — D declining
to close door and window — Suit by A
against D, B and C filed on 2-4-1960
(A D) — Case, one of continuing wrong —
S. 23 held applicable and suit was not
barred by limitation — (J & K) Limita-
tion Act (9 of 1955), S. 23, Arts. 84, 119.)

A purchased a plot of land from B and
C on 17-1-2006 (Bikrami). B and C under-
took to close the door and window of

DM/EM/B714/69

their house opening on the said plot. They
also undertook for ever not to open any
door or window on the said plot. Subse-
quently, on 19th Magh 2006, D purchased
from B and C the house having the afore-
said door and window. D was asked sever-
al times to close the door and window,
but he failed to comply with this demand
and finally declined to do so. About a
fortnight thereafter i.e., on 2-4-1960
(A D), A filed suit against D, B and C for
perpetual injunction enjoining D to close
the door and the window opening on his
land.

Held, (1) that the suit was not for speci-
fic performance of the contract and was
maintainable in the form in which it was
framed by A. As the continuance of the
door and the window by D was contrary,
to the right of A and constituted a breach
of the obligation undertaken by D, the
suit for perpetual injunction for preven-
tion of the wrong could lie. AIR 1917
Mad 465 & AIR 1935 Mad 967 Distinguish-
ed. (Para 7)

(2) that Section 23 was applicable and
the suit could not be barred after the ex-
piry of six years from 23-1-2006, as in the
very nature of the obligations, the case
was one of continuing wrong and every
fresh default on the part of D or his pre-
decessor-in-interest would furnish the
plaintiff A with a fresh cause of action.
Their conduct thus amounted to a
continuing wrong and a fresh period of
limitation began to run at every moment
of time during which the wrong continu-
ed. (Para 7)

Cases Referred: Chronological Paras

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|-----------------------------------|---|
| (1959) AIR 1959 SC 798 (V 46) = | |
| (1959) Supp (2) SCR 476 Bala- | |
| krishna Savalram v. Shree | |
| Dhyaneshwar Maharaj Sansthan | 7 |
| (1951) AIR 1951 Nag 327 (V 38) = | |
| ILR (1950) Nag 633, Abid Ali | |
| Khan v. Secy. of State | 7 |
| (1935) AIR 1935 Mad 967 (V 22) = | |
| ILR 59 Mad 75, Ponnu Nadar v. | |
| Kumasu Reddhar | 6 |
| (1917) AIR 1917 Mad 465 (V 4) = | |
| ILR 40 Mad 910, Secy. of State v. | |
| P. Venkayya Garu | 6 |
| (1902) ILR 26 Mad 410, Rajah of | |
| Venkatagiri v. I. Subbiah | 7 |

D. D. Thakur, for Appellant; R. N.
Bhalgotra, for Respondent

JUDGMENT:— This is a defendant's se-
cond appeal against the judgment and
decree of the learned District Judge,
Udhampur, dated 30-11-1965, affirming
the judgment and decree passed by the
Subordinate Judge, Udhampur.

2. The facts leading to this appeal are
simple and may briefly be stated as
follows:—

On 2-4-1960 (A.D.) Amar Nath, plaintiff respondent filed a suit against Durga Dass, defendant-appellant for a perpetual injunction enjoining the latter to close a door and a window opening on the land of the former, as also for removal of two water shoots falling on the said land. It was inter alia averred by the plaintiff that he along with his brother, Daya Ram, purchased a plot of land measuring 85 Ft. x 65 Ft. from Ishar Das and Chuni Lal, defendants Nos. 2 and 3, their elder brother, Mukund Lal, and their mother Mst. Malto by virtue of sale-deed dated 17-1-2006 (Bikrami), that by the aforesaid sale-deed the said vendors i.e. defendants 2 and 3, their elder brother, and their mother, also undertook to close the door and the window of their house opening on the said plot, that the said vendors also undertook for ever not to open any door or window on the said plot, that subsequently by means of sale-deed dated 19th Magh 2006, the defendant No. 1 purchased from defendants Nos. 2 and 3 and their mother the house having the aforesaid door and the window opening on the aforesaid plot, that the defendant No. 1 was asked several times to close the said door and the window and to remove the water shoots but he failed to comply with his demands and finally declined to do so about a fortnight before the institution of the suit.

3. Defendant No. 1 alone resisted the suit. He denied that the defendants Nos. 2 and 3 and others from whom the plaintiff purchased the plot ever undertook to close the door and the window and contended that such an undertaking could not have been given. He further pleaded that the plaintiff not having enforced the alleged agreement within time, his suit was time barred. He also averred that the water shoots alluded to by the plaintiff had been in existence ever since the house was constructed by his predecessors-in-interest.

4. On the pleadings of the parties the following issues were struck in this case by the learned trial court :

1. Whether the defendants Nos. 2 and 3 had promised to close the window and the door of their house opening on the land of the plaintiff? O. P. P.

2. In case issue No. 1 is proved, whether the defendant No. 1 is bound to honour the commitments of the defendants Nos. 2 and 3? O. P. P.

3. In case issues Nos. 1 and 2 are proved, whether the plaintiff has waived his right? O.P.D.

4. Whether the defendant No. 1 has opened two water shoots without any title towards the plaintiff's land? O. P. P.

5. Relief.

5. After recording and appraising the evidence led by the parties the learned

Sub-Judge, Udhampur, found issues Nos. 1 to 3 in favour of the plaintiff. Regarding issue No. 4 the finding of the trial court was that the plaintiff had not been able to show that the water shoots had been opened by the defendant No. 1 after the house was purchased by him from defendants Nos. 2 and 3. The trial court further found that the water shoots existed in the house from the very beginning and as such the plaintiff was not entitled to get them removed. Before striking these issues, the trial court by its order dated 11-8-1960 (A.D.) raised a preliminary issue on the point of limitation which on the concession of the counsel for the defendant No. 1 was also decided by it in favour of the plaintiff by its order dated 31-5-1961. Issues Nos. 1 to 3 having been found in favour of the plaintiff as stated earlier, the Sub-Judge granted him a decree for perpetual injunction enjoining the defendant No. 1 to close the window and door of his house which opened on the land of the plaintiff. The appellant herein thereupon preferred an appeal to the learned District Judge, Udhampur, who by his judgment dated 30-11-1965, affirmed the judgment and the decree passed by the Sub-Judge Udhampur. Against this judgment of the learned District Judge, the defendant No. 1 has come up in second appeal to this court.

6. In this appeal, the findings of the lower courts with regard to issues Nos. 1, 2 and 3 have not been challenged by the learned counsel for the appellant. He has merely confined himself to the plea of limitation. Under the plea of limitation two points have been canvassed by him firstly, that the suit in substance was for specific performance of the contract dated 17-1-2006 to which Art. 84 of the Limitation Act applied and secondly, that the suit in any event was governed by Art. 119 of the Limitation Act which provides a period of six years and as it i.e. the suit had been brought after the lapse of about 13 years, the same was time barred. He has further contended that this is not a case of continuing breach of contract as held by the lower appellate court. In support of his contentions, the learned counsel has relied on two rulings reported in AIR 1917 Mad 465, and AIR 1935 Mad 967. On the other hand, Mr. Bhalgotra appearing for the respondent while relying on Article 119 of the Limitation Act has urged that the present is the case of continuing breach of contract and that every moment's default on the part of the defendant No. 1 in not closing the door and window furnished his client with a fresh cause of action and the suit was not barred by limitation. According to him, the appropriate provision that should govern the case is Section 23 of the Limitation Act, which ordains that

"In the case of a continuing breach of contract and in the case of a continuing wrong independent of contract, a fresh period of limitation begins to run at every moment of the time during which the breach or the wrong, as the case may be, continues"

I have gone through the authorities cited by the learned counsel for the parties and have also studied the law bearing on matter Adverting to the rulings cited by Shri D D Thakur it may at once be observed that these are clearly distinguishable and cannot afford any help to the appellant. The first ruling cited by the learned counsel for the appellant relates to a case of a lease, the obligation wherein was to place the lessee in possession in the beginning of the term and on breach of the obligation the lessee was held entitled to institute an action and recover by way of damage the whole value of the term. The second authority cited by the learned counsel is with regard to a suit to establish the right to pass in a procession over a certain route in a village

7. As regards, the first contention of the learned Counsel of the appellant that the suit was governed by Article 84 of the Limitation Act, I am of the opinion, that the suit was not for specific performance of the contract and was maintainable in the form in which it was framed by the plaintiff. As the continuance of the door and the window by defendant No 1 was contrary to the right of the plaintiff and constituted a breach of the obligation undertaken by the defendant-appellant, the suit for perpetual injunction for prevention of the wrong could lie. The other submission of the learned counsel for the appellant is equally misconceived. The instant case is manifestly a case of continuing breach of contract to which Section 23 of the Limitation Act is clearly attracted. As pointed out in (1902) ILR 26 Mad 410, ILR (1950) Nag 633 = (AIR 1951 Nag 327) the contention under Section 23 of the Limitation Act, is not whether the right is a continuing one but whether the wrong is a continuing wrong. The following illuminating observations made by their Lordships of the Supreme Court in AIR 1959 SC 798, are also apposite in this connection.

"In dealing with this argument it is necessary to bear in mind that Section 23 refers not to a continuing right but to a continuing wrong. It is the very essence of a continuing wrong that it is an act which creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. If the wrongful act causes an injury which is complete, there is no continuing wrong even though the damage resulting from the act may continue. If, however, a wrongful act is of such a character that the injury caused by

itself continues, then the act constitutes a continuing wrong. In this connection, it is necessary to draw a distinction between the injury caused by the wrongful act and what may be described as the effect of the said injury. It is only in regard to acts which can be properly characterised as continuing wrongs that Section 23 can be invoked"

In the instant case, although the predecessor-in-interest of defendant No 1 had by virtue of sale-deed dated 17-1-2006 (Bikrami) undertaken to close the door and the window of the house overlooking the plot purchased by the plaintiff within a week of the execution of the deed in his favour, yet the suit could not be barred after the expiry of six years from 23-1-2006, as in the very nature of the obligations, the case is one of continuing wrong and every fresh default on the part of defendant No 1 or his predecessor-in-interest would furnish the plaintiff with a fresh cause of action. There has not been a single wrongful act from which injurious consequences have ensued to the plaintiff but a state of affairs in which the defendant No 1 and his predecessor-in-interest though in position to terminate the injury at their pleasure have intentionally caused it to continue. Their conduct thus amounted to a continuing wrong and a fresh period of limitation began to run at every moment of time during which the wrong continued i.e., the cause of action arose *de die in diem* to the plaintiff and his suit was within limitation. That being so, there is no substance in this appeal which is dismissed with costs.

SSG/D.V.C.

Appeal dismissed.

AIR 1969 JAMMU AND KASHMIR 142
(V 56 C 32)

S. M. FAZL ALI, C.J. AND
J. N. BHAT, J.

Kuldip Raj and others, Appellants
v. State of Jammu & Kashmir and others,
Respondents

Civil Appeals Nos. 27, 28, 53 to 56, 58
to 70 of 1966, D/- 2-5-1968, against order
of Dist. J. Jammu, dated 4-5-1966

(A) Land Acquisition Act (1894), Ss.
28 & 35 — Payment of interest obligatory.

Payment of interest under Sections 28
and 35 of the Land Acquisition Act is ob-
ligatory and it cannot be denied to a
person whose land has been acquired.
AIR 1967 J & K 44 (FB), Foll. (Para 3)

(B) Land Acquisition Act (1894), Ss.
23(1) and (2), 28 and 35 — Solatium is
part of the compensation — Interest is
payable on the solatium amount as well.
(Para 5)

GL/KL/D54/68/P

On a plain construction and simple reading of Section 23 of the Land Acquisition Act, it is clear that 15 per cent of Jabirana (solatium) is included in the word 'compensation', and interest is to be paid on this amount under Sections 28 and 35 of the Act. The head-note of Section 23 is "Matters to be considered in determining compensation," which obviously means that not only the first part but both parts of this section have to be read together in determining the compensation. AIR 1959 Mad 16 Ref; AIR 1968 Guj 1 Foll. (Paras 4 and 5)

Cases Referred: Chronological Paras

(1968) AIR 1968 Guj 1 (V 55)=

Maganbhai Chuturbhai v.

Collector Mehsana District

(1967) AIR 1967 J & K 44 (V 54)=

1967 Kash LJ 83 (FB), Collector

v. Habib Ullah

(1959) AIR 1959 Mad 16 (V 46)=

ILR (1958) Mad 891, State of

Madras v. Balaji Chettiar

Ishwar Singh, S. M. Gupta, J. L. Sehgal,

D. N. Gupta and Bansi Lal, for Collector.

BHAT J.—In these 19 appeals two points arise for consideration. The proprietors or, in legal language, the persons interested have objected to the amount of compensation. Their grievance is that more compensation should have been allowed to them than has been actually given by the learned District Judge Jammu. The appeal of the Collector is with respect to the grant of interest. His objection is twofold, one that interest is discretionary and should not have been allowed and secondly that if any interest is allowed, it should be allowed only on the value of the land assessed and not on the 15% Jabirana i.e., solatium also.

2. After hearing the parties, the parties took time to arrive at an amicable settlement about the price of the land to be paid to the owners. Ultimately they came to an agreement that Rs. 375/- per kanal should be paid as compensation for the land in village Gaganan Tehsil R. S. Pora (i.e. in appeals Nos. 27, 28, 53, 55 and 56 of 1966) and Rs. 2,000/- per kanal for the land situate in Ranbir Singh Pora (i.e. in appeal No. 54 of 1966). The amount of money payable to various owners in the different appeals at this rate as the price of the land comes to:—

In appeal No. 27 of 1966=Rs. 25,818.75

In appeal No. 28 of 1966=Rs. 12,918.75

In appeal No. 53 of 1966=Rs. 10,462.50

In appeal No. 56 of 1966=Rs. 11,306.25

In appeal No. 55 of 1966=Rs. 20,587.50

In appeal No. 54 of 1966=Rs. 15,100.00

So that concludes one part of the appeals i.e. the appeals of the owners.

3. The argument of the learned counsel for the Collector is composed of two parts; one that payment of interest is discretionary; but this argument of his is

refuted and the matter concluded by a Full Bench decision of this Court, Collector v. Habib Ullah AIR 1967 J & K 44 (FB). In that case after considering various authorities the court came to the conclusion that payment of interest under Sections 28 and 35 of the Act was obligatory and it could not be denied to a person whose land had been acquired.

4. For the proposition that interest should not be paid on 15% jabirana (solatium), the argument of the learned counsel for the Collector is that Jabirana is not part of compensation and interest is payable only on compensation. He has referred us to Section 23 of the Land Acquisition Act. This section consists of two parts: Part (1) states:—

"In determining the amount of compensation to be awarded for land acquired under the Act, the Court shall take into consideration —

....."

six things, which are mentioned therein. According to him this is the compensation that has to be paid and interest is to be computed only on this amount. But we are afraid that this argument of the learned counsel for the Collector is not correct. As already stated this section consists of two parts. The opening words of the first part have already been quoted but the second part reads like this:—

"(2) In addition to the market value of the land as above provided, the Court shall in every case award a sum of fifteen per centum on such market value in consideration of the compulsory nature of the acquisition."

The head-note of the section is "Matters to be considered in determining compensation", which obviously means that not only the first part but both parts of this section have to be read together in determining the compensation. The compensation that the owner or other person who is deprived of his property is to get is the first market value then other things contained in part (1) of the section plus 15% as solatium (Jabirana) which is given to him to compensate him for the acquisition of his property against his wishes. The learned counsel for the Collector has referred us to AIR 1959 Mad 16 but we are afraid he has not read the authority properly because that authority clearly says that:—

"The Solatium under Section 23(2) Land Acquisition Act cannot be considered to be an integral part of Section 23(1) of that Act. The 15 per cent solatium is not integrated with the market value but is a gift or addition provided under the statute. The claim to it will disappear when the statute providing for it is withdrawn."

So this authority clearly makes the distinction between parts (1) and (2) of Section 23 of the Act. Obviously the solatium is not a part of the market value of the land but is an additional amount granted to the owners as I said earlier, to compensate them for the loss caused to them.

5. The dictionary meaning of the word "compensation" is "something that constitutes an equivalent or recompense; something that makes good a lack; something that makes up for a loss; something that relieves, equalizes or neutralizes". Similarly the word has been defined in Wharton's Law Lexicon as "making things equivalent, satisfying or making amends; also that equivalent in money which is paid to the owners or occupiers of land taken or injuriously affected for public purposes and under Act of Parliament i.e. the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. Clause 18)'. Therefore, on a plain construction and simple reading of Section 23 of the Act, it is clear that 15 per cent of *Jabirana (solatium)* is included

in the word 'compensation', and interest is to be paid on this amount under Sections 28 and 35 of the Land Acquisition Act. In this view of ours, we are further fortified by a recent authority of the Gujarat High Court reported as AIR 1968 Guj 1.

(In paragraphs 6 to 8, the judgment works out the amounts of compensation payable to the various owners with interest. The judgment then proceeds.)

9. In all the cases, the appellants will be entitled to a further interest at the rate of 4 % per annum from today on the amount of compensation standing unpaid till the whole amount is liquidated.

10. The appeals filed by the Collector stand dismissed. But the parties are left to bear their own costs.

11. S. M. FAZL ALI, C. J.—I agree
TVN/D.V.C. Orders accordingly.

E N D

(1942) AIR 1942 FC 27 (V 29)=
1942-4 FCR 53, Megh Raj v. Allah
Rakhia 2, 5
(1931) AIR 1931 Mad 659 (V 18)=
ILR 54 Mad 900, Chandrasekhara
Bharati Swamigal v. Duraiswamy
Naidu 5

C. K. Viswanatha Iyer and E. R. Venkiteswaran, for Applicant; C. T. Peter, for Respondent.

ISAAC, J.: This is a reference made by the Madras Bench of the Income-tax Appellate Tribunal under Section 64 (1) of the Estate Duty Act, 1953 on the application of the assessee. The question referred is:

"Whether on the facts and in the circumstances of the case, the Appellate Tribunal was correct in law in having included the value of the forest lands in the total value of the estate for the purpose of Estate Duty?"

2. The estate concerned in this case is that of Smt. Jayalakshmi Devi and Shri Madhava Rajah of Kollengode, the former having died on 6th March 1954, and the latter on 9th May 1955. They were members of a Marumakkathayam tarwad; and each of them had admittedly a one-thirteenth share in the tarwad properties on the dates of their deaths. The tarwad had large extents of forest lands situate in the erstwhile Malabar District which was part of the State of Madras till the formation of Kerala on 1-11-1956. The assessee claimed that forest lands are agricultural lands, and they were not, therefore, liable to estate duty under the Estate Duty Act, 1953. In support of this claim, reliance was made on the decision of the Madras High Court in Sarojini Devi v. Sri Krishna, AIR 1944 Mad 401 which held that the expression 'agricultural lands' must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees for any other purpose of husbandry. The Appellate Tribunal, by its order dated 28th July 1964 rejected the assessee's claim holding that the above decision did not lay down a definition of the expression of agricultural lands for all purposes, and that it did not apply to cases under the Estate Duty Act. The question in this reference arose out of the above order; and it came for decision before a Bench of this Court in I. T. R. Case No. 75 of 1965, which was disposed of by the order pronounced on 26th August, 1966. This Court disagreed with the view of the Tribunal, and held that the term agricultural land should be interpreted in its widest significance. In support of the above view, reference was made by this Court to the decision of the Federal Court in Megh Raj v. Allah Rakhia, AIR 1942 FC 27 and the Commissioner of Income-
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tax v. Benoy Kumar, AIR 1957 SC 768, in addition to the decision of the Madras High Court above referred to. In this view of the matter, this Court directed the Appellate Tribunal to modify the statement of the case by incorporating therein a clear finding as to whether the forest lands concerned in this case were agricultural lands. Accordingly the Appellate Tribunal has submitted a supplementary statement; and the question has again come before us for decision in the present reference.

3. The supplementary statement and the report of the valuers which is Appendix F to this reference show that the forest lands belonging to the tarwad of the deceased on the relevant dates have an extent of 36.857 acres. Out of this, 16.640 acres are held by the State of Kerala on a 99 years lease; and the remaining 20,000 and odd acres are in the possession of the tarwad of the deceased persons. 5,000 acres out of the latter area are bare rock; and admittedly this area is neither cultivable nor useful for any purpose. This has been valued separately as non-agricultural land; and there is no dispute about it. The controversy relates only to the remaining extent of about 32,000 acres. The assessee produced a number of lease deeds before the Appellate Tribunal, and contended that the forest lands were of the same nature as taken in by the lease deeds, and were, therefore, agricultural lands. The Appellate Tribunal found that none of the lease deeds related to the forest lands in question; and it rightly held that these lease deeds cannot give any assistance in deciding whether the said forest lands are agricultural lands or not. Regarding the 15,000 and odd acres of land in the possession of the assessee's tarwad, the Appellate Tribunal stated:

"According to the valuers, the remaining extent of 15,000 and odd acres out of the first category, has been leased by the assessee from time to time for cutting of timber and fuel wood, and has never been used by him either by himself or through lessees to bring it under cultivation for any purpose. There is no material on record from which it can be said that this area can at all be brought under cultivation for any purpose. Even if it is assumed that there is a bare possibility of this area being brought under cultivation, the assessee has not placed any material before us from which it can be said that a prudent owner would undertake any process of farming in respect of this land". Regarding the 16,000 and odd acres held by the State of Kerala under lease, the Appellate Tribunal stated:

"With regard to the second category of the land of the extent of 16,000 and

oddacres the report of the valuers does not throw any light upon the nature of this land, and the only information available is that these lands have been held by the Kerala Government under a perpetual lease on an annual rent of Rupees 5,000/- The assessee has not shown whether this land was being cultivated by the Kerala Government or whether it was only being exploited by the Kerala Government for its timber value. On the material on record it is not possible for these lands to come under the category of agricultural lands."

The Tribunal then concluded by saying:

"We, therefore, record a finding that none of the lands in question of the total extent of 36,857 16 acres is agricultural land."

4 It is obvious from the above statement of the Tribunal that its finding is solely based on the absence of evidence or the assessee's failure to prove that the disputed forest lands are agricultural lands. The learned counsel for the assessee contended that what the assessee claims is not an exemption, but an immunity from tax liability on the ground that the lands do not fall within the ambit of the charging Section. It is not disputed that, if what the assessee claims is an exemption, the burden of proving that he is entitled to the exemption is on him, and on the short ground that he has not discharged that burden, he should fail. On the other hand, if what he claims is an immunity from tax on the ground that the subject does not fall within the ambit of taxing Statute, the Revenue has to establish that the subject is taxable, and then alone it would be entitled to tax. The whole question depends upon the construction of the charging section in the Estate Duty Act, 1953. Section 5 is the charging Section, and it has undergone a small amendment by Adaptation Order 3 of 1956 issued under the States Reorganisation Act 1956. The amendment is not very material; however, we will quote Section 5 as it stood before its amendment.

"5 Levy of estate duty—

(1) In the case of every person dying after the commencement of this Act, there shall, save as hereinafter expressly provided, be levied and paid upon the principal value ascertained as hereinafter provided of all property settled or not settled, including agricultural land situate in the States specified in the First Schedule to this Act, which passes on the death of such person, a duty called "estate duty" at the rates fixed in accordance with section 35

(2) The Central Government may, by notification in the Official Gazette, add the names of any other States to the First Schedule in respect whereof reso-

lutions have been passed by the Legislatures of those States adopting this Act under clause (1) of Article 252 of the Constitution in respect of estate duty on agricultural lands situate in those States and on the issue of any such notification the States so added shall be deemed to be States specified in the First Schedule within the meaning of sub-section (1)."

"Estate duty in respect of agricultural land" is Item 48 in List II of the Seventh Schedule to the Constitution. Hence Parliament has no power to levy estate duty in respect of agricultural lands, except in pursuance of resolutions passed by the State Legislatures as provided by Article 252 of the Constitution. The Legislatures of some of the States had passed such resolutions for enabling the Parliament to levy estate duty in respect of agricultural lands. Accordingly the Parliament became entitled to levy estate duty on agricultural lands within the said States, and these States were included in the First Schedule to the Estate Duty Act, 1953. By sub-section (2) of Section 5 of the Estate Duty Act provision was also made for including in the First Schedule in the Act, States in respect whereof resolutions adopting this Act may be passed by their Legislatures. The Madras Legislature passed such a resolution on 2-4-1955, and pursuant to that the Government of India issued a notification, S R O No. 1227 dated 6-6-1955. It reads as follows:

"Whereas in pursuance of the provisions contained in clause (1) of Article 252 of the Constitution a resolution has been passed by the Legislature of the State of Madras on the 2nd April 1955, adopting the Estate Duty Act, 1953 (34 of 1953) in so far as it relates to estate duty in respect of agricultural land, situate in the said State,

Now, therefore, in pursuance of the provision contained in sub-section (2) of Section 5 of the said Act, the Central Government hereby adds the name of the State of Madras to the First Schedule thereof. Accordingly, the State of Madras was added in the First Schedule to the Act with effect from 6th June 1955; and from that date agricultural lands in this State became liable to estate duty under the Estate Duty Act, 1953. It is also clear from sub-section (1) of Section 5 that, unless the State is included in the First Schedule to the Act, estate duty cannot be levied under this Section. Therefore, estate duty is not leviable before 6-6-1955 in respect of agricultural lands situate in Madras State; and the words "the principal value ascertained as hereinafter provided of all property" appearing in Section 5 of the Act should be read and understood as all property other than agricultural land situate in States not specified in the First Schedule to the Act. In other words, the charge can be imposed only on non-agricultural lands.

It appears to us, therefore, on a reading of Section 5(1), that the burden is on the Revenue to prove that the property in respect of which estate duty is sought to be levied is non-agricultural property, as Parliament's power to levy estate duty was confined only to such lands in respect of States not specified in the First Schedule to the Act. There is no material in this case to hold that forest lands concerned in this reference are non-agricultural lands; and hence the finding of the Tribunal to that effect cannot be sustained.

5. We may also point out that, as has been held by this Court in I. T. R. Case No. 75 of 1965 and the decisions referred to therein, the question whether a land is agricultural land or not has to be determined with reference to its nature, and not to the use to which it may be put at a particular time. The question whether the Punjab Restitution of Mortgaged Land Act, 1938 was a law falling under Entry 21 in List II in the Seventh Schedule to the Government of India Act, 1935 (which corresponds to Entry 18, List II in the Seventh Schedule of the Constitution) arose for decision before the Federal Court of India in AIR 1942 FC 27. In dealing with this question the Court had to consider the meaning of the term "agricultural land" appearing in that entry; and after referring to various decisions of the Indian High Courts, the Court said:

"It may on a proper occasion be necessary to consider whether for the purpose of the relevant entries in Lists 2 and 3, Constitution Act, it will not be right to take into account the general character of the land (as agricultural land) and not the use to which it may be put at a particular point of time. It is difficult to impute to Parliament the intention that a piece of land should, so long as it is used to produce certain things, be governed by and descend according to laws framed under List 2, but that when the same parcel of land is used to produce something else (as often happens in this country), it should be governed by and descend according to laws framed under List 3."

The same question arose before the Madras High Court in AIR 1944 Mad 401 with respect to the constitutional validity of the Hindu Women's Rights to Property Act, 1937; and Patanjali Sastri J., in delivering the judgment of the court said:

"As we have already pointed out, the term "agriculture" is used in different senses and in order to ascertain in what sense it is used in the Legislative Lists in Sch. 7, Constitution Act, we must have regard to the object and purpose of Section 100 of which these lists really form part. That section deals with the distribution of legislative powers as between the Federal and Provincial Legislatures, and the Lists enumerate the "matters" in respect of which those Legislatures have or have not power to make laws. In such context it seems to us

that the expression "agricultural land" must receive the widest meaning for it would be somewhat grotesque to suppose that Parliament intended that lands devoted to the production of one kind of crop should devolve according to laws passed by Provincial Legislatures, while those used for growing another kind should pass according to laws made by the Central Legislature, or that "the circumstances in which the cultivation is carried on" (per Reilly J. in ILR 54 Mad 900 = (AIR 1931 Mad 659)) should determine the law which governs the devolution of the land. Nor could it have been intended that succession to such lands should depend on the degree of tillage or preparation of the soil or of the skill and labour expended in rearing and maintaining the plants. We are of opinion that for the purpose of the relevant entries in Lists II and III of Sch. 7, the expression "agricultural lands" must be taken to include lands which are used or are capable of being used for raising any valuable plants or trees or for any other purpose of husbandry."

The force of the expression of opinion contained in the above two decisions regarding the meaning of the term "agricultural land" was recognised by the Supreme Court in AIR 1957 SC 768. After referring to the above decisions, this Court said in its decision in I. T. R. Case No. 75 of 1965:

"The test, as we have already indicated, should be whether a prudent owner would embark on an adventure in agriculture in respect of the land concerned. The prudent owner is the common man of the common law, sane and sensible, reasonable and responsible averse to gambling and speculative experiments; but none the less prepared for normal risks and legitimate expenditure."

6. It is well known that the extensive areas of different varieties of plantation that we have got in this State were once forest lands; and it is also equally well known that year after year large areas of forest lands in this State are being cleared and converted into valuable plantations. In the absence of exceptional circumstances such as the land being entirely rocky or barren for other reasons, all forest lands in this State are agricultural lands in the sense that they can be prudently and profitably exploited for agricultural purposes. There is no case that the forest lands concerned in this case or any part thereof are unfit for agricultural exploitation.

7. The learned counsel for the Revenue raised a new contention before us on the basis of Section 30 of the Estate Duty (Amendment) Act, 1958. This section reads as follows:

"Act not to apply to agricultural land.

For the removal of doubts it is hereby declared that nothing contained in this Act shall have effect in respect of any matter enumerated in entry 48 of List II in the

Seventh Schedule to the Constitution, and estate duty in respect of any estate which consists wholly or in part of agricultural land situate in the territories which immediately before the 1st day of November, 1956, were comprised in the State specified in the First Schedule to the principal Act shall continue to be governed by the principal Act as if this Act had not been passed". This section was omitted by the Estate Duty (Amendment) Act, 16 of 1960. We are not certain why such a provision was enacted, and why it was omitted. It appears to us that, in view of the amendment made to Section 5(1) of the Estate Duty Act, 1953 by Adaptation Order 3 of 1956, Section 30 of the Estate Duty (Amendment) Act, 1958 was unnecessary, and it served no purpose. Whatever it may be this section is not available in the Statute after the Estate Duty (Amendment) Act 16 of 1960, and the contention of the learned counsel is, therefore, based upon a non-existing statutory provision. This is sufficient to dismiss that contention. However, the learned counsel seriously pressed it; and we may therefore, deal with the same. Relying on Section 30 of the Estate Duty (Amendment) Act, 1958, he submitted that, before 1st day of November, 1956, Madras got included in the First Schedule to the Estate Duty Act, 1953, and therefore the agricultural land in Madras State was liable to estate duty before the above date under Section 5 of the Estate Duty Act as it stood before the amendment of 1958. We are unable to appreciate this argument. In the first place, as we have already pointed out, Parliament had no power to levy estate duty in respect of agricultural lands in Madras until the Legislature of that State adopted the Estate Duty Act by a resolution passed under Article 252 of the Constitution, and the Central Government issued the notification under Section 5(2) of the Estate Duty Act on 6-6-1955, adding Madras in the First Schedule to the Act. Secondly, it appears to us that the contention of the learned counsel cannot also be sustained on the language of Section 30 of the Amendment Act of 1958. In clear terms, this section states that the amending Act shall not in any manner affect the power of the States to levy Estate Duty on agricultural lands; and it also states that estate duty in respect of any estate existing of agricultural land situate in territories which immediately before 1st November, 1956 were comprised in the States specified in the First Schedule to the original Act shall continue to be governed by the original Act, as if the amendment Act had not been passed. It, therefore, takes us to the provision of the original Act, and under the Original Act, the agricultural land in Madras State was not subject to estate duty until that State was included in the First Schedule to the Act by the notification of the Central Government dated 6-6-1955. It may also

be stated that in the valuation made by the Assistant Controller of Estate Duty, which has been upheld by the Appellate Tribunal, agricultural lands which belonged to the deceased persons and situate in Madras have been excluded from the valuation, obviously on the ground that such lands did not come within the ambit of the Statute on the relevant dates. The question in this reference has been drawn up on that basis; and it was also dealt with by this Court in I T. R 75 of 1965 accordingly. The contention raised by the learned counsel for the Revenue is devoid of any substance.

8. In the result, we answer the question referred to this Court in the negative and against the Controller of Estate Duty, except regarding 5000 acres of rocky land which have been found by the Revenue as non-agricultural land. In the circumstances of the case, the parties will bear their costs. A copy of this judgment will be forwarded to the Appellate Tribunal as required by S 64 (4) of the Estate Duty Act, 1953.

CSV/D.V.C.

Reference answered in favour of the assessee.

'AIR 1969 KERALA 308 (V 56 C 74)

P NARAYANA PILLAI, J

State of Kerala, Appellant v. New Dholarr Steamships Ltd., Respondent

Second Appeal No. 1111 of 1965, D/- 11-9-1968, from Dist Court, Ernakulam in A.S. No. 215 of 1964

Carriage of Goods by Sea Act (1925), Schedule, Article 3, para 6, clause 3 — Calculation of one year — Starting point.

Paragraph 6(3) to Article III in the Schedule of the Act provides for extinction of the right of the consignee to claim compensation for loss and damage if one year has passed after the delivery of goods or the date when the goods should have been delivered. For calculating the period of one year two starting points are given and that in the alternative. There may be cases where the two starting points synchronise. There may also be cases where one of them may be earlier than the other. In such cases it is to the advantage of the consignee that the later date is adopted as the starting point for calculating the period of one year. Where both the starting points are equally applicable to the case and none of them can be said to be more general or more specific than the other, it is only a fair rule of construction that, that which keeps alive the right should be preferred and that as much time as the language admits of should be given in the matter of computation of the period. If the goods are deli-

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vered on several days it is from the last of those days that the period of one year has to be calculated because only on that day inclusive of the delivery of goods on that day can the total loss and damage be assessed: 1932 A. C. 328 Ref.; AIR 1960 SC 1058, Disting. (Para 7)

Cases Referred: Chronological Paras
(1960) AIR 1960 SC 1058 (V 47) =

1960-3 SCR 820, East and West

Steamship Co. v. S. K. Ramalingam

4, 5, 6

(1932) 1932 AC 328 = 146 LT 305,

Stag Line Ltd v. Foscolo Mango and Co.

6

Govt. Pleader, for Appellant; P. K. Kurien, V. Desikan, K. A. Navar, K. Sukumaran and C. M. Ramachandra Menon, for Respondent.

JUDGMENT: The question in this appeal depends upon what is the true reading of the 3rd clause of paragraph 6 of Article III in the Schedule of the Carriage of Goods by Sea Act, Central Act XXVI of 1925, (hereinafter referred to as the Act) and is whether, when on the date of suit more than one year has elapsed from the date of departure from the port of delivery of the ship which carried the contracted goods but not from the last date of actual delivery of a portion of them the consignee has a subsisting right to claim compensation for short delivery.

2. Paragraph 6 of the aforesaid Article reads as follows:

"6. Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, or, if the loss or damage be not apparent, within three days, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods."

3. The suit out of which this appeal arises, was filed on 7-4-1962 by the appellant, the State of Kerala, against a shipping company, the New Dholaru Steamships Ltd., for damages for short delivery of 10 and odd tons of M. S. Rods valued at Rs. 7,600 and odd. The goods were shipped

at Calcutta on board "S. S. Jayalakshmi" under 2 bills of lading for delivery at Cochin. The ship arrived at Cochin on 7-7-1960 and left that port on 12-7-1960. Except 10 and odd tons covered by the suit the rest of the goods was delivered by the defendant to the plaintiff on several dates, the last of which was 28-7-1961. The suit was resisted by the defendant on various grounds one of which based on paragraph 6(3) of the aforesaid Article was that the plaintiff had no subsisting enforceable right to claim compensation. Issues 4 and 5 raised in the suit related to it and they were heard preliminarily and disposed of. The decision of both the trial and lower appellate courts on them was against the plaintiff.

4. Both the lower courts relied upon the decision in East and West Steamship Company v. S. K. Ramalingam, AIR 1960 SC 1058 in support of their conclusion. What directly falls for decision in the instant case is when the 2 dates, the date of actual delivery of goods and the date when they should have been delivered are different and one of them falls within one year before suit and the other outside it which of them should be taken as the starting point for calculation of the period of one year mentioned in paragraph 6(3) of the aforesaid Article. If delivery of goods is made on several dates the question also arises as to whether it is not the last of those dates that has to be taken as the starting point. These questions did not arise for consideration and were not considered in AIR 1960 SC 1058. Only 3 points arose for decision in that case and they were whether the word "loss" as used in paragraph 6(3) of the Article included failure to supply goods also, whether the period of one year fixed in that paragraph was a period of limitation for suit or for extinction of right and what was the import of the words "the date when the goods should have been delivered" as used there. The Supreme Court held that the word 'loss' was wide enough to include failure to deliver goods also, that the period of one year fixed was one for extinction of the right to claim compensation and that the last date when the goods should have been delivered was the date of departure of the ship from the port. No opinion whatsoever was expressed in that decision as to which date had to be taken as the basis for calculation of the period of one year when the date of delivery of goods was different from that when they should have been delivered. In the present case the trial Court ignoring the dates of delivery of goods took the starting point for calculating the period of one year as the date when the ship left Cochin and that Court's decision was affirmed by the lower appellate Court.

5. I now come to the Act itself and the circumstances under which it happened to be passed. The rights and liabilities of the carriers by sea whose activities were

widespread were not uniform in all countries. Consequently merchants were put to great difficulties. To remedy their grievances it became necessary to have a set of uniform rules. At a meeting of the International Law Association at Hague in 1921 certain Rules known as the 'Hague Rules' were approved. In the next year with certain modifications those rules were recommended by the delegates to the Diplomatic Conference on Maritime Law held at Brussels to their respective Governments for adoption. Thereafter on the recommendation of the Imperial Economic Conference held in 1923 most of the then British dominions including India passed the necessary Acts. These matters are clear from pages 439 to 441 of the 15th Edition of Scrutton on Charter Parties the Preamble to the Act and AIR 1960 SC 1058.

6. The Act applies only to outward as distinguished from homeward bills of lading. Consequently the provisions in bills of lading which though outwardly are only receipts for goods shipped on board ships showing the terms on which the goods were delivered to and received by the ships are really documents of title and form part of the currency of trade, issued from our country and the provisions in the Act would have to be interpreted in foreign countries and the provisions in the bills of lading issued from foreign countries and the provisions in the corresponding Acts of those countries would have to be interpreted in our courts. This involves a serious responsibility on our part and that is emphasised in AIR 1950 SC 1058. One of the decisions cited in that case is *Stag Line Limited v. Foscolo Mango and Company* 1932 AC 328 where Lord Atkin observed that as the English Act was the result of an International Conference intended to unify rules relating to bills of lading, in construing the provisions of that Act words had to be given their plain meaning and that one should not allow to colour his interpretation by considering whether a meaning otherwise plain should be avoided if it altered the previous law and Lord Macmillan said

"It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date but rather that the language of the rules should be construed on broad principles of general acceptance"

7. To turn now to Article III in the Schedule of the Act, Paragraph 6 (3) provides for extinction of the right of the consignee to claim compensation for loss and damage if one year has passed after the delivery of goods or the date when the goods

should have been delivered. For calculating the period of one year two starting points are given and that in the alternative. There may be cases where the two starting points synchronise. There may also be cases where one of them may be earlier than the other. In such cases it is to the advantage of the consignee that the later date is adopted as the starting point for calculation of the period of one year. Both the starting points are equally applicable to the instant case. None of them can be said to be more general or more specific than the other. In such cases it is only a fair rule of construction that that which keeps alive the right should be preferred and that as much time as the language admits of should be given in the matter of computation of the period. If the goods are delivered on several days it is from the last of those days that the period of one year has to be calculated because only on that day inclusive of the delivery of goods on that day can the total loss and damage be assessed. From all these it follows that in the present case the plaintiff's right to claim compensation for short delivery had not become extinguished on the date of suit as one year had not passed after the last date of delivery of some of the goods.

8. In the result, the judgments and decrees of the lower courts are set aside, Issues 4 and 5 raised in the suit are found in favour of the plaintiff and the case is remanded to the trial court for trial and disposal according to law of the remaining issues raised in the suit. This Second Appeal is allowed as mentioned above. The plaintiff is allowed to recover the costs hitherto incurred by it in all the three courts from the defendant.

RSE/D V.C.

Order accordingly

AIR 1969 KERALA 310 (V 56 C 75)

K K MATHEW J.

M/s Calicut-Wynad Motor Service Private Ltd, Calicut Petitioner v. The Industrial Tribunal, Calicut and another, Respondents

Original Petition No 3617 of 1967, D/- 26-8-1968.

Industrial Disputes Act (1947), S. 33 (2) (b) — Decision to dismiss employee taken on 7-6-1966 — Application under S. 33 (2) (b) made on 15-7-1966 i.e. before decision to dismiss was actually communicated on 8-12-1966 — One month's salary sent by money order on 8-12-1966 — Held decision became effective only when it was communicated and application made before communication of decision to employee was maintainable — Further held that wages need not have been paid on 7-

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6-1966 or before application for approval was made on 15-7-1966; tender of wages when decision became effective was sufficient. Case law Ref. (Paras 7, 9)

Cases Referred : Chronological Paras

(1967) 1967-1 Lab LJ 637 (Bom),
Bala Krishna Bhiwa v. Industrial Tribunal

(1966) AIR 1966 SC 380 (V 53) =
1965-2 Lab LJ 128, Tata Iron and Steel Co. v. Modak

(1965) AIR 1965 SC 1503 (V 52) =
1965-1 Lab LJ 458, Delhi Transport Undertaking v. Industrial Tribunal

(1964) AIR 1964 SC 732 (V 51) =
1963-2 Lab LJ 657, State Bank of Bikaner v. Balai Chander Sen

(1963) AIR 1963 SC 295 (V 50) =
1962-2 Lab LJ 498, Ritz Theatre v. Its Workmen

(1962) AIR 1962 SC 1500 (V 49) =
1962-1 Lab LJ 420, Strawboard Manufacturing Co. v. Gobind

M/s. M. Ramachandran, C. J. Bala-krishnan and Miss Narayanikutty Chettoor, for Petitioner; Govt. Pleader, for Respondent No. 1; C. M. Stephen, for Respondent No. 2.

ORDER :— This is an application for the issue of an appropriate writ or order quashing the order of the Industrial Tribunal, Calicut, passed under Section 33 (2) (b) of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act), refusing approval to the action taken by the management in dismissing the 2nd respondent herein from the service of the petitioner.

2. The order dismissing the 2nd respondent was passed by the management on 7-6-1966. It was communicated to the 2nd respondent on 8-12-1966. The application under Section 33 (2) (b) of the Act for approval of the action was filed on 15-7-1966. The one month's salary was sent by money order to the 2nd respondent on 8-12-1966.

3. The tribunal held that the dismissal, the payment of one month's wages, and the application for approval must form part of the same transaction and since the application was filed on 15-7-1966 but the order of dismissal was passed on 7-6-1966 and the one month's wages were tendered only on 8-12-1966, they do not form part of the same transaction and so the application was not maintainable.

4. In Strawboard Manufacturing Co. v. Gobind, 1962-1 Lab LJ 420 = (AIR 1962 SC 1500) the Supreme Court held that the proviso to Section 33 (2) (b) requires the employer to do three things, namely, (i) dismissal or discharge of the employee; (ii) payment of wages; and (iii) the making of the application as part of the same transaction. In that case, the employer decided to dismiss the employee after mak-

ing an enquiry. It then passed the order of dismissal on 1st February, 1960, and made an application on the same day to the Tribunal for approval of the action taken. The tribunal took the view that the application should have been made before dismissing the employee. This view was held to be wrong by the Supreme Court. The contention before the Supreme Court was that the application for approval must have been made before the employer took action. The court said:

"It seems to us, therefore, that when the proviso speaks of an application for approval of the action taken, there is the order of actual discharge or dismissal made by the employer and it is for the approval of this order that the application is to be made. This is borne out by Form X under Rule 60 of the rules framed under the Act which corresponds to Form XV under Rule 31 of the Uttar Pradesh Rules. Further, the use of the word "approval" in the proviso also suggests that something has been done by the employer who seeks approval of that from the Tribunal.

If the intention was, that in view of the proviso, the employer could not pass the order of dismissal or discharge without first obtaining the approval of the tribunal, we see no reason why the words in the proviso should not have been similar to those in sub-sections (1) and (3), namely, that no workman shall be discharged or dismissed without the express permission in writing of the authority concerned. The change, therefore, in the language used in the proviso to sub-section (2) (b) clearly shows in our opinion that the legislature intended that the employer would have the right to pass an order of discharge or dismissal subject to two conditions, namely,

(i) payment of wages for one month; and

(ii) making of an application to the authority concerned for approval of the action taken.

The use of the word 'approval' also suggests that what has to be approved has already taken place, though sometimes approval may also be sought of a proposed action. But it seems to us in the context that the approval here is of something done, as otherwise it would have been quite easy for the legislature to use the words 'for approval' of the action proposed to be taken, that some action has been taken and it is that action which the employer wants to be approved by his application. The difference between sub-s. (1) and sub-section (2) is therefore that under sub-section (1), the employer proposes what he intends to do and asks for the approval of the action taken from the authority concerned by his application. There can therefore be no doubt that sub-section (2) (b) read together with the proviso contemplates that the employer may pass an order of dismissal or discharge be-

fore obtaining the approval of the authority concerned and at the same time make an application for approval of the action taken by him . . ."

5 In *Tata Iron and Steel Co v. Modak*, 1965-2 Lab LJ 128 at p 132 = (AIR 1966 SC 380 at p 382) the Supreme Court said:

"It is now well settled that the requirements of the proviso have to be satisfied by the employer on the basis that they form part of the same transaction, and stated generally, the employer must either pay or offer the salary for one month to the employee before passing an order of his discharge or dismissal, and must apply to the specified authority, for approval of his action at the same time, or within such reasonably short time thereafter as to form part of the same transaction."

6. In *Balakrishna Bhiva v. Industrial Tribunal*, 1967-1 Lab LJ 637 (Bom) the order of dismissal was passed on 19th April, 1963. It was communicated to the employee on 24th April. The application for approval of the action was made on 29th April. The Bombay High Court said:

"The application could, therefore, have been prepared and made to the tribunal at or about the same time. It was not necessary, to wait until the petitioner had been served. Even after the petitioner was served there was five days' further delay in making the application or if the holidays are excluded at least three days' delay, which has not been satisfactorily explained. On the facts of this case, we do not think that it can be said that the making of the application was part of the same transaction, by which the petitioner was dismissed from service."

6-A. Counsel for the petitioner relied upon the ruling reported in *State Bank of Bikaner v. Balai Chander Sen*, 1963-2 Lab LJ 657 = (AIR 1964 SC 732) in support of the contention that an application made before an order of dismissal takes effect is maintainable, and therefore, the application made in this case before the date when the order of dismissal took effect was competent. He also argued that the money order of one month's wage was sent on 8-12-1966, and therefore, it became part of the dismissal, as the dismissal took effect only on 8-12-1966, when the order of dismissal was communicated to the 2nd respondent.

7. In 1963-2 Lab LJ 657 = (AIR 1964 SC 732) it was held that an application under Section 33 (2) (b) for approval can be made even before the actual action is taken by the management and that the latest point on which the application should be made is the date of actual dismissal of the employee. The Court distinguished the decision in 1962-1 Lab LJ 420 = (AIR 1962 SC 1500) and said:

"We see nothing in principle against the employer making an application under

Section 33 (2) (b) for approval of the proposed action before the actual action is taken. Such a course on the part of the employer would, if anything, be more favourable to the employee and would not in our opinion be against the provisions contained in Section 33 (2) (b). We are therefore of opinion that the labour court was wrong in holding that an application made by an employer under Section 33 (2) (b) for approval of the action he proposes to take is not entertainable and that such an application must necessarily be made after the action of which approval is sought to be taken. All that the *Strawboard Manufacturing Company case*, 1962-1 Lab LJ 420 = (AIR 1962 SC 1500) lays down is that the application can be made after the action of which approval is sought has been taken and that when this happens the three conditions in the proviso to Section 33 (2) (b) must be shown to be parts of the same transaction. But if an employer chooses to make an application under Section 33 (2) (b) for approval of the action he proposes to take and then takes the action we find nothing in Section 33 (2) (b) which would make such an application not maintainable. Such an application in our opinion, would not be contrary to the provisions of Section 33 (2) (b), read with the proviso thereof and would be maintainable."

This decision is a clear authority for the proposition that an application under Section 33 (2) (b) for approval of the action can be made before the action becomes effective. In this case, as already stated, the management after conducting the enquiry passed the order of dismissal on 7-6-1966. The order was communicated to the employee only on 8-12-1966. The application was made on 15-7-1966, after the decision to dismiss the employee was made, but before it was communicated to him. The decision became effective only when it was communicated to the employee on 8-12-1966; and since the application was made before the decision was communicated to the employee, it was maintainable. The question whether a tender of wages for one month before the order of dismissal came into force would be sufficient was considered in *Delhi Transport Undertaking v. Industrial Tribunal* 1965-1 Lab LJ 458 at p 461 = (AIR 1965 SC 1503 at p. 1505). There, the tender of the wages for one month was made on 30th October, 1961, and that was before the order of dismissal came into force by communicating it to the employee. The court said:

"The tender was thus made on the 30th before the order of dismissal came into force and the wages would have been paid either on the 30th or on the 31st had Hari Chand cared to receive them. In any event, the amount was sent to him by money order immediately afterwards and

the application for the approval made 3 days prior to the date of dismissal mentioned the fact that the amount was being paid to him

The proviso does not mean that the wages for one month should have been actually paid, because in many cases the employer can only tender the amount before the dismissal but cannot force the employee to receive the payment before dismissal becomes effective. In this case the tender was definitely made before the order of dismissal became effective and the wages would certainly have been paid if Hari Chand had asked for them. There was no failure to comply with the provision in this respect."

8. In *Ritz Theatre v. Its Workmen*, (1962) 2 Lab LJ 498 at p. 505 = (AIR 1963 SC 295 at p. 301) the question arose as to when an order of dismissal comes into force. Gajendragadkar J. (as he then was) observed thus:

"The relationship of the employer and the employee can be effectively terminated in such a case not merely by the decision of the employer to terminate the employee's services but by the communication of the said decision to the employee; and as it happened, such a communication had not been made even till the date when the award was pronounced. We are told by Mr. Andley today, and Mr. Sastri concedes, that effective steps have now been taken by the employer to terminate the services of Mohd. Mia and that from today in any case he is not an employee of the appellant."

9. It was argued for the 2nd respondent that the wages for one month were not paid before the application was filed and that on that ground the application was not maintainable. The proviso to Section 33 (2) (b) says:

"Provided that no such workman shall be discharged or dismissed, unless he has been paid wages for one month and an application has been made by the employer to the authority before which the proceeding is pending for approval of the action taken by the employer."

In this case, the wages for one month were tendered by money order on the day on which the order of dismissal took effect. That was a sufficient compliance with the proviso. If an application under Section 33 (2) (b) for approval can be made after a decision to dismiss an employee has been taken, and before it has not become effective by communication to the employee, it must necessarily follow that an application can be filed before the wages for the month are tendered to the employee; for, the wages need be paid only when an employee is dismissed, which takes place only when the order of dismissal is communicated to him and the

application for approval can be filed before the decision to dismiss takes effect according to the authorities referred to above. Reference was made to Form X in the rules framed under the Act and it was submitted that before the application was made it was necessary that the wages for one month should have been paid or tendered. I do not think that the Form is intended to cover a situation like this. I hold that the wages for the month need not have been paid or tendered in this case at the time of the decision of the management to dismiss the worker, namely on 7-6-1966, and that it was also unnecessary that they should have been paid before the application for approval was made. The wages were tendered when the order became effective and that was sufficient.

10. It was contended on behalf of the 2nd respondent that the case must be remitted to the Tribunal for a consideration of the question whether the wages for the month were actually paid to the employee. The finding of the Tribunal is that wages for the month have been tendered to the employee. I do not therefore think that the case should be remitted to the Tribunal.

11. I quash the order of the Tribunal and allow the writ petition. No costs.
RSK/D.V.C. Petition allowed.

AIR 1969 KERALA 313 (V 56 C 76)

V. BALAKRISHNA ERADI, J.

Giovanola-Binny Limited, Palluruthy, Cochin, Petitioner v. Industrial Tribunal, Calicut and another, Respondents.

Original Petition No. 3815 of 1966 D/- 5-11-1968.

Industrial Disputes Act (1947), S. 33 — Appointment of employee on probation — His removal from service on ground of unsuitability a few days after expiry of probation period — Does not amount to alteration of service condition — (Words and Phrases — 'Probationer') — (Constitution of India, Art. 311 — Probationer — Non-confirmation after expiry of probation — Effect).

It is well settled that a person appointed on probation does not ordinarily get automatic confirmation in service on the expiry of the stipulated probationary period and that if he is allowed to continue in service without any action being taken by the employer either by way of confirmation or by way of termination, he continues only as a probationer even after the expiration of the period of probation. Where the appointment order issued to the employee does not contain any provision stating that at the end of the period of probation men-

tioned therein the employee would automatically stand confirmed but on the other hand it is specifically mentioned therein that he would be confirmed in the appointment only if his work and conduct were found to be satisfactory, the continuance of the employee in the service of the company after expiry of probation period is only as a probationer and it is open to the management to decide about his suitability for confirmation and pass consequential orders either confirming him or discharging him from service 1969 Lab IC 37 and AIR 1964 SC 806 and C A No 548 of 1962 D/- 23-1-1964 (SC) Foll (Para 7)

It would be totally meaningless to refer to a person's employment as being on probation if the management has the right to terminate his services only on grounds of proved misconduct, it is of the very essence of the concept of probation that the person is on trial regarding his suitability for regular appointment and is liable to be discharged on being found to be unsuitable for permanent absorption. The employee continuing in service only as probationer does not become immune from liability to be discharged from service on the ground of unsuitability and it cannot be said that he can only be dismissed on grounds of misconduct. In this respect, the only difference between a probationer whose term of probation has not expired and one who is continuing in service after the expiry of the stipulated period of probation without any order of confirmation having been passed, is that the former has a guaranteed period of trial namely the probationary period during which he is not liable to be discharged on the ground of unsuitability whereas the latter is liable to be discharged at any time. It must then follow that an order discharging the probationer from service does not amount to an alteration of the conditions of service even if it is passed not exactly on a date coinciding with the end of the probationary period but only a few days thereafter. (Para 8)

Cases Referred: Chronological Paras
(1969) 1969 Lab IC 37 = 1968 Ker
LJ 537, Stanley Kendez v
Giovanola Binny Ltd. 5, 6, 8
(1964) AIR 1964 SC 806 (V 51) =
(1964) 1 Lab LJ 9 Express News-
papers Ltd. v. Labour Court
Madras 2
(1964) Civil Appeal No 548 of 1962
D/- 23-1-1964 = 1964 SC (Notes) 5,
Accountant General M P v. B P.
Bhatnagar 7

K V. R Shenoi P K Kurlen V Desikan, K. A Nayar & K Sukumaran for Petitioner, Govt Pleader, for Respondent No 1, S Easwara Iyer L G. Potti and C S Rajan, for Respondent No 2

ORDER:— This writ petition is directed against an award passed by the Industrial

Tribunal, Calicut in I. D. No. 19 of 1965 setting aside the order passed by the petitioner company discharging from their service the 2nd respondent who was a production worker on probation and ordering his reinstatement with continuity of service and back wages.

2 The award in question was passed by the Tribunal on a petition preferred before it by the 2nd respondent under S. 33-A of the Industrial Disputes Act, 1947. The 2nd respondent had been appointed by the management as a production worker as per order dated 8-1-1964 (M-2). It was expressly stipulated in that order that the appointee was to be on probation for one year with effect from 1-1-1964 and that if his work and conduct were found to be satisfactory he will be confirmed in his appointment at the end of the probationary period. On 19-1-1965 the management terminated his services as per Ext W-2 order by which the 2nd respondent was informed that it had been decided not to confirm his appointment. An industrial dispute namely I D No 74 of 1964 was pending adjudication at that time before the Industrial Tribunal. That dispute had been raised at the instance of certain workmen of the company concerning certain terms and conditions of their service. The 2nd respondent put in the petition under Section 33-A of the Industrial Disputes Act on the allegation that the termination of his services under Ext W-2 order during the pendency of I D 74/64 amounted to a violation of the provisions of Section 33 of the Industrial Disputes Act.

3. The management contended before the Tribunal that the discharge of the probationer after the completion of his period of probation on the ground that he was considered unsuitable for confirmation would not amount to an alteration of the conditions of his service to his prejudice so as to constitute a violation of Section 33 of the Act and that therefore the complaint filed under Section 33-A was totally misconceived and devoid of merit.

4. The Tribunal took the view that even though a termination of the service of probationer on the very date of the expiry of the period of probation will not constitute an alteration of his conditions of service within the meaning of S. 33 of the Act, the position would be entirely different where the discharge is ordered not on the precise day on which the probationary period ends but only a few days thereafter. According to the Tribunal in cases where the discharge is ordered subsequent to the date of expiry of the period of probation, it has jurisdiction to go into the question whether discharge was bona fide or was only a colourable exercise of the contractual power. In this view the Tribunal proceeded to hold that

the order passed by the company terminating the services of the 2nd respondent offended against the provisions of Section 33 and was therefore liable to be set aside.

5. Counsel appearing for the petitioner relied on the decision of this court reported in *Stanley Kendez v. Giovanola Binnv* 1968 Ker LJ 537 = (1969 Lab IC 37), and contended that the action taken by the management in terminating the services of an employee who had admittedly been appointed only on probation, the termination being effected after the completion of the period of probation and before his confirmation, will not constitute an alteration of the conditions of service of the employee concerned so as to amount to contravention of Section 33 of the Industrial Disputes Act. It was urged that the Tribunal had gone wrong in holding that there was a distinction between cases where the order of discharge was passed exactly on the date of expiry of the probationary period and cases where the order was passed only a few days thereafter.

6. Counsel appearing for the 2nd respondent, however, contended that the applicability of the principle laid down in 1968 Ker LJ 537 = (1969 Lab IC 37), should be limited to cases where the order terminating the services of the probationer has been passed exactly at the end of the probationary period and the probationer is not continued in service for any time thereafter. According to the respondent's counsel once the period of probation expires without an order of discharge having been passed on or before the date of completion of the probationary period, the position is that the probationer would continue in service, no doubt only as a probationer, but his service cannot be terminated otherwise than for misconduct.

7. I have no hesitation to reject the respondent's contention. It is now well settled that a person appointed on probation would not ordinarily get automatic confirmation in service on the expiry of the stipulated probationary period and that if he is allowed to continue in service without any action being taken by the employer either by way of confirmation or by way of termination he would continue only as a probationer even after the expiration of the period of probation. This has been clearly laid down by the Supreme Court in *Express Newspapers, Ltd. v. Labour Court, Madras*, (1964) 1 Lab LJ 9 = (AIR 1964 SC 806). The same principle has been reiterated by their Lordships in *Accountant General, Madhya Pradesh v. B. P. Bhatnagar*, Civil Appeal No. 548 of 1962 (SC) where it was held:

"When a first appointment or promotion is made on probation for a specific period and the employee is allowed to

continue in the post after the expiry of the said period without any specific order of confirmation, he continues as a probationer only and acquires no substantive right to hold the post. If the order of appointment itself states that at the end of the period of probation, the appointee will stand confirmed in the absence of any order to the contrary, the appointee will acquire a substantive right to the post even without an order of confirmation which is necessary to give him such a right. When after the period of probation, an appointee is allowed to continue in the post without an order of confirmation the only possible view to take is that by implication the period of probation has been extended. Much can be said for the view that it is desirable in such cases that an express order extending the period of probation should be made, as otherwise the appointed person may be under a misapprehension about the exact position. There is however no basis for the conclusion that from the mere fact that an appointee is allowed to continue after the end of the period of probation stated in his order, he should be deemed to have been confirmed."

The appointment order issued to the 2nd respondent (Exl. M2) does not contain any provision stating that at the end of the period of probation mentioned therein the employee would automatically stand confirmed; on the other hand it is specifically mentioned therein that he would be confirmed in the appointment only if his work and conduct were found to be satisfactory. Hence there can be no doubt that the continuance of the 2nd respondent in the service of the company after 31-12-1964 was only as a probationer and it was open to the management to decide about his suitability for confirmation and pass consequential orders either confirming him or discharging him from service.

8. It would, in my opinion, be totally meaningless to refer to a person's employment as being on probation if the management has the right to terminate his services only on grounds of proved misconduct; it is of the very essence of the concept of probation that the person is on trial regarding his suitability for regular appointment and is liable to be discharged on being found to be unsuitable for permanent absorption. It is not therefore, possible to accept the contention put forward by the respondent's counsel that once the stipulated period of probation expires, the employee, though continuing in service only as probationer, is nevertheless immune from liability to be discharged from service on the ground of unsuitability but can only be dismissed on grounds of misconduct. In this respect, the only difference between a probationer whose term of probation has not expired and

one who is continuing in service after the expiry of the stipulated period of probation without any order of confirmation having been passed, is that the former has a guaranteed period of trial namely the probationary period during which he is not liable to be discharged on the ground of unsuitability whereas the latter is liable to be discharged at any time. It must then follow that an order discharging the probationer from service would not amount to an alteration of the conditions of service even if it is passed not exactly on a date coinciding with the end of the probationary period but only a few days thereafter and that the decision in 1968 Ker LJ 537 = (1969 Lab IC 37) would equally govern both types of cases.

9. I accordingly hold that in ordering the discharge of the 2nd respondent on the ground of his unsuitability for confirmation the management has not violated the provisions of Section 33 of the Industrial Disputes Act and the complaint made by the 2nd respondent under Section 33-A was clearly misconceived.

10. The Tribunal had, therefore, no jurisdiction to go into the question of the propriety of the action taken by the management. The original petition is allowed and the award Ext P1 is quashed. There will be no direction regarding costs.

DVT/DVC. Petition allowed.

AIR 1969 KERALA 316 (V 56 C 77)

V R KRISHNA IYER, J.

Kurian Chacko Plaintiff, Appellant v. Varkey Ouseph, Defendant, Respondent.

Second Appeal No. 739 of 1965, D/- 25-9-1968, from decision of Dist. Court, Alleppey in A S No. 465 of 1959.

Civil P. C. (1908), Ss. 96, 107 — Duty of appellate court to consider evidence independently.

An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him. No supplementing of appreciation is contemplated at the appellate stage. But, an independent appraisal of the evidence is the duty of the Court at that level. Failure to do that is an abdication of appellate power. It is the appellate Court's function not to find out whether there is perversity in the trial Court's judgment but whether it is wrong. There is very wide difference between a wrong conclusion and a perverse conclusion. A restricted revisional jurisdiction may be invoked under certain statutes only where there is perversity in the findings but the wider appellate jurisdic-

tion conferred under Section 96 of the Civil P. C demands a little more effort on the part of the appellate Court in going into the evidence to come to its own conclusion and reversing the trial Court's decision if it is found to be wrong.

(Para 2)

M/s Joseph Vithayathil, George Vadakkal Varghese Kallath and K. J. Kurien, for Appellant; S Narayanan Pottu, N. K. Varkey and V. Dharmadan, for Respondent.

JUDGMENT:— The plaintiff, unsuccessful in two Courts, has come up here aggrieved by the dismissal of his suit which was one for declaration of title and recovery of possession. The defendant disputed the plaintiff's title to the property as also his possession and claimed both in himself. The learned Munsif, who tried the suit, recorded findings against the plaintiff both on title and possession. But, in appeal the learned Subordinate Judge disposed of the whole matter glibly and briefly, in a few sentences.

2. An appellate court is the final Court of fact ordinarily and therefore a litigant is entitled to a full and fair and independent consideration of the evidence at the appellate stage. Anything less than this is unjust to him and I have no doubt that in the present case the learned Subordinate Judge has fallen far short of what is expected of him as an appellate Court. Although there is furious contest between the counsel for the appellant and for the respondent, they appear to agree with me in this observation. Shri Varkey, learned counsel for the respondent, feels that his client has a strong case not merely regarding possession but regarding title and wants me to remember that the burden is on the plaintiff to establish a subsisting title and this implies possession within 12 years of the suit. The learned Subordinate Judge, after stating a few facts, has wound up with the following observations:

"There was also no satisfactory explanation by the appellant for the delay of about three weeks to file the suit". I may state in parenthesis that a suit for possession on title does not depend upon a few weeks' delay, after the trespass had occurred, in bringing the suit. The crucial question is as to whether the plaintiff has title at all which, in this context, means a subsisting title. The Court cannot sidetrack itself by minor questions like whether the trespass was a week ago or two weeks ago and whether any cock-and-bull story seeking to explain the 2 or 3 weeks' delay in bringing the suit is true or not. The Subordinate Judge continued:

"In this context we cannot help remarking that the appreciation by the Court below of the evidence of possession on the side of the respondent cannot be usefully supplemented."

No supplementing of appreciation is contemplated at the appellate stage. But, an independent appraisal of the evidence is the duty of the Court at that level. Failure to do that is an abdication of appellate power. Unfortunately, there is no consideration of the evidence in the case in appeal. The Subordinate Judge concluded still more erroneously, by stating:

"No factual error or perversity has also been pointed out by the appellant's counsel."

It is the appellate Court's function not to find out whether there is perversity in the trial Court's judgment but whether it is wrong. There is very wide difference between a wrong conclusion and a perverse conclusion. A restricted revisional jurisdiction may be invoked under certain statutes only where there is perversity in the findings but the wider appellate jurisdiction conferred under Section 96 of the Civil Procedure Code demands a little more effort on the part of the appellate Court in going into the evidence to come to its own conclusion and reversing the trial Court's decision if it is found to be wrong. Far be it from me to suggest that I even hinted at the trial court's judgment being wrong in this case. That is a matter entirely for consideration by the appellate Court. The interests of justice, therefore, require that the judgment and decree of the Court below should be set aside and the appeal sent back for fresh disposal by the Sub Court of Kottayam.

The court-fee paid on the memorandum of second appeal will be refunded. Costs of this appeal will be costs in the cause.

RSK/D.V.C.

Order accordingly.

AIR 1969 KERALA 317 (V 56 C 78)

FULL BENCH

M. S. MENON, C. J., P. GOVINDAN NAIR AND V. BALAKRISHNA ERADI, JJ.

E. Ramavarama Raja, Petitioner v. State of Kerala and another, Respondents.

Original Petition No. 2124 of 1967, D/- 18-7-1968.

Constitution of India, Arts. 309, 311, 226 — Kerala Civil Services (Classification, Control and Appeal) Rules, 1960, Rule 60 — Travancore Service Regulations, Regn. 352 F (c) — Government employee — Date of birth accepted and entered in service register with remark 'verified with horoscope and found correct' — Correction in date of birth on basis of School register without giving opportunity to employee to show cause — State asserting that there is no rule requiring Government to give

such opportunity — Held, in view of Rule 60, employee had a vested right to continue in service till the age of 55 reckoned on basis of actual date of birth — If date was to be altered it could only be on the basis of enquiry made in consonance with principles of natural justice as specified in AIR 1967 SC 1269 — Rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences: AIR 1967 SC 1269, *Foll.*; AIR 1953 Tra-Co 140 and AIR 1954 Tra-Co 32 and AIR 1957 Tra-Co 124 and AIR 1958 Ker 1 & 1959 Ker LT 553 held not applicable in view of AIR 1967 SC 1269.

(Paras 3, 8)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1269 (V 54) =	
(1967) 2 SCR 625, State of Orissa v. Dr. Miss Binapani Dei	7
(1959) 1959 Ker LT 553, Joseph Augustine v. State	7
(1958) AIR 1958 Ker 1 (V 45) = 1957 Ker LT 608, Rama Iyer v. Union of India	7
(1957) AIR 1957 Tra-Co 124 (V 44) = 1956 Ker LT 906, Kesava Panicker v. State	7
(1954) AIR 1954 Tra-Co. 32 (V 41) = 1954 Ker LT 966, Travancore Cochin State v. Madhavan	7
(1953) AIR 1953 Tra-Co 140 (V 40) = ILR (1952) Tra-Co 756, Varadaraja Iyer v. State of Trav-Co.	7

S. A. Nagendran and N. N. D. Pillai, for Petitioner; Govt. Pleader, for Respondents.

JUDGMENT:— The short question arising for decision is whether the alteration by Ext. P 3 order of the date of birth of the petitioner entered in the Service Register, from 15-12-1912 (1-5-1089 M. E.) into 13-12-1911 (28-4-1087 M. E.) is illegal, justifying interference by this Court, in proceedings under Art. 226 of the Constitution.

2. The petitioner entered service on 17-7-1939 (1-12-1114 M. E.). Regulation 352F (c) of the Travancore Service Regulations which admittedly governed the petitioner is in these terms:—

"352-F (c). The age of an officer whether gazetted or non-gazetted, can be recorded only on receipt of satisfactory proof. Once the date of birth has been accepted and recorded in the service register, it should form conclusive evidence of the same in respect of all future Government transactions. The entry in the service register should be full and it should indicate on what evidence the date of birth is accepted by the appointing officer or the Head of

the office. The following shall be considered as satisfactory proof of age.

1 An authenticated extract from the birth register or the baptismal register or the English School Leaving Certificate, or the admission register of a school or college where the officer last studied or a certificate by a Magistrate or other well-known and trustworthy person in the town or village

2 Original copy of the horoscope, or correspondence at the time of the birth supported by a declaration before the Head of the office, or

3 An affidavit of the parent of the applicant or a close relative who has knowledge of the approximate date of birth of the applicant signed before an officer who is competent to administer oath"

3. Apparently in accordance with the above provision proof was furnished of the date of birth of the petitioner and this was accepted by an order dated 11-12-1940 corresponding to 26-4-1116 M.E. In the Service Book there is the following entry.

"Verified with horoscope and found correct"

We are marking the Service Register as Ext. R4 and the portion where the above entry is seen as Ext R4 (a) Years afterwards a Memo Ext. P1 dated 17-12-1966 reading as under-

"1 That you, Sri. E. Ramavarma, Raja Regional Transport Officer Cannanore while employed in Government service as Plant Operator in the Development Department furnished incorrect date i.e 1-5-1089 as your date of birth to be entered in the Service Register (Service Book) fully knowing that your date of birth according to the records of Ennakkad Upper Primary School, C. M S L G V. School, Pallon, G. M. S. E. M S Pallon and C. M. S. H. S Pallon was 28-4-1087.

2 That you disobeyed the directions issued by the Government in respect of the rectification of the defects or irregularity in the date of birth entered in Service Records as per Government Circulars P1. 96 dated 5-1-1942 and M3 2789/50/CS dated 30-1-1950 read with No M3 2789/50CS dated 22-2-1950 and that you have not taken any steps to get the Service Records examined and the defect in respect of your date of birth rectified on proper proof.

Your action described above amounts to gross irregularity on your part. You are, therefore requested to show cause why disciplinary action as contemplated under the Kerala Civil Services (Classification, Control and Appeal) Rules, 1960 should not be taken against you. You are allowed 15 days time from the date of receipt of this communication to put in a written statement of your defence. If the written statement of defence is not received within

the said period, the matter will be proceeded with on the presumption that you have no defence. You are also requested to state whether you desire to be heard in person

A statement of allegations on the basis of which the charge is framed, and a list of documents, proposed to be relied on are attached hereto. You may peruse the records mentioned in the list of documents and take down extracts if so desired during office hours from the Secretariat in the presence of Deputy Secretary to Government, Home Department, on any day prior to the due date for the submission of your written statement"

was issued to the petitioner. An explanation Ext P2 was submitted by the petitioner to the Memo. But this was found unacceptable, and by Ext P3 order, the petitioner was censured. We may state here that the Memo Ext P1 proceeded on the basis that the petitioner was liable to be punished by taking action under the Kerala Civil Services (Classification, Control and Appeal) Rules 1960 because he had committed a misconduct. The misconduct as is seen from the Memo is the refusal to 'correct' the entry in the Service Register of the date of birth of the petitioner in accordance with the Circulars Exts R1, R2 and R3 issued by the Government in January 1942, January 1950 and February 1950. It is unnecessary to read the Circulars Exts R1 and R2 which merely contain directions that all Government employees should correct the dates of birth given by them and entered in the Service Register if those dates are incorrect. These Circulars were issued by the State Government because it is alleged the Government discovered that in many cases incorrect dates of birth had been furnished by Government employees. It is necessary to read the last paragraph of Ext. R3:-

"As a further clarification to these orders Government are pleased to order that in the case of graduates the entry in the College Certificate will be accepted as correct age and in the case of non-graduates the school age is the authority"

4-5. It is clear from the Memo of charges Ext P1 as well as from the statements contained in the order Ext P3 and the several statements in the counter affidavit that has been filed on behalf of the State of Kerala that the State Government proceeded on the basis that the one and only evidence acceptable to the State Government as regards the date of birth of the petitioner is that furnished by the entry in the School Register. We may refer to some of the statements in the counter affidavit.

6. In paragraph 3 of the counter affidavit it is stated -

"Government have laid down the procedure for entering in the service records the correct date of birth of Government Ser-

vants as per Exts. R1 to R3 Circulars. According to the Government Orders the school record is the authority to prove the correct date of birth The only date of birth acceptable to the Government as proof of the correct date of birth of the petitioner is 28-4-1987 which is entered in the School records Here the proper authority is the records of the various schools where the petitioner had studied. The petitioner had also produced the relevant extract from his horoscope. In the face of the date of birth as entered in the School records (which alone is recognised by Government) was available to prove his date of birth, the records produced by the petitioner could not be relied on....."

It is unnecessary to multiply instances of the definite stand taken. We must however refer also to another statement in the counter affidavit where it is asserted that it is not necessary to give any opportunity to the petitioner to state his case before the date of birth as entered in the Service Register is 'corrected'.

"There is no rule requiring the Government to give the petitioner an opportunity to show cause why his date of birth should not be corrected."

From what is stated above, it is very clear that a strict adherence to a rule contained in Ext. R3 which specified a particular document and that alone as proof of the date of birth of a Government employee has been the basis of the 'correction' effected by Ext. P3 order.

7. The question is whether this procedure is justified or not. The question has to be answered in favour of the petitioner in the light of the ruling of the Supreme Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, AIR 1967 SC 1269. In view of this decision, the decisions of the Travancore Cochin High Court and of this Court AIR 1953 Trav-Co 140, 1954 Ker LT 966 = (AIR 1954 Trav-Co 32), 1956 Ker LT 906 = (AIR 1957 Trav-Co 124), 1957 Ker LT 608 = (AIR 1958 Ker 1) and 1959 Ker LT 553 relied on by the State cannot have any application. A perusal of the judgment of the Supreme Court AIR 1967 SC 1269 would show that that decision was rendered on facts very similar to those in this case. The relevant paragraphs of the decision are paragraphs 9 and 10. We shall read those paragraphs.

"The first respondent held office in the Medical Department of the Orissa Government. She, as holder of that office, had a right to continue in service according to the rules framed under Art. 309 and she could not be removed from office before superannuation except 'for good and sufficient reasons'. The State was undoubtedly not precluded, merely because of the acceptance of the date of birth of the first

respondent in the service register, from holding an enquiry if there existed sufficient grounds for holding such enquiry and for re-fixing her date of birth. But the decision of the State could be based upon the result of an enquiry in manner consonant with the basic concept of justice. An order by the State to the prejudice of a person in derogation of his vested rights may be made only in accordance with the basic rules of justice and fairplay. The deciding authority, it is true, is not in the position of a Judge called upon to decide an action between contesting parties, and strict compliance with the forms of judicial procedure may not be insisted upon. He is, however, under a duty to give the person against whom an enquiry is held an opportunity to set up his version or defence and an opportunity to correct or to controvert any evidence in the possession of the authority which is sought to be relied upon to his prejudice. For that purpose the person against whom an enquiry is held must be informed of the case he is called upon to meet, and the evidence in support thereof. The rule that a party to whose prejudice an order is intended to be passed is entitled to a hearing applies alike to judicial tribunals and bodies of persons invested with authority to adjudicate upon matters involving civil consequences. It is one of the fundamental rules of our constitutional set-up that every citizen is protected against exercise of arbitrary authority by the State or its officers. Duty to act judicially would, therefore, arise from the very nature of the function intended to be performed; it need not be shown to be superadded. If there is power to decide and determine to the prejudice of a person, duty to act judicially is implicit in the exercise of such power. If the essentials of justice be ignored and an order to the prejudice of a person is made, the order is a nullity. That is a basic concept of the rule of law and importance thereof transcends the significance of a decision in any particular case.

The State has undoubtedly authority to compulsorily retire a public servant who is superannuated. But when that person disputes the claim he must be informed of the case of the State and the evidence in support thereof and he must have a fair opportunity of meeting that case before a decision adverse to him is taken."

8. There is a rule which came into force on 1-11-1959, Rule 60, of the Kerala Service Rules, which has stipulated that the age of superannuation of Government employees is 55. This rule was framed under Article 309 of the Constitution. So it has to be taken that the petitioner had a vested right to continue in service till he attained the age of 55 reckoned on the basis of the actual date of birth of the

petitioner. The actual date of birth was accepted by the State Government by order dated 11-12-1940 and we conceive that if this is to be altered, it can only be on the basis of an enquiry which would satisfy the requirements specified by the Supreme Court in the decision already read. This means that such an enquiry must be made in consonance with the principles of natural justice. We cannot think of such an enquiry where there has been a pre-determination of the issue by an adherence to a single item of evidence and refusal to consider the question with an open mind. And this procedure has been adopted when there has been an earlier acceptance of the date given by the petitioner on material then furnished by him and found acceptable. That makes the position worse.

9. The order Ext P-3 cannot be sustained. This has to be quashed. We do so. It necessarily follows that no further action pursuant to Ext P-3 as visualised by

Ext. P-4 order by the second respondent, the Commissioner of Transport the Head of the Department in which the petitioner was working can be taken. We therefore quash Ext. P-4 as well.

10. We may add that the quashing of these orders will not preclude a proper enquiry being conducted, if there is need for it, in consonance with the principles of natural justice as regards the age of the petitioner. This enquiry will of course be as to what is the actual date of birth of the petitioner and the question naturally would not be what is the date of birth of the petitioner as entered in a particular document or in any School Register.

11. We allow this original petition on the above terms. There will be no order as to costs.

LGC/D V C.

Petition allowed.

END

AIR 1969 MADHYA PRADESH 241
(V 56 C 61)

K. L. PANDEY, J.

Smt. Hirabai Chauhan, Appellant v.
Mst. Bhagirathibai, Respondent.

Second Appeal No. 101 of 1964, D/-
25-9-1967, from decree of Dist. J. Drug
at Rajnandgaon, D/- 4-2-1964.

(A) Civil P. C. (1908), O. 6, R. 2 and
O. 14 R. 1 — Omission to frame issue on
particular aspect of matter in dispute—
Matter covered by general issue — Par-
ties fully knowing and understanding
what the real issue was and adducing
evidence in support of their contentions
— Held there was, even in absence of
specific issue, no mis-trial such as might
vitiate decision — None of the parties
could be regarded as having been taken
by surprise or prejudiced in any manner.
AIR 1956 SC 593; AIR 1963 SC 884 and
AIR 1964 SC 164 and AIR 1966 SC 735
Rel. on. (Para 5)

(B) Hindu Law — Bombay School —
Applicability — Lex loci—Parties claim-
ing to be Maharashtrian Mahars — Indi-
cations that their ancestors immigrated
from Bombay region into Nagpur and
Berar plain, though migration in sense of
its exact origin not proved — Family
retaining its identity as Maharashtrian by
clinging to its language, dress, social cus-
toms and manners, mode of worship and
like — Until contrary is shown presump-
tion would be that the family had migrat-
ed from Bombay region — Presumption
being not rebutted, parties held govern-
ed by Bombay School of Hindu law. AIR
1938 Nag 163 and AIR 1957 Madh Pra
175 and AIR 1960 Madh Pra 382 Foll.
Case law discussed. (Para 10)

Cases Referred: Chronological Paras

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|-----------------------------------|----|
| (1966) AIR 1966 SC 735 (V 53)= | |
| (1967) 1 SCJ 666, Bhagwati Pra- | 5 |
| sad v. Chandramaul | |
| (1964) AIR 1964 SC 164 (V 51) = | |
| (1964) 3 SCR 634, Kunju Kesavan | 5 |
| v. M. M. Philip | |
| (1963) AIR 1963 SC 884 (V 50)= | |
| (1963) 2 SCR 208, Kamesharamma | 5 |
| v. Subba Rao | |
| (1961) AIR 1961 Bom 169 (V 48)= | |
| 62 Bom LR 322, Ramaji v. Mano- | 9 |
| har | |
| (1960) AIR 1960 Madh Pra 382 | |
| (V 47)=1960 Jab LJ 1054, | 10 |
| Anjubai v. Ramchandraro | |
| (1957) AIR 1957 Madh Pra 175 | |
| (V 44)=1957 MPLJ 572, Udebhan | 10 |
| v. Vikram | |
| (1957) AIR 1957 Nag 76 (V 44)= | |
| ILR 1956 Nag 980, Sonabai v. | 9 |
| Lakshmibai | |
| (1956) AIR 1956 SC 593 (V 43)= | |
| 1956 SCR 451, Nagubai v. B. Shama | 5 |
| Rao | |

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|---------------------------------------|----------|
| (1953) AIR 1953 Nag 326 (V 40)= | |
| ILR 1953 Nag 187, Bhaskar v. | |
| Laxmibai | 8 |
| (1947) AIR 1947 Nag 180 (V 34)= | |
| ILR 1947 Nag 267, Ramlu v. Vithal | 9 |
| (1944) 1944 Nag LJ 291, Rajeshwar | |
| v. Kesheo | 9 |
| (1938) AIR 1938 Nag 163 (V 25)= | |
| ILR 1938 Nag 469, Kesheo Rao | 8, 9, 10 |
| v. Sadasheo Rao | |
| (1921) AIR 1921 PC 59 (V 8)= | |
| 16 Nag LR 187, Balwantrao v. | |
| Baji Rao | 8 |
| A. P. Sen, for Appellant; Y. S. Dhar- | |
| madhikari, for Respondent. | |

PANDEY, J.: The main question for con-
sideration in this appeal is whether the par-
ties are governed by the Lex Loci or by
the personal law of the parties.

2. The question arises in this manner.
It is no longer disputed, though it was in
contest in the Courts below, that one Jagan
Mahar owned the house in dispute which is
situate at Rajnandgaon. He had by his
wife Gujji a son, Mangya, and three
daughters, Kamalji, Bhagi and Kisni. It
transpired that Mangya, Bhagi and Kisni pre-
deceased Jagan, who died in 1929 leaving
behind him surviving his widow Gujji, a
daughter Kamalji and two sons of his daugh-
ter Kisni, namely, Atmaram and Rajaram.
On Jagan's death, the widow Gujji inherited
the house. Upon her death in 1936, her
daughter Kamalji took the house. Kamalji
died on 4 October 1952 leaving a daughter,
Bhagirathibai, as her only issue. The suit,
out of which this appeal arises, was filed
by Bhagirathibai, Jagan's daughter's daughter
against Rajaram, Jagan's daughter's son, for
possession of the disputed house. It was
dismissed by the Court of first instance. The
lower appeal Court, however, allowed her
claim. Rajaram filed this second appeal. He
died during the pendency of the appeal sur-
vived by his daughter Hirabai who was
thereupon brought on record as his legal
representative.

3. Initially Bhagirathibai filed a suit for
ejectment, but she was allowed to withdraw
it with liberty to bring a fresh suit because
she had not duly served on the defendant
a notice to quit. After doing the needful,
she filed the present suit. Subsequently, she
was allowed to convert it into a suit for
possession grounded on her title to the house.
The second suit for ejectment was filed in
accordance with the liberty reserved to her
under Order 23, Rule 1 (2) of the Code of
Civil Procedure. Therefore, the question
here is not whether a suit based on title
grounded on a different cause of action could
be filed. Order 23, Rule 1 of the Code
does not interfere with the liberty of filing
such a suit. The precise question is whe-
ther the suit for ejectment, as subsequently
laid, could be allowed under O. 6. R. 17

of the Code to be converted into a suit founded on title. The powers of allowing an amendment under Order 6, R. 17 of the Code are very wide because the proviso in the old section, which inhibited an amendment that changed the character of the suit, is no longer there. No question of limitation was involved and the defendant was not prejudiced in any way. In this situation, the amendment which the Court allowed was within its jurisdiction. Since the point was not argued before me, I do not consider it necessary to dwell further on this aspect of the matter.

4. On the main question, the plaintiff pleaded

"Jagan died in or about the year 1929 and his property was inherited by his widow Mst Guji as the parties are Maharashtra Mahars and they are governed by the Bombay School of Hindu Law. Mst Guji thus became the actual owner of the property inherited by her from her husband." In answer, the defendant stated

"The parties are Mahars. They have been living in Rajnandgaon for last more than a century. It is denied that they are governed by Bombay School of Hindu Law. It is denied that the rule regarding the taking of absolute property by daughters in Bombay is applicable to the community to which the parties belong. That rule was not adopted by the Mahars of the Bombay Presidency even in Bombay. It is denied that, among the community to which the parties belong, the daughter takes an absolute estate either by adoption of the Bombay School of law of inheritance or by any custom or even otherwise".

5. There was, it will be seen, no specific plea that the plaintiff's predecessors had, at some time in the past, migrated from any State or region where the Bombay School of Hindu Law was in force or that they had carried with them their personal law. No issue was, therefore, framed on this particular aspect of the matter. Even so, it may well be regarded as covered by the general issue whether the parties are governed by the Bombay School of Hindu Law. The point is that both parties fully knew and understood what the real issue was and also led evidence in support of their contentions. That being so, none of them could be regarded as having been taken by surprise or prejudiced in any manner. In this situation, there was, even in the absence of a specific issue on the point, no mis-trial such as might vitiate the decision. *Nagubhai v. B. Shama Rao*, AIR 1956 SC 593, *Kameshramma v. Subba Rao*, AIR 1963 SC 884 and *Kunju Kesavan v. M. M. Philip*, AIR 1964 SC 164. Indeed even when there is no specific plea but the matter is covered by an issue by implication and the parties go to trial with full knowledge that the plea is involved in the trial and adduce evidence

thereon, the absence of the plea is a mere irregularity which did not cause any prejudice to the parties, AIR 1956 SC 593 and *Bhagwati Prasad v. Chandramaul*, (1967) 1 SCJ 666 (AIR 1966 SC 735). In the last mentioned case, the Supreme Court observed:

"If a plea is not specifically made and yet it is covered by an issue by implication and the parties knew that the said plea was involved in the trial, then the mere fact that the plea was not expressly taken in the pleadings would not necessarily disentitle a party from relying upon it if it is satisfactorily proved by evidence. The general rule no doubt is that the relief should be founded on pleadings made by the parties. But where the substantial matters relating to the title of both parties to the suit are touched, though indirectly or even obscurely, in the issues, and evidence has been led about them, then the argument that a particular matter was not expressly taken in the pleadings would be purely formal and technical and cannot succeed in every case". (Page 670 of SCJ) = (at p. 738 of AIR)

6. Upon a consideration of the evidence, the lower appeal Court found the following facts well established.

(i) The parties are, by caste, Mahars

(ii) They had settled at Rajnandgaon after migrating from Nagpur and Bhandara districts

(iii) It was not proved that they had migrated from any place where the Bombay School of Hindu Law is the *Lex Loci*

(iv) The parties speak Marathi language.

(v) They dress in Maharashtra style

(vi) they follow Maharashtra social customs and manners

(vii) They worship Maharashtra Gods, visit Maharashtra religious places and observe Maharashtra festivals

(viii) They have adopted some local social customs and manners also

7. Russel, in his *Tribes and Castes of Central Provinces*, stated that the customs of Mahars showed that they were the earliest immigrants from Bombay into the Berar and Nagpur plain (Volume IV, page 132). The same view was expressed in the "Central Province Ethnographic Survey, Part IX, Draft Articles of Maratha Castes, 1911". In the Chapter on Mahars, the following observations were made

"These customs tend to show that the Mahars were the earliest immigrants from Bombay into the Berar and Nagpur plain, excluding of course the Gonds and other tribes, who have practically been ousted from this tract".

It would, therefore, appear that Mahars had originally migrated from the Bombay region. After they settled in Berar and Nagpur plain, they migrated into other tracts including Chhattisgarh.

8. The leading case on the point is *Kesheo Rao v. Sadasheo Rao*, ILR 1938 Nag 469 = (AIR 1938 Nag 163). Bose, J. (as he then was) referred to the decision of the Privy Council in *Balwant Rao v. Baji Rao*, 16 Nag LR 187 = (AIR 1921 PC 59) and observed:

"It must follow from this that the Mayukha did not create the Bombay view and that even though it was written by Nilkanth in the seventeenth century, he merely recited the customs and usages which he found in vogue around him, and knowing 'the tenacity with which oriental races cling to their age-long tradition' it can only mean that this was always the law of the Maharashtrians, whoever they were, wherever they came from.

If that is so, then wherever we find a family clinging to its individuality and retaining its identity as Maharashtrian, it must be presumed until the contrary is shown that it hailed from the race or group of people known as Maharashtrians and carried the law of Maharashtra with them — the law which according to the reasoning of their Lordships has always been their law and which has been as characteristic of them as their racial or communal identity, as distinct as their name." (Page 477-8 of ILR) = (at p. 1967 of AIR).

9. The learned counsel for the appealing defendant distinguished ILR 1938 Nag 469 = (AIR 1938 Nag 163) (supra) on the ground that it related to Maharashtra Brahmins and referred to a number of contrary decisions about lower castes. In *Rajeshwar v. Kesheo*, 1944 Nag LJ 291, *Dhanoje Kunbis of Chanda* who had merely adopted the Marathi language, were not regarded as Maharashtrian origin. In *Ramlu v. Vithal*, ILR 1947 Nag 267 = (AIR 1947 Nag 180) migration of Komtis from the region where the Madras School of Hindu Law applies was not proved. As held in *Bhaskar v. Laxmibai*, ILR 1953 Nag 187 = (AIR 1953 Nag 326) there was no presumption that *Khaire Kunbis of Nagpur*, who spoke Marathi language, had migrated from Maharashtra. It was held in *Sonabai v. Lakshmibai*, ILR 1956 Nag 980 = (AIR 1957 Nag 76) that *Halbi Koshtis* were of eastern rather than western origin and the mere fact that they had adopted Marathi language would not bring them under the Bombay School of Hindu Law. In *Ramaji v. Manohar*, AIR 1961 Bom 169 all that was said was that the parties were Marathi Telis and there were other circumstances contra-indicating that the Bombay School of Hindu Law applied to them. It was, therefore, held that they were governed by the Benaras School. It will be readily seen that all these cases are distinguishable mainly because it was not found in these cases that the parties could be identified as characteristically or peculiarly Maharashtrian by their language, dress,

customs, manners, festivals, observances, Gods they worshipped, the places to which they pilgrimaged and the like.

10. In the present case, the parties claim to be Maharashtrian Mahars. As already stated, there are indications that their ancestors had immigrated from the Bombay region into Nagpur and Berar plain, though migration of the family, in the sense of its exact origin, is not proved. Even so, as found by the lower appeal Court, the family is retaining its identity as Maharashtrian by clinging to its language, dress, social customs and manners, mode of worship and the like. That being so, it must be presumed, until the contrary is shown, that the family had migrated from the Bombay region. I have already referred to the case of ILR 1938 Nag 469 = (AIR 1938 Nag 163) (supra) as the leading authority on this point. The same view was taken in *Udebhan v. Vikram*, AIR 1957 Madh Pra 175 and *Anjubai v. Ramchandrarao*, AIR 1960 Madh Pra 382 also. The last mentioned case related to a Maratha family of Chhattisgarh and the Bombay School of Hindu Law was applied to that family in circumstances mostly similar to those present in this case. It only remains to be mentioned that here the defendant made no endeavour to rebut the presumption mentioned in *Kesheo Rao's* case, ILR 1938 Nag 469 = (AIR 1938 Nag 163) (supra). I therefore, agree with the conclusion of the lower appeal Court that the parties are governed by the Bombay School of Hindu Law.

11. Since it is not disputed that, under the Bombay School of Hindu Law, the claim of *Bhagirathibai* must succeed, this appeal fails and is dismissed with all costs throughout on the appellant. Hearing fee according to schedule.

LGC/D.V.C.

Appeal dismissed.

AIR 1969 MADHYA PRADESH 243
(V 56 C 62)

S. P. BHARGAVA, J.

Ramashanker Parmanand, Petitioner v. Jugalkishore Ramasahaya Bajaj and others, Respondents.

Election Petn. No. 36 of 1967, D/- 26-7-1967.

(A) Representation of the People Act (1951), Ss. 81, 37, 86 (1) — Election challenged on ground of corrupt practice — Omission of petitioner to supply copies of annexures for being served to respondents — Effect — Petition is liable to be dismissed — Requirement of Section 81 (3) is mandatory.

Where an election is challenged on ground of corrupt practice, but the petitioner fails

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to supply copies of annexures to the petition, for being served on the respondents, the defect produced by the non-supply of copies is a defect of presentation of the petition and so cannot be allowed to be cured subsequently. Consequently, the petition is liable to be dismissed. (Para 13)

The requirement of the copies being supplied to the respondents according to Section 81 (3) is as important a requirement of the section as the necessity of supplying the requisite number of copies after getting them attested under the signature of the petitioner. Section 81 (3) in unmistakable terms lays down the manner in which an election petition should be presented and it is also clearly laid down in Section 86 (1) as to what the consequence would be in case the provisions of Section 81 are not complied with. The requirement of Section 81 (3) is mandatory. (Para 11)

The copies of the petition served on the respondents with the omission of the copies of annexures cannot also be treated to be copies or true copies of the petition within the meaning of Section 81 (3). It is true that a substantially true copy would be a copy within the meaning of S. 81 (3), but a copy which differs in material particulars from the original is not a copy within the meaning of Section 81 (3). The word "petition" as used in Section 81 (3), includes the annexures to the petition containing particulars of corrupt practice alleged therein. The entity of an annexure may be different but nevertheless it is a part of the petition when it contains material particulars of the corrupt practice (Paras 13 & 14)

(B) Representation of the People Act (1951), Ss. 86 (5), 81 — Election petition — Amendment of — Power of High Court — Extent of — Amendment when can be allowed — Principles of — Civil P. C. (1908), O. 6, R. 11.

The High Court has power under Sec 86 (5) and also under O. 6, R. 17, Civil P. C. to allow the particulars of any corrupt practice alleged in the petition to be amended or amplified but plainly enough there are two limitations on the powers of the Court (i) that it cannot allow any amendment which will enable the petitioner to remove the defect pertaining to the presentation which is dealt with under Section 81, and (ii) that it cannot allow a defect of non-joinder of parties to be cured after the limitation for making the election petition is run out. The third limitation is to be found in the provision under Section 86 (5) which prohibits any amendment being allowed which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition. With these limitations the High Court can permit the same amendments in the election petition as it could in a plaint or an application under the Code of Civil Procedure. However, it is plain that only those amendments can be permitted which

are necessary for the purpose of determining the real question in controversy between the parties. (Para 14)

Where the petitioner fails to supply the copies of annexures giving better particulars of the alleged corrupt practice, he cannot be allowed to introduce the same in petition by way of amending the same. Annexures being part of the petition, amendment would amount to change of form without any substance. Moreover, such amendment would enable the petitioner to remove the defect of presentation which cannot be allowed to be done. (Para 15)

Cases	Referred	Chronological	Paras
(1965) AIR 1965 SC 1243	(V 52)=		
(1966) 1 SCJ 43, Amin Lal v. Hunnamal			14
(1964) AIR 1964 SC 1027	(V 51)=		
(1964) 6 SCR 213, Subbarao v. Member, Election Tribunal, Hyderabad			14
(1964) AIR 1964 SC 1545	(V 51)=		
(1964) 3 SCR 573, Murarka Radhey Shyam Ram Kumar v. Roop Singh			12
(1964) AIR 1964 Raj 223	(V 51)=ILR		
(1964) 14 Raj 503, Sardarmal v. Smt. Gayatri Devi			10, 12
(1959) AIR 1959 SC 93	(V 46)=1959		
SCR 1403, Baru Ram v. Smt. Prasanna			11
(1958) AIR 1958 SC 687	(V 45)=1958		
SCJ 680, K. Kamaraja Nadar v. Kunju Thevar			10, 14
(1958) AIR 1958 SC 698	(V 45)=		
1959 SCR 611, Inamati Mallappa Basappa v. Desai Basavaraj Ayyappa			14
(1957) AIR 1957 SC 444	(V 44)=		
1957 SCR 370, Harish Chandra Bajpai v. Triloki Singh			14
(1958) AIR 1958 All 809	(V 45), Chaturbhuj Chunnilal v. Election Tribunal, Kanpur		14
(1953) (1953) 2 All ER 704	=(1953)		
1 WLR 1060, Pope v Clarke			10
(1866) 17 QBD 805	=55 LJQB 512,		
Phillips v. Goff			10

R. S. Dabir, for Petitioner, G. P. Singh, for Respondent No. 1.

ORDER: This election petition was filed by the petitioner Ramshanker challenging the election of respondent No. 1 Jugalkishore who was elected from a constituency known as "Hatta 162" constituency of the Vidhan Sabha of Madhya Pradesh. In the election which took place on 17-2-1967, in all fifteen candidates including the petitioner had taken part. The petitioner and the first ten respondents contested the election while respondents 11 to 14 withdrew their candidature after the acceptance of their nomination papers within the time allowed for such withdrawal. The election of the first respondent is challenged on the ground that he resorted to the corrupt practice described in Section 123 (5) of the Representation of the People Act, 1951 (hereinafter called the Act). The particulars of the said corrupt practice have been specified in paragraphs 6 to 17 of the peti-

tion, which, briefly stated, consisted of procuring and hiring vehicles for conveyance of the voters to the different polling stations and the vehicles procured or hired were used for the said purpose on the date of voting.

2. In Paragraph 4 of the petition it was averred that annexed to the petition and as part thereof is annexure A showing the number of votes obtained by each of the candidates who contested at the poll. The petition referred to annexure (2) and annexure (3) also. Annexure (2) is a schedule showing the names of persons who worked for the returned candidate. Annexure (3) is the schedule showing the names of electors who were carried in the vehicles for casting their votes. It is admitted on behalf of the petitioner and is stated so in paragraph 8 of the application for amendment of the petition that by inadvertence copies of the said three annexures (A), (2) and (3) were not given for being served on the respondents. It is averred in the said amendment that copies supplied to the respondents were copies of the petition minus the said annexures.

3. The first respondent in his written-statement raised a preliminary objection to the effect that in paragraphs 4, 16 and 17 of the petition reference is made by the petitioner to annexures (A), (2) and (3) and the petitioner himself states that these annexures are parts of the election petition but in spite of this the petitioner did not file copies of these annexures along with the copies of the petition as required by Section 81 (3) of the Act. It is pleaded that as there were fourteen respondents in the petition, the petitioner was bound to file fourteen copies of the entire petition including the said annexures. It is urged that as there was non-compliance of Section 81 (3), the petition should be dismissed under Section 86 of the Representation of the People Act, 1951.

4. On the aforesaid objection, a preliminary issue was framed as under on 12-7-1967:

"Whether due to copies of annexures (A), (2) and (3) not having been furnished for being supplied to the respondents, the petition is liable to be dismissed under Sec. 86 (1) of the Representation of the People Act, 1951?"

5. Later, on 17-7-1967, the petitioner filed an application under Section 86 (5) of the Representation of the People Act read with Order 6, Rule 17 read with Section 151 of the Code of Civil Procedure seeking permission of the Court to incorporate the contents of annexures (A), (2) and (3) in the body of the petition itself by way of better particulars.

6. The application for amendment was opposed by the learned Counsel for the first respondent. As it is convenient to consider the application for amendment and the first

preliminary issue reproduced above together, arguments on both the application for amendment and the preliminary issue were heard together.

7. Shri G. P. Singh, learned Counsel for the first respondent, has reiterated the objections raised in the written-statement. He has urged that the provision contained in Section 81 (3) with regard to the supply of true copies is mandatory, that the copies filed by the petitioner did not contain the said annexure and therefore could not be treated to be "copies of the petition" within the meaning of Section 81 (3); that the petition on account of the omission of the supply of true copies of the petition suffered from a defect of presentation under Section 81 (3) of the Act and it could not be allowed to be cured later by any amendment or by permitting the petitioner to file copies of the annexures subsequently; that on the ground of non-compliance of the mandatory provision of Section 81 (3), the petition should be dismissed under Section 86 (1) of the Act. With regard to the amendment application, the argument advanced by the learned Counsel is that the petition as filed in Court did not suffer from any defect of particulars which are now sought to be supplied. In the petition itself it was clearly averred that annexures (A), (2) and (3) were parts of the petition and if they were so, according to the petitioner himself the question of amending the petition which incorporated these very particulars though, in another form, was wholly unnecessary and the question of amendment really did not arise at all. Further it has been urged that possibly the application for amendment has been made only to get over the defect of presentation of the petition, but such a defect could not be allowed to be cured under Section 86 (5) of the Act or even under Order 6, Rule 17 of the Code of Civil Procedure as under the general provisions of law only that amendment could be allowed which was not in contravention of the provisions of the Act.

8. Shri R. S. Dabir, learned Counsel for the petitioner, urged in reply that there is no defect in the petition as the petition contains all the three annexures (A), (2) and (3). He has further urged that the defect of non-supply of copies of the said annexures for being served on the respondents does not entail the penalty of dismissal of the petition as the petition can be dismissed only if there is a failure to comply with the provisions of Section 81 (3) in respect of "copy of the petition" and not "annexures thereof" and the defect being merely a technical one, caused by clerical inadvertence, and the application for amendment having been made bona fide and without delay, the defect should be allowed to be cured so that the trial of the petition on merits is secured. He further urged that the requirement of the annexures being served along with the copy of the petition on the respondents is merely technical

and cannot be held to be mandatory. It has also been urged that the application for amendment of the petition falls squarely within the provision of Section 86 (5) of the Act and the general provisions of law contained in Order 6, Rule 17, C P C, and there could be no valid objection to the amendment being permitted and therefore the petition should not be dismissed under Section 83 (1) of the Act.

9. It would be convenient to consider the arguments advanced in connection with the preliminary issue first and then to take up the question as to whether the petition should be allowed to be amended.

10. The first question which arises for consideration is whether the provision with regard to the supply of copies made in Section 81 (3) is a mandatory provision. Section 81 (3) reads as follows:

"Every election petition shall be accompanied by as many copies thereof as there are respondents mentioned in the petition, and every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition."

The object of copies supplied by the petitioner being attested by him as true copies and served on the respondents is clearly to inform the respondents of the grounds on which the election is challenged. Where a statute requires an act to be done at or within a particular time, or in a particular manner, the question arises whether the validity of the act is affected by a failure to comply with what is prescribed. If it appears that Parliament intended disobedience to render the act invalid, the provision in question is described as "mandatory" "absolute," "imperative" or "obligatory", if, on the other hand, compliance was not intended to govern the validity of what is done, the provision is said to be "directory." (See Halsbury's Laws of England Simonds Edition, Vol 36, Article 656). In the foot-note (b) to Article 656, the following passage is found—

"It has also been said that mandatory provisions must be fulfilled exactly, whereas it is sufficient if directory provisions are substantially fulfilled see, e. g., (1875) 10 CP 733, at p 746, *Phillips v Goff*, (1886) 17 QBD 805 at p 812. It appears, however, from the authorities (see, e. g., notes (i) —(I), pp 435, 436, post) that acts have frequently been held valid notwithstanding a total failure to comply with what is prescribed, and the foregoing proposition would seem to amount to no more than an inaccurate description of the over-all position where a provision laying down a number of requirements is held to be mandatory as to some and directory as to the rest see e. g., *Pope v. Clarke*, (1953) 2 All ER 704, (the facts of which are mentioned in note (b), p. 435, post)."

In *K Kamaraja Nadar v. Kunju Thevar*, AIR 1958 SC 687 their Lordships held the provisions of Section 81 to be mandatory. In *Sardar Mal v. Smt Gayatri Devi*, AIR 1964 Raj 223 in paragraph 26 the learned Judge expressed the view that the requirements of Section 81 (3), both about the requisite number of copies to be supplied and their attestation under the signature of the petitioner are mandatory as they have a purpose and a public policy behind them and are essential elements of the provisions contained in that sub-section. To my mind, the requirement of the copies being supplied to the respondents according to Section 81 (3) is as important a requirement of the Section as the necessity of supplying the requisite number of copies after getting them attested under the signature of the petitioner.

11. In *Baru Ram v Smt Prasanna*, 1959 SCR 1403=AIR 1959 SC 93 it has been explained that whenever the statute requires a particular act to be done in a particular manner and also lays down that failure to comply with the said requirement leads to a specific consequence it would be difficult to accept the argument that the failure to comply with the said requirement should lead to any other consequence. In such a case, the requirement is a mandatory requirement which must be strictly complied with. Applying this test to the instant case, it is clear that Section 81 (3) in unmistakable terms lays down the manner in which an election petition should be presented and it is also clearly laid down in Section 86 (1) as to what the consequence would be in case the provisions of Section 81 are not complied with. I, therefore, hold that the said requirement is mandatory.

12. The next question which arises for consideration is as to whether the copies of the petition given by the petitioner with the omission of the annexures (A), (2) and (3) for being served on the respondents can be treated to be copies or true copies of the petition within the meaning of Section 81 (3) of the Act. In *Murarka Radhev Shyam Ram Kumar v Roop Singh*, AIR 1961 SC 1545 their Lordships of the Supreme Court took the view that the word "copy" as used in Section 81 (3) does not mean an absolutely exact copy, but means that the copy shall be so true that nobody can by any possibility misunderstand it. Their Lordships' dictum indicates that a substantially true copy would be a copy within the meaning of that section.

It is true that in the ultimate analysis in every case the question involved is one of construction of a relevant provision of a particular statute which proceeds on the basis of the words used as understood in the context of the statute, but it appears to be plain that where the portion which is omitted in the copy exhibited was a material portion, there can be little doubt that such a copy which differs in material particulars from the

original is not a copy within the meaning of Section 81 (3) of the Act. The petition itself declares that the copies of the annexures (A), (2) and (3) are parts of the petition. One of the recognised ways of incorporating documents or other matter which is not reproduced in the petition itself is to include it in the annexures and schedules and to state that such annexures and schedules may be treated as part of the petition. The word "petition" as used in Section 81 (3), in my opinion, includes the annexures to the petition containing particulars of corrupt practice alleged therein. I am fortified in my view by the observations made by the Rajasthan High Court in Sardar Mal's case, AIR 1964 Raj 225 (supra) in para 31 of the judgment. Section 83 which deals with the contents of the petition clearly provides for schedules or annexures to the petition in sub-section (2) thereof. The entity of an annexure may be different but nevertheless it is a part of the petition when it contains material particulars of the corrupt practice.

13. It is obvious that any one who has the original petition before him and the copy of the petition supplied to the respondents cannot fail to notice that they are neither identical or substantially the same, as the particulars given in the annexures annexed to the petition are lacking in the copies of the petition supplied to the respondents. These particulars are so material that without them the election petition cannot be said to be complete. It lacks something so vital that without the annexures the copies served cannot be said to be copies of the petition. Under Section 81 (3) it is the duty of the petitioner to supply the copies for being served on the respondents. By attesting copies under his own signatures to be true copies of the petition, the petitioner assures that they have been duly compared with the original and then served on the respondents without any further comparison as the copies of the original. The copies supplied are so defective that on their basis it is obviously impossible to file a complete written-statement meeting the objections raised against the returned candidates in the petition. In annexure (2) and list of workers of respondent No. 1 has been given by the petitioner. Without knowing the names he could not accept or deny as to whether the particular persons mentioned in annexure (2) were his workers or not. Similarly, in annexure (3) the list of those electors has been given who were allegedly carried to the polling stations in the vehicles hired or procured by the first respondent. (In the heading of annexure 3 the word "labourers" appears to have been wrongly written instead of "electors"). Again, unless the names of these electors were communicated to the respondents when the copies of the election petition were served on them, it was not possible for them to meet the case of corrupt practice set up in the

petition and to file their written-statement on the date required by the Court.

The defect thus is of a fundamental nature and therefore the copies of the petition served on the respondents with the omission of the said annexures cannot be treated to be copies or true copies of the petition within the meaning of Section 81 (3) of the Act.

14. The third question which arises for consideration is as to whether the defect produced by the non-supply of copies is a defect of presentation of the petition and so cannot be allowed to be cured subsequently. I may straightway refer to the decision of their Lordships in Ch. Subbarao v. Member, Election Tribunal, Hyderabad, AIR 1964 SC 1027. In that case it was urged on behalf of the appellant that the jurisdiction of the tribunal under Section 90 (3) to dismiss an election petition which does not comply with the provisions of Section 81 was attracted only if there was a defect in the petition itself and that a defect merely in the copy accompanying the petition would not be a case of a petition not complying with the provisions of Section 81 so as to require or even permit the tribunal to dismiss the petition. Their Lordships rejected this argument in Para 14 of their judgment and significantly observed:

"When Section 81 (3) requires an election petition to be accompanied by the requisite number of copies, it becomes a requirement for the presentation of the election petition to the Commission, and therefore a condition precedent for the proper presentation of an election petition. If that is a requirement of Section 81 no distinction can be drawn between the requirements of sub-ss. (1) and (2) and of sub-section (3). We might add that if there is a total and complete non-compliance with the provisions of Section 81 (3), the election petition might not be 'an election petition presented in accordance with the provisions of this Part' within S. 80 of the Act. We are therefore inclined to consider that if there had been such a non-compliance with the requirement of sub-section (3) not merely the Election Commission under Section 85 but the Election Tribunal under Section 90 (3) would prima facie not merely be justified but would be required to dismiss the election petition."

In my opinion, these observations aptly apply with full force in the instant case where the provision made in Section 81 (3) with regard to the supply of copies or true copies as stated above has not been complied with.

15. I may now consider the application for amendment of the election petition. The amendment which is sought to be introduced in the petition is to lift the particulars given in the annexures bodily from them and to incorporate them in the petition. Under Section 86 (5) the High Court may upon such terms as to costs or otherwise, as it

may deem fit, allow the particulars of any corrupt practice alleged in the petition to be amended or amplified in such a manner as may in its opinion be necessary for ensuring a fair and effective trial of the petition but shall not allow any amendment of the petition which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition.

A perusal of the decisions in *Harish Chandra Bajpai v. Triloka Singh*, AIR 1957 SC 444, AIR 1958 SC 837, *Inamati Mallappa Bassappa v. Desai Basavaraja Ayyappa*, AIR 1958 SC 698, *Chaturbhuj Chunnial v. Election Tribunal, Kanpur*, AIR 1958 All 809 and *Amin Lal v. Hunna Mal*, AIR 1965 SC 1243 makes it clear that even in the absence of the said provision the Court has wide powers for allowing amendments under Order 6, Rule 17, Civil Procedure Code but plainly enough there are two limitations on the powers of the Court, (i) that it cannot allow any amendment which will enable the petitioner to remove the defect pertaining to the presentation which is dealt with under Section 81, and (ii) that it cannot allow a defect of non-joinder of parties to be cured after the limitation for making the election petition is run out. The third limitation is to be found in the provision under Section 86 (5) of the Act which prohibits any amendment being allowed which will have the effect of introducing particulars of a corrupt practice not previously alleged in the petition. With these limitations the High Court can permit the same amendments in the election petition as it could in a plaint or an application under the Code of Civil Procedure. However, it is plain that only those amendments can be permitted which are necessary for the purpose of determining the real question in controversy between the parties. If the annexures were parts of the election petition according to the petitioner himself, as they really are, there is no point in permission being granted to introduce the same matter by incorporating the particulars given in the annexures in the body of the petition. This would be a change of form without any substance and such an amendment is obviously unnecessary and futile. On the other hand, if the amendment were desired for the purpose of getting over the mandatory provisions of Section 81 (3) read with Section 86 (1), the amendment would defeat a provision of law and therefore could not be allowed. The most significant reason for not allowing the amendment, in my opinion, is that the amendment, if permitted, would enable the petitioner to remove the defect of presentation which cannot be allowed to be done.

16. For the aforesaid reasons I hold that the copy of the petition supplied to the respondents was not a copy of the election petition within the meaning of Section 81 (3) and therefore the election petition is liable to be dismissed under Section 86 (1). I fur-

ther hold that the petitioner is not entitled to introduce the amendment in the petition which is sought to be made by his application dated 17-7-1967. For these reasons, the election petition is dismissed with costs. Counsel's fee Rs. 400/-.

DVT/D.V.C.

Petition dismissed.

AIR 1969 MADHYA PRADESH 248

(V 56 C 63)

P V DIXIT, C J. AND G P. SINGH, J.

Employees of Asbestos Cement Ltd., Ky-more, Petitioners v. Industrial Court, Madhya Pradesh, Indore and others, Respondents

Misc Petn. No 249 of 1968, D/- 11-10-1968

(A) Madhya Pradesh Industrial Relations Act (27 of 1960), Ss. 2 (17), 31, 51 — Industrial Dispute — Notice of change under S. 31 — No prerequisite for giving rise to.

Notice of change under Sec 31 of the Madhya Pradesh Industrial Relations Act is no prerequisite for giving rise to an Industrial Dispute. The power of the State Government to make a reference under Sec 51 is not controlled by anything contained in Sec. 31. Section 51 opens with a non obstante clause — "Notwithstanding anything contained in this Act" — which makes it plain that a notice of change under Sec 31 is not a condition precedent for enabling the State Government to make a reference under Section 51. (Para 3)

The definition of 'Industrial Dispute' under Sec 2 (17) of the Act also goes to show that it is not restricted to disputes arising out of a notice of change issued by employer or employees under Sec. 31. AIR 1966 SC 497, Rel. on. (Para 3)

In a case where a dispute about the propriety and legality of closure of certain establishments was referred to arbitration by the Industrial Court, it was wrong for the Court to hold that the reference was incompetent on the ground that the workers had not issued a notice under Sec 31 (2) of the Act demanding withdrawal of the change. (Paras 3 and 6)

(B) M. P. Industrial Relations Act (27 of 1960), S. 51 — Existence of industrial dispute — Reference requiring satisfaction of Government — Regularity of reference must be presumed — Company pleading absence of dispute has to prove it. AIR 1961 SC 1331 at p 1357, Foll. (Para 3)

(C) M. P. Industrial Relations Act (27 of 1960), Ss. 2 (17), 51 and 82 — Closure can be subject-matter of Industrial Dispute — Scope of provisions stated.

Considering the language of Ss 51 and 82 of the M. P. Industrial Relations Act, it must be held that S 51 is not controlled by any-

thing contained in S. 82 and that an industrial dispute arising out of a proposed strike, lock-out, closure or stoppage can be referred for arbitration under Sec. 51 if other conditions of that section are fulfilled. The above inference is strongly reinforced by the non obstante clause with which S. 51 opens.

(Para 4)

(D) M. P. Industrial Relations Act (27 of 1960), Sec. 2 (17) — Closure of part of machinery or discontinuance of a shift may give rise to an industrial dispute. AIR 1968 SC 1002, Dist.

(Para 5)

Cases Referred: Chronological Paras

- | | |
|--|---|
| (1968) AIR 1968 SC 529 (V 55)=
1968-1 SCR 515, Sindhu Resettle-
ment Corporation Ltd. v. Industrial
Tribunal, Gujarat | 3 |
| (1968) AIR 1968 SC 1002 (V 55)=
(1968) 2 SCWR 303, Indian Hume
Pipe Co. v. Their Workmen | 5 |
| (1966) AIR 1966 SC 497 (V 53)=
(1966) 1 SCR 382, Ahmedabad Mill-
owners' Association v. Textile Labour
Association | 8 |
| (1961) AIR 1961 SC 1381 (V 48)=
(1962) 1 SCR 422, Swadeshi Cotton
Mills v. S. I. Tribunal, U. P. | 3 |

Y. S. Dharmadhikari and Gulab Gupta, for
Petitioner; R. S. Dabir and M. R. Pathak, for
Respondents.

SINGH, J.: This is a petition under Arti-
cles 226 and 227 of the Constitution for
issuance of writs of certiorari and mandamus
by the Employees of the Asbestos Cement
Limited, Kymore through their representative
Union and is directed against an order of
the Industrial Court, Indore by which a re-
ference made to it by the State Govern-
ment was rejected as incompetent.

2. The facts and circumstances leading
up to this petition are as under:

The Asbestos Cement Limited, Kymore,
hereinafter referred as the Company, put up
and issued a notice on 11th March, 1968
declaring its intention to close one pipe
machine and one sheeting machine from
20th May, 1968 as also to close the third
shift in the loading department from 20th
June, 1968. This led to the reference of
an industrial dispute. The State Govern-
ment by its order of reference made on 22nd
April, 1968 referred the dispute upon the
matters specified in the schedule annexed
thereto to the arbitration of the Industrial
Court under Section 51 (a) of the Madhya
Pradesh Industrial Relations Act, 1960.

The schedule which specified the dispute
ran as follows:

"1. Whether the proposed closure of
one sheeting machine and one pipe machine
from 20-5-1968 and discontinuance of one
shift in Loading Department from 20-6-68
by the Management of Asbestos Cement Ltd.
Kymore, is legal and justified.

2. Whether an interim order should be
issued restraining the management from clos-
ing down the above departments shift until
the dispute about the propriety and legality
of the closure is adjudicated upon."

The Industrial Court by its order passed on
20th May, 1968 rejected the reference hold-
ing it to be incompetent. The employees,
therefore have filed this petition in which
they pray that the said order be quashed
and the Industrial Court be directed to de-
cide the reference according to law.

3. The first ground on which the refer-
ence was held to be incompetent is that on
the company issuing the notice giving out
its decision to discontinue the two machines
and close the third shift in the loading
department, the Representative Union of the
Employees made no demand nor expressed
any desire to the company to withdraw the
proposed change in accordance with Sec-
tion 31 (2) and in the absence of such a
notice under Section 31 (2) no industrial dis-
pute could be said to have arisen and, there-
fore, no reference could be made to the
Industrial Court under Section 51 of the
Act. This reasoning presupposes that a
notice of change under Section 31 is a pre-
requisite for giving rise to an Industrial Dis-
pute. But there is no basis whatsoever for
such an assumption.

The expression "Industrial Dispute" is de-
fined by Section 2 (17) of the Act which
reads as follows:

"S. 2 (17). "Industrial dispute" means any
dispute or difference between an employer
and employee or between employers and
employees or between employees and em-
ployees and which is connected with any
industrial matter."

A bare reading of this definition goes to show
that Industrial Dispute is not restricted to
disputes arising out of a notice of change
issued by Employer or Employees
under Section 31. The generality of the
definition which embraces any dispute or
difference connected with any industrial
matter cannot be cut down by any such
assumption as was made by the Industrial
Court. Moreover, the power of the State
Government to make a reference under Sec-
tion 51 is not controlled by anything con-
tained in Section 31. Section 51 opens with
a non obstante clause "Notwithstanding any-
thing contained in this Act"— which makes
it plain that a notice of change under Sec-
tion 31 is not a condition precedent for en-
abling the State Government to make a refer-
ence under Section 51.

Indeed this question can be taken to be
covered by the decision of the Supreme
Court in Ahmedabad Millowners' Association
v. The Textile Labour Association, AIR 1968
SC 497. In that case their Lordships con-
sidered this question in the context of the
Bombay Industrial Relations Act, 1946 which
contains similar provisions. Sections 2 (17),

31 and 51 of the Madhya Pradesh Act correspond respectively to Sections 3 (17), 42 and 73 of the Bombay Act. Construing these sections of the Bombay Act, their Lordships observed:

"On a fair reading of Section 73, it is plain that it deals with the powers of the State Government to make a reference and as such, it is difficult to assume that the said powers of the State Government are intended to be controlled by the provisions of Section 42. Section 42 prescribes the procedure which has to be followed by the employer and the employee respectively if either of them wants a change to be effected as contemplated by it. The scheme of Section 42 read along with the other provisions in Ch VIII clearly shows that the said Chapter can have no application to cases where the State Government itself wants to make a reference. That is the first consideration which militates against the construction which Mr Setalvad suggests."

"The opening clause in Section 73 also unambiguously indicates that the power of the State Government to make a reference will not be controlled by any other provision contained in the Act. This clause plainly repels the argument that the provisions of Section 42 should be read as controlling the provisions of Section 73. The meaning of the non obstante clause is clear and it would be idle to urge that the requirements of Section 42 must be satisfied before the power under Section 73 can be invoked by the State Government."

"It is, however, urged that the power conferred on the State Government by Sec 73 is the power to refer an industrial dispute to the arbitration of the Industrial Court, and there can be no industrial dispute unless a notice of change has been given either by the employer or the employee. In other words, the argument is that unless a notice of change is given as required by Section 42, no industrial dispute can be said to arise between the employer and his employee, and that is how Section 42 governs Sec 73. If it was the true legal position that there can be no industrial dispute between an employer and his employee unless a notice of a change is given by either of them, there would have been some force in this contention, but the definition of the words "industrial dispute" does not justify the assumption that it is only a notice of change that brings into existence an industrial dispute. Section 3 (17) of the Act defines an "industrial dispute" as meaning any dispute or difference between an employer and employee or between employers and employees or between employees and employees and which is connected with any industrial matter. This definition is so wide and comprehensive that it would be impossible to accept the argument that it

introduces the limitation suggested by Mr. Setalvad."

The observations quoted above apply with full force for construing Sections 2 (17), 31 and 51 of the Madhya Pradesh Act and it must be held that the Industrial Court went wrong in holding that no industrial dispute could arise and none could be referred under Section 51 in the absence of a notice of change contemplated by Section 31.

In support of its conclusion the Industrial Court placed reliance on the ruling of the Supreme Court in *Sindhu Resettlement Corporation Ltd v Industrial Tribunal, Gujarat*, AIR 1968 SC 529 and quoted the following observations:-

"If no dispute at all was raised by the respondents with the management, any request sent by them to the Government would only be a demand by them and not an industrial dispute between them and their employer. An industrial dispute, as defined must be a dispute between employers and employees, employers and workmen, and workmen and workmen. A mere demand to a Government without a dispute being raised by the workmen with their employer, cannot become an industrial dispute."

All that these observations mean is that simply by making a request to the Government the employees cannot be said to have raised a dispute with the management and that raising of a dispute with the management is necessary for giving rise to an industrial dispute. But these observations do not in any way support the conclusion that a dispute with the management which can be subject matter of reference as an industrial dispute can only arise by giving a notice of change. In that case certain retrenched employees and their representative union had demanded from the management only retrenchment compensation and had not claimed reinstatement and therefore, it was held that it was not open for the State Government to make a reference in respect of reinstatement and the reference could have been made only in respect of the retrenchment compensation which was the only subject matter of dispute between the employees and the management.

As regards the instant case, the Industrial Court merely found that the employees did not give any notice of change under Section 31 (2) of the Act to the company and the finding is not thus that no demand was made by the employees to the company not to close the two machines and the third shift in the loading department. In the absence of a finding to that effect it could not have held that there was no industrial dispute, which the State Government could refer under Section 51. The order of reference in the instant case recited the satisfaction of the State Government about the existence of the industrial dispute between the company

and its employees. In view of this recital the regularity of the order including the fulfilment of the conditions precedent had to be presumed; see *Swadeshi Cotton Mills v. S. I. Tribunal*, AIR 1961 SC 1381 at p. 1387. If the company wanted to contend that no industrial dispute in fact existed, it was for the company to produce the relevant material to rebut the presumption of existence of dispute. Be that as it may, the *Sindhu Resettlement Corporation's* case, AIR 1968 SC 529 (supra) relied upon by the Industrial Court does not support the reasoning that in the absence of a notice of change under Section 31 no industrial dispute could arise for reference under Section 51.

4. The second ground on which the reference was rejected is that an industrial dispute in respect of a proposed closure is outside the purview of Section 51, as it falls within Section 82 and, therefore, the reference made by the Government under Section 51 was not entertainable. To appreciate this reasoning it is necessary to read Sections 51 and 82 —

“S. 51. Reference of disputes to Labour Court, Industrial Court or Board.—

Notwithstanding anything contained in this Act, the Government may, if on a report made by the Labour officer or otherwise it is satisfied that an industrial dispute exists, and—

(a) it is not likely to be settled by other means; or

(b) by reason of the continuance of the dispute—

(i) a serious outbreak of disorder or breach of the public peace is likely to occur; or

(ii) serious or prolonged hardship to a large section of the community is likely to be caused; or

(iii) the industry concerned is likely to be seriously affected or the prospects and scope of employment therein curtailed; or

(c) it is necessary in the public interest to do so; refer the dispute or any matter appearing to be connected with or relevant to the dispute for arbitration to a Labour Court or the Industrial Court or a Board;

Provided that—

(i) no reference under this section shall be made to a Board without referring the matter to the parties and obtaining consent in writing of one of the parties to the dispute; and

(ii) no reference shall be made to a Labour Court under this Section if the matter in dispute is included in Schedule I or if the dispute is between employees and employees.”

.... ..
.... ..

“S. 82. Reference to Industrial Court for declaration whether strike, lock-out, closure or stoppage is illegal.—

(1) The State Government may make a reference to a Labour Court or the Industrial Court for a declaration whether any proposed strike, lock-out, closure or stoppage will be illegal.

(2) No declaration shall be made under this section save in open Court.

(3) The declaration made under sub-section (1) shall be recognised as binding and shall be followed in all proceedings under this Act.”

The language used in Section 51 is very wide in scope and authorises the Government to refer any industrial dispute for arbitration provided other conditions of the section are satisfied. The section does not enact that an industrial dispute arising out of a proposed strike, lock-out, closure or stoppage cannot be referred under the section and it is difficult to read any such implied exception. If a proposed strike, lock-out, closure or stoppage leads to an industrial dispute, the same can be referred for arbitration if other conditions mentioned in the section exist. This inference which follows from the plain meaning of the words used is strongly reinforced by the non obstante clause — “Notwithstanding anything contained in this Act” — with which the section opens. After a reference is made under section 51 the authority concerned will have power to decide the dispute and to grant appropriate relief to the parties within the scope of the reference by its award under Section 56.

We may now turn to section 82 to see if there is anything in that section which can be read as a limitation on the power of the State Government to refer for arbitration under Section 51 an industrial dispute arising out of a proposed strike, lock-out, closure or stoppage. Section 82 does not speak of any industrial dispute. It only authorises the Government to make a reference to a Labour Court or the Industrial Court, for a declaration whether any proposed strike, lock-out, closure or stoppage will be illegal. The existence of an industrial dispute is not a condition precedent for a reference under this section. There is nothing in its wording which may prevent the making of reference under Section 51 if the proposed strike, lock-out, closure or stoppage gives rise to an industrial dispute. Moreover, the relief available in a reference to the Industrial Court, under section 82 is only that of a declaration whereas Sec. 51 is not so limited. Having considered the language of Sections 51 and 82 we are of opinion that Section 51 is not controlled by anything contained in Section 82 and that an industrial dispute arising out of a proposed strike, lock-out, closure or stoppage can be referred for arbitration under Section 51 if other conditions of that section are fulfilled.

5. It will thus be seen that the two grounds given by the Industrial Court in support of its order cannot be sustained. But that is not the end of the matter, for it was contended on behalf of the company before us that a proposed closure cannot give rise to an industrial dispute. Reliance for this contention was placed on the decision of the Supreme Court in *Indian Hume Pipe Co. v. Their Workmen*, AIR 1968 SC 1002. In that case it has been observed.

"Once the Tribunal finds that an employer has closed its factory as a matter of fact it is not concerned to go into the question as to the motive which guided him and to come to a conclusion that because of the previous history of the dispute between the employer and the employees the closure was not justified. Such a closure cannot give rise to an industrial dispute."

The Indian Hume Pipe Company's case related to closure of a factory i.e. closure of the entire business carried on in the factory. In the instant case the closure is not of that type. Here the company merely proposed to close two of its machines and one shift in the loading department, the proposal was not to close the factory at Kymore or the business carried on at that place and therefore the principle laid down in the Indian Hume Pipe Company's case AIR 1968 SC 1002 can have no application.

6. The petition is allowed. The order of the Industrial Court dated 20th May, 1968 rejecting the reference is quashed and that Court is directed to decide the reference according to law. By the same order the Industrial Court refused to grant to the employees the relief for interim injunction and we make it clear that this part of the order has not been challenged before us and will, therefore, stand. The petitioners will have their costs of this petition from the respondent No. 2. Counsel's fee Rs 200. The security amount will be refunded to the petitioner.

TVN/D.V.C.

Petition allowed.

AIR 1969 MADHYA PRADESH 252
(V 56 C 64)

A. P. SEN AND G. P. SINGH, JJ.

Sitaram Barela, Petitioner v. State of Madhya Pradesh, Respondent

Misc. Petn No 32 of 1969, D/- 12-2-1969.

Transfer of Prisoners Act (1950), S. 3 — M. P. Prisoners Release on Probation Act (16 of 1954), S. 2 — M. P. Prisoners Release on Probation Rules (1964), R. 3 — Transfer of prisoner to M. P. State—Powers of State Government under S. 2 to release such prisoner — Are not subject to prior concurrence of State of conviction — Expression,

DM/EM/B852/69

"in due course of law" in Section 3 — Meaning — Interpretation of Words and Phrases — Expression "in due course of law".

The powers of the State Government of Madhya Pradesh to release prisoners by licence on conditions prescribed in Section 2 apart from being subject to the conditions specified therein are not subservient to any further requirement like the prior concurrence of the State of conviction. Neither the State Government of Madhya Pradesh nor their Inspector General of Prisons can, by an executive fiat curtail the ambit of the statutory powers conferred on the State Government under Section 2 of 1954 Act.

(Para 6)

The use of the words 'it appears to the Government' in Section 2 of 1954 Act prima facie rests the exercise of those powers to the satisfaction of the State Government. Nevertheless, that satisfaction has to be arrived at, only upon a consideration of the conditions mentioned therein. Only two conditions envisaged by that section, are (i) the confinement of a prisoner under a sentence of imprisonment, and (ii) the likelihood of his abstaining from crime and leading a peaceful life, if he is released therefrom, looking to his antecedents and conduct in prison. Upon fulfilment of these conditions, the powers of the State Government to direct a prisoner's conditional release, at once, come into play, subject, of course to a compliance of the other requirements appearing in the latter part of that section, by the prisoner himself. That construction flows from a plain reading of the section itself. The only other requirement is that imported by Rule 3 of the Rules which enumerates the different classes of prisoners who should not be released under the Act of 1954. (Paras 5, 6)

Under sub-section (1) of Section 3 of 1950 Act, when any person is confined in any prison of a State, the Government of that State may, with the willingness of the Government of the other State concerned, direct the removal or transfer of the prisoner, from their prison to any prison in that other State. That provision applies to all classes of prisoners. In terms of this provision, no inter-State agreement could possibly be arrived at, which would make the subsequent release of such prisoner on probation or otherwise, by the transferee State, conditional upon the prior concurrence of the State from whose prison he had been transferred. (Para 8)

Apart from this, it is clear upon the transfer of a prisoner from the prisons of one State to that of another, sub-section (2) of Section 3 of 1950 Act comes into play. On a plain construction of Section 3 (2) the Officer in charge of the prison to which a prisoner is removed or transferred under sub-section (1), has to receive and detain him in that prison, so far as may be, (i) according to the exigencies of any writ, warrant or order of the Court, by which such person had been committed; or (ii) until such person was dis-

charged or removed, in due course of law.

(Para 9)

The expression 'in due course of law', appearing in sub-section (2) of Section 3, in the context in which it appears, must be interpreted, as meaning 'under some rule or enactment in force'. In this view, detention of a prisoner is governed not only by the relevant rules and regulations in the Jail Manual of the particular State where he happens to be imprisoned for the time being, but also by all the laws of that State governing all classes of prisoners. The Madhya Pradesh Prisoners Release on Probation Act, 1954 must be regarded as a relevant law governing the subject. It, accordingly, follows that on other conditions being fulfilled, a prisoner transferred to State of M. P. is entitled to benefits of Section 2 thereof, unless he belonged to any of the excepted classes mentioned in Rule 3 of the Rules.

(Para 10)

S. C. Datt, *amicus curiae*, for Petitioner; M. V. Tamaskar, Dy. Govt. Advocate, for State.

SEN, J.: After hearing the parties on merits, we passed an order on 27th January, 1969, to the following effect:

"Having heard the parties, we are satisfied that this petition for grant of a writ of habeas corpus under Article 226 of the Constitution of India, must be allowed. We hereby set aside the order issued by the Secretary to Government of Madhya Pradesh, Jail Department, bearing No. 1090/342/III-Jail, dated Bhopal, the 3rd May 1967, cancelling the petitioner's conditional release on a licence issued under Section 2 of the Madhya Pradesh Prisoners Release on Probation Act, 1954.

We accordingly direct the State of Madhya Pradesh and, in particular, the Superintendent of the Central Jail, Jabalpur, where the petitioner is being detained, to serve him with the original licence of conditional release already issued by the State Government in Form 'D' under Rule 7 of the Madhya Pradesh Prisoners Release on Probation Rules, 1964, and to afford him every facility to comply with the conditions imposed thereby and to fulfil all other legal requirements and thereafter to release him forthwith in terms of the licence, from the prison where he is being detained. The reasons for our decision shall follow later."

The reasons for allowing the petition are these.

2. Before stating the reasons, it is necessary for us to set out a few facts which are relevant to the present controversy. On 29th October, 1956, the petitioner was convicted by the Additional Sessions Judge, Chanda, under Secs. 302, 452, 453 and 506 (II) of the Penal Code and sentenced to imprisonment for life. The district of Chanda being in Vidarbha Region, he was lodged at the Central Jail, Nagpur, to serve out his sentence. After the States Reorganisation Act (Act No. XXXVII of 1956), came into force

on 1st November, 1956, the entire Vidarbha Region became part of new State of Maharashtra and, since he had been convicted by a Court of Session in that region, the petitioner continued to be a prisoner in the State of Maharashtra, till 23rd April, 1958. As the petitioner desired to be transferred to the Central Jail, Jabalpur, being nearer to his home district, Narsinghapur, the Maharashtra State under the arrangement referred to in Section 3 of the Transfer of Prisoners Act (Act No. XXIX of 1950), obtained the sanction of the Government of Madhya Pradesh for his transfer, and, he was, accordingly, on that day, transferred to that jail, where he is now detained. The Madhya Pradesh Prisoners Release on Probation Act (No. XVI of 1954) having been brought into force on 1st February, 1962, the petitioner applied to the State Government of Madhya Pradesh for his release on probation under Section 2 thereof.

The petitioner's application was forwarded by the authorities to the District Magistrate, Chanda, who recommended his case for release and, thereupon, the Government of Madhya Pradesh placed the matter before the Advisory Board under Rule 6 (5) of the Madhya Pradesh Prisoners Release on Probation Rules, 1964 (hereinafter referred to as the 'Rules'). The Advisory Board duly recommended his release on a conditional licence, and the Inspector General of Prisons having agreed with that recommendation, the State Government of Madhya Pradesh issued a licence in Form D under Rule 7 of the Rules, for his conditional release on probation under Section 2 *ibid*, vide Licence No. 1191-92/347-III dated the 8th April, 1966. Before that order could, however, be implemented, the authorities concerned felt that they had overlooked the Inspector General of Prisons' Circular No. 6548 dated 2nd April, 1965, which requires the prior concurrence of the State of conviction as a condition precedent for the release of prisoners under Section 2 *ibid*. Apparently, the State Government of Madhya Pradesh consulted the State of Maharashtra which ultimately did not agree to the release of the petitioner, and hence the order of conditional release passed on 8th April, 1966, was cancelled by the State Government of Madhya Pradesh, by their impugned order No. 1090-342/III-J dated 3rd May, 1967, without assigning any reason whatever. Thereafter, the authorities tried to take steps for his premature release under Paragraph 1018 of the Madhya Pradesh Jail Manual, but their efforts proved to be abortive.

The Advisory Board on 13th March, 1968, had recommended his premature release under Section 401 of the Code of Criminal Procedure and, on the 14th March, 1968, the Inspector General of Prisons also appears to have agreed with that recommendation but the State Government of Madhya Pradesh in their turn, referred the matter to the State of Maharashtra on 23rd April, 1968, for their

concurrence That Government, having turned down the recommendation for the premature release of the petitioner, the Government of Madhya Pradesh dropped the proceedings. Hence this petition for a writ of habeas corpus.

3 The State Government of Madhya Pradesh have in their return, asserted that the petitioner cannot be released without the prior concurrence of the State Government of Maharashtra and, they were, therefore, right in revoking their earlier order for his conditional release and in consequence, the confinement of the petitioner in prison was not illegal. Their contention is that so far as remissions in sentence are concerned, the rules applicable to the prisoners in general in Madhya Pradesh, whether from this State or outside, are the same, but as regards premature release of prisoners, the concurrence of the State of conviction is necessary. Presumably, the contention rests on the strength of the Inspector General of Prisons, Circular referred to above. The validity of that Circular being in question, we feel it would be rather convenient to set the same out in extenso. It reads

“कार्यालय जेल - हा निरीक्षक, मध्य प्रदेश, भोपाल
भोपाल, दिनांक २ अप्रैल, १९६५.

क्रमांक ६५४८ प्रो०

प्रति,

अधीक्षक,

केन्द्रीय जेल, जबलपुर।

विषय:—अन्य प्रदेशों से दण्डित बंदियों के प्रोवेशन पर सुक्ति आवदन पत्र।

संदर्भ:—आपका पत्र क्रमांक १ प्रो० दिनांक ४-१-६५ व क्रमांक २५५ प्रो० दिनांक २४-३-१९६५।

अन्य प्रांतों के दण्डित बन्दी इस प्रान्त में सजा काट रहे हैं। तो उनके परिवर्त्ताधीन सम्मोचन के आवेदन पत्र भर कर सम्बन्धित दण्डित जिला मजिस्ट्रेट को भेजे जावें वे प्राप्त होने पर बोर्ड के सामने उनके प्रकरण रखे जावें। लेकिन शासन की अन्तिम आज्ञा का पालन जिस प्रान्त से बन्दी दण्डित हैं उस प्रान्त की सहमती प्राप्त होने पर ही किया जावेगा।

अन्य प्रान्त के रहने वाले बन्दी यदि मध्य प्रदेश में दण्डित हो कर मध्य प्रदेश के ही जेलों में सजा काट रहे हों तो नियमानुसार उस प्रान्त में उनके लिये कोई अति-मावक नहीं मिलेगा। इस लिये यदि वे जिस प्रान्त के निवासी हैं वहाँ के प्रोवेशन एक्ट का ध्यान रखना चाहते हैं तो वहाँ अपना स्थानान्तरण करा लें।

सही:—

जेल महा निरीक्षक,
मध्य प्रदेश, भोपाल।”

4 The questions for our consideration in this petition, are—

(1) Whether the powers of the State Government of Madhya Pradesh under Section 2 of the Madhya Pradesh Prisoners Release on Probation Act, 1954 are subject to any prior concurrence of the State of conviction, as envisaged by the impugned Circular?

and

(2) Whether the Superintendent of the Central Jail, Jabalpur has a right under Section 3 (1) of the Transfer of Prisoners Act, 1950 to detain the petitioner until he serves out his sentence of imprisonment for life, despite the order of the State Government of Madhya Pradesh for his release on licence in Form 'D' under Rule 7 of the Rules?

5. As to the first, we are clearly of the view that the powers of the State Government under Section 2 *ibid* are untrammelled by any such condition as was sought to be introduced by the offending circular requiring the prior concurrence of the State of conviction as a condition precedent for the exercise of such powers. The terms of that section are clear enough, and it reads, a follows

“2 Notwithstanding anything contained in Section 401 of the Code of Criminal Procedure, 1898, where a person is confined in a prison under a sentence of imprisonment and it appears to the Government from his antecedents and his conduct in the prison that he is likely to abstain from crime and lead a peaceable life, if he is released from prison, the Government may by licence permit him to be released on condition that he be placed under the supervision or authority of a Government Officer or of a person professing the same religion as the prisoner or such institution or society as may be recognised by the Government for the purpose, provided such other person, institution or society is willing to take charge of him.”

The use of the words ‘it appears to the Government’ in the section, *prima facie* rests the exercise of those powers to the satisfaction of the State Government. Nevertheless, that satisfaction has to be arrived at, only upon consideration of the conditions mentioned therein.

6. Now, the only two conditions envisaged by that section, are (i) the confinement of a prisoner under a sentence of imprisonment and (ii) the likelihood of his abstaining from crime and leading a peaceful life, if he is released therefrom, looking to his antecedent and conduct in prison. Upon fulfilment of these conditions the powers of the State Government to direct a prisoner's conditional release, at once, come into play, subject, of course, to a compliance of the other requirements appearing in the latter part of that section, by the prisoner himself. That con-

struction flows from a plain reading of the section itself. The only other requirement is that imported by Rule 3 of the Rules which enumerates the different classes of prisoners who should not be released under the Act. Admittedly, the petitioner does not fall within the mischief of Rule 3, and there was, therefore, no impediment to the applicability of Section 2 *ibid* to his case. For these reasons, it follows that the powers of the State Government of Madhya Pradesh to release prisoners by licence on conditions prescribed in Section 2 *ibid*, apart from being subject to the conditions specified therein, are not subservient to any further requirement like the prior concurrence of the State of conviction. Neither the State Government of Madhya Pradesh nor their Inspector General of Prisons could, by an executive fiat of this nature like the offending circular in question, curtail the ambit of the statutory powers conferred on the State Government under Section 2 *ibid*. The Inspector General of Prisons' Circular in question must, accordingly, be held to be invalid, being in excess of his authority, and the action of the State Government in cancelling the petitioner's conditional release under Section 2 *ibid* being based on that circular, must also be held to be an wholly unwarranted abdication of their own powers to the caprice or whim of an external authority.

7. We now turn to the second question urged, namely, whether the transfer of the petitioner by the State of Maharashtra being under Section 3 of the Transfer of Prisoners Act (Act No. XXIX of 1950), there could be no remission of his sentence without the previous sanction of that State. We may profitably refer to the legislative history leading to this piece of legislation. Section 29 of the Prisoners Act (Act No. III of 1900) had previously provided, *inter alia*, for the inter-State transfer of prisoners between the different States mentioned in Parts A, C and D of the First Schedule to the Constitution. There was, however, no provision either in that Act, or, in any other law, for the transfer of prisoners from prisons in those States to prisons in Part B States and vice versa. It appears that cases frequently arose where the transference of prisoners from Parts A, C and D States to Part B States and *mutatis mutandis* was considered administratively desirable or necessary. The Transfer of Prisoners Act, 1950, was intended to remove this lacuna and was to provide legal sanction to such transfers or removals; and, the words "or, with the consent of the State Government concerned, to any person in any other State", appearing in Section 29 (1) (d) were, consequently, omitted by Section 4 thereof, inasmuch as the Transfer of Prisoners Act (Act No. XXIX of 1950) was now an all pervading measure providing for transfer of prisoners between the different States in India. It extends to the whole of India except the State of Jammu and Kashmir.

8. We are definitely of the view that the continued detention of the petitioner at the Central Jail, Jabalpur, despite the earlier order of the State Government for his conditional release on probation under Section 2 *ibid*, is wholly illegal. On a reading of Section 3 of the Transfer of Prisoners Act, it would appear that the transfer of the petitioner by the State Government of Maharashtra to the Central Jail, Jabalpur, with the sanction of the Madhya Pradesh Government, did not make his subsequent release on probation, conditional upon the prior concurrence of the State Government of Maharashtra. Under sub-section (1) of Section 3 of 1950 Act, when any person is confined in any prison of a State, the Government of that State may, with the willingness of the Government of the other State concerned, direct the removal or transfer of the prisoner, from their prison to any prison in that other State. That provision applies to all classes of prisoners, including one like the petitioner, who is undergoing a sentence of imprisonment for life. In terms of this provision, no inter-State agreement could possibly be arrived at, which would make the subsequent release of such prisoner on probation or otherwise, by the transferee State, conditional upon the prior concurrence of the State from whose prison he had been transferred. At any rate, no such inter-State agreement between the States of Madhya Pradesh and Maharashtra has been brought to our notice, nor have the State Government placed reliance on any of its terms as supporting their action.

9. Apart from this, it is clear upon the transfer of a prisoner from the prisons of one State to that of another, sub-section (2) of Section 3 comes into play. It reads:

"(2) The Officer in charge of the prison to which any person is removed under sub-section (1) shall receive and detain him, so far as may be, according to the exigency of any writ, warrant or order of the Court by which such person has been committed, or until such person is discharged or removed in due course of law."

On a plain construction of this provision, the Officer in charge of the prison to which a prisoner is removed or transferred under sub-section (1), has to receive and detain him in that prison, so far as may be, (i) according to the exigencies of any writ, warrant or order of the Court, by which such person had been committed; or (ii) until such person was discharged or removed, in due course of law. Normally, the Superintendent of the Central Jail, Jabalpur, has, therefore, under the first part of Section 3 (2), a right to detain the petitioner till the completion of his sentence of imprisonment for life, unless he is discharged or removed, in due course of law, under the second part of that section.

10. Now, the expression 'in due course of law', appearing in sub-section (2) of Sec-

tion 3, in the context in which it appears, must be interpreted, as meaning 'under some rule or enactment in force'. In the view, detention of a prisoner is governed not only by the relevant rules and regulations in the Jail Manual of the particular State where he happens to be imprisoned for the time being, but also by all the laws of that State governing all classes of prisoners. The Madhya Pradesh Prisoners Release on Probation Act, 1954 must, in our view, be regarded as a relevant law governing the subject. It accordingly, follows that on other conditions being fulfilled, the petitioner was entitled to benefits of Section 2 thereof, unless he belonged to any of the excepted classes mentioned in Rule 3 of the rules. As already stated, he does not belong to any of the categories enumerated therein, and there was, therefore, no legal impediment to his conditional release on probation under Section 2 *ibid*. Section 3 of the Transfer of Prisoners Act, 1950, under which the petitioner was transferred by the State of Maharashtra to the Central Jail, Jabalpur, nowhere contemplates that their

prior concurrence, i.e., of the State Government of Maharashtra, would be a condition precedent for the exercise of the powers conferred under Section 2 *ibid*, i.e., his conditional release on probation, and cannot, therefore, be brought into aid as supporting the present action of the State Government of Madhya Pradesh in cancelling their earlier order.

11. The result is that the petition succeeds and is allowed. We, accordingly, direct that a writ of habeas corpus under Article 226 of the Constitution be issued for the release of the petitioner in terms of our interim order dated 27th January, 1969, upon fulfilment of the conditions set forth therein. There shall be no order as to costs in these proceedings. We would, however, like to record our indebtedness to Shri Satish Dutt, Advocate, who had kindly consented to appear as *amicus curiae* on behalf of the petitioner, for the assistance that he has rendered.

YPB/D V C.

Petition allowed.

E N D

and also in Cl. (3) of L-2 licence are not exhaustive. They deal with safeguards where spirit as such is used, but they are not authority for the conclusion that a preparation containing alcohol comes into existence, only if alcohol in its free condition had been used but not as tincture or spirits. The rules are intended to safeguard the case of manufacture outside bond where alcohol in unmixed form is used. But they will have no application where alcohol in tinctures or spirits is used in a preparation; the preparation will come within the category of preparations containing alcohol for the levy of excise duty on which the Act as well as the Schedule thereunder have made provision. (Para 10)

(B) Medicinal and Toilet Preparations Excise Duties Act (1955), Ss. 3 and 4 and Schedule — Excise duty on preparations containing tinctures or spirits — Validity — Held that there was no double taxation in respect of such preparations — Tax already paid on tinctures or spirits is paid by their manufacturers and not by petitioners — If manufacturer used alcohol on which duty was paid by him, he could claim rebate under S. 4 (Para 11)

(C) Medicinal and Toilet Preparations Excise Duties Act (1955), Sch. Items 1 and 2 — Validity — Constitution of India, Art. 14 — 'Potability' as basis for distinction between items 1 and 2 is not capricious or absurd — Provisions are valid.

The "potability" test constituting a distinction between items 1 and 2, on a careful analysis, does not appear to be a capricious or absurd test like the distinction between a white horse and black horse, for the purpose of taxation. On the introduction of the Prohibition Acts in various States, it became apparent that many preparations under the name of medicinal preparations were being put on the market but which were medicines only in nominal sense, they were being bought up and consumed in large quantities by addicts to alcohol, valuing them exclusively for their alcoholic content. Customers of this kind will not care to buy medicines which contain only a trace of alcohol used as a preservative because such preparations would not readily help them to achieve their object of getting inebriated. It was therefore, considered to be a proper method to levy excise duty on preparations which contain alcohol and which are potable in the sense of their being fitted for consumption as ordinary alcoholic beverages on a rate calculated upon the volumetric content of alcohol. This appears to be a perfectly rational basis for drawing a distinction between item 1 and item 2 of the Schedule based upon their suitability or non-suitability for being used as ordinary alcoholic beverages. In item 1, stress is laid not so

much on the value of alcoholic content as on the value of the medicines that go into their preparations. In item 2, the value of the medicines that go into the preparations may be little, when compared with the value of the higher alcoholic content that went into the preparation, and that has necessitated the levy on item 2 on the basis of the alcoholic content. From this point of view there appears to be a valid basis of distinction between items 1 and 2. Again, when by the amendments in 1963 and 1964 ad valorem duty as an alternative to the duty based on the value of the alcoholic content was used for taxing both items 1 and 2 preparations, apparently a certain uniformity was introduced where such uniformity did not exist before, but still the provision even after such amendment, for the levy of the higher duty out of two alternative rates might have helped to lay stress in the case of item 2, on alcoholic content, and in the case of item 1 on the value of the medicines. Further, it is not possible to say by merely looking at the Schedule that item 1 will operate more oppressively than item 2. (Para 14)

(D) Medicinal and Toilet Preparations Excise Duties Rules, 1956, Rr. 12, 11 and 9 — Limitation — Manufacturer failing to take licence and failing to pay duty at appropriate time and place — It is R. 12 that applies — Limitation of six months contained in R. 9 does not apply.

The rules other than Rule 12 do not contain any specific provision for a case where the manufacturer, due to his own default, fails to take a licence and fails to ensure the proper safeguards for the manufacture under Rules 46 to 58. Had he done so, it would have ensured the levy of duty at the proper time and proper place. But that does not mean that the goods which are dutiable under the Act should escape from duty due to the default of the manufacturer. It is for such cases that Rule 12 provides the appropriate power for levy, it being in the nature of a residuary power, as the heading itself states. For the application of Rule 12, there is no period of limitation. A limitation of six months is provided only for Rule 11, which does not apply to such a case: AIR 1962 SC 1006 and AIR 1955 Raj 114 and W. P. Nos. 125 and 126 of 1961 (Mad), Disting.

(Paras 15, 16)

(E) Medicinal and Toilet Preparations Excise Duties Rules, 1956 Rr. 2 (xix) and 60 (1) — "Restricted preparation" — Meaning of.

The definition of "restricted preparation" contained in Rule 2 (xix) read with R. 60 (1) would show that a restricted preparation is one which the Government have considered after adopting the prescribed procedure and after taking the

advice of the Standing Committee, to be capable of being misused as ordinary alcoholic beverage (Para 17)

Cases Referred: Chronological Paras

- (1962) AIR 1962 SC 1006 (V 49) — 1962 Supp (2) SCR 1, Chhotabhai Jetha Bhai Patel & Co v Union of India 16
- (1961) AIR 1961 SC 412 (V 48) — 1960-11 STC 827—(1961) 2 SCR 14 = 1961-1 Mad LJ (SC) 45— 1961-1 Andh WR (SC) 45 = 1961-1 SCJ 272, Tungabhadra Industries Ltd v Commercial Tax Officer 5
- (1961) W P Nos 125 and 126 of 1961 (Mad), A. Peria Nachimuthu Gowndar v Assistant Collector of Central Excise Coimbatore 16
- (1955) AIR 1955 Raj 114 (V 42) — ILR (1955) 5 Raj 832, Mewar Textile Mills Ltd v Union of India 16
- T Chengalvarayan, K. Raj Iyer and K. Narayanaswami Mudaliar for Petitioners, Govt Pleader, for Respondents

ORDER — These petitions were heard together because common questions of fact and of law arise in them for consideration. They are filed by certain manufacturers of patent or proprietary medicines under Art. 226 of the Constitution for writs in the nature of mandamus or certiorari, as the case may be. In all these cases the respondents who are the Board of Revenue Authorities of the Commercial Tax Department and the District Revenue Officer charged with the administration of the Medicinal and Toilet Preparations Excise Duties Act 1955 (Central Act 16 of 1955) hereinafter called the Act, as amended in 1961 have, after calling for returns of their manufacture of patent and proprietary medicines since 1st June, 1961, when an amendment to the aforesaid Act was brought about under Act XIX of 1961, issued demands against the petitioners for payment of excise duty calculated ad valorem at 10 per cent of the value on the patent or proprietary medicines manufactured by them subsequent to 1st June, 1961.

2 The first contention of the petitioners in these cases, for challenging the correctness and validity of the above demand was that under the Schedule to Act XVI of 1955, in item 1, under which the proposed levy of excise duty had been made only preparations containing alcohol are liable to excise duty: but in the case of the preparations manufactured by the petitioners, except a single item called "Selvine" (manufactured by the petitioner in W P. No 1139 of 1964) alcohol in its free state had not been used, but they had used "spirits," "Chloroform" or other tinctures containing alcohol in small quantities only as preservatives. In such

circumstances, bearing in mind the definition of alcohol given in S 2 (a) of the Act and also the general scope of the Act and the Rules the petitioners contend that it is illegal to consider that their preparations contain alcohol, and therefore, liable to pay excise duty

3. In addition to this main plea which turns on the proper interpretation to be given to the use of the term "containing alcohol", in the Schedule to the Act, the petitioners have also raised pleas that the levy in question is illegal because (1) it involves a double taxation on their products, (2) the levy is discriminatory, (3) the levy is barred by time and finally (4) that in any event, assuming that all the above mentioned points are decided against them bearing in mind the presumption of law enunciated in R 60 (3) of the Rules framed under the Act, the appropriate item of the Schedule under which they should have been assessed to excise duty will be item 2 and not item 1. In their counter affidavit, the Department traversed all these points and raised pleas contra I shall refer to them at the appropriate stage in the course of this judgment

4. I will take up first for consideration the first plea mentioned above, that the preparations under consideration do not contain alcohol as defined in the Act. The definition of alcohol in Section 2 (a) of the Act runs—

"Alcohol means ethyl alcohol of any strength and purity having the chemical composition of C-2, H-5 OH."

5. It is admitted by the petitioners that in most of the products manufactured by them, they have used either spirits, chloroform, or tinctures of other substances only as preservatives. It was also admitted by them that on the labels affixed to their preparations, they have given in the formula used for the manufacture, the exact alcoholic content by volume. The words "spirits" and "tinctures" have recognised meanings in the Pharmacopoeias. Taking for example Bentley's Text Book on Pharmaceutics "spirits" are defined as solutions of volatile substances in alcohol, and as such furnishing relatively stable solutions for distilling purposes. The British Pharmacopoeia Codex describes tinctures as alcoholic liquids containing in comparative dilute solution the active principle of vegetable drugs. Both these definitions of the terms "tinctures" and "spirits" would show that they comprise necessarily solutions of other substances in alcohol. The products manufactured by the petitioners are prepared adding spirits or tinctures to other drugs so as to form a mixture in the form of a solution. Therefore alcohol which has functioned as a solvent in the

tinctures and spirits, has gone into state of further solution in the medicines prepared by the petitioners. In other words, alcohol, though it might not have been directly added, is present in the medicines in a state of solution. It has not undergone a chemical change into some other substance. It is present in a liquid form and the medicines thus prepared will reveal all the properties of alcohol, whether of smell or taste or capacity to vaporise, dependent of course, upon the quantity present. A solution of sugar in water retains the properties of sugar including taste, a solution of salt in water retains the properties of salt including taste, and a solution containing coloured substance or substances having smell, retains the colour and smell, the going of a substance into the solution will still make it an ingredient present in the solution importing all its characteristics to the solution. Therefore, the fact that alcohol went into solution in these preparations as tinctures or spirits and was not directly added will not make any difference to the resultant position about the presence of alcohol as alcohol in the product. In fact the position of alcohol in relation to the pharmaceutical products of the petitioners, as an ingredient in a state of solution is an a fortiori case, in the light of the decision of the Supreme Court in *Tungabhadra Industries Ltd. v. Commercial Tax Officer*, (1960) 11 STC 827 = (1961) 2 SCR 14 = (1961) 1 Mad LJ (SC) 45 = (1961) 1 Andh WR (SC) 45 = (1961) 1 SCJ 272 = (AIR 1961 SC 412) where the Supreme Court held that Vanaspathi manufactured out of groundnut oil is still groundnut oil notwithstanding that in the manufacture of Vanaspathi, a chemical change has intervened by effecting an

inter-molecular change in the composition of the oil, by the absorption of hydrogen atoms. I am, therefore, of the opinion that the medicines in this case are preparations which contain alcohol.

6. Before dealing with the other contentions of the petitioners I will briefly refer to the charging section which is Section 3 of the Act, and it reads thus:

"Duties of excise to be levied and collected on certain goods—

1. There shall be levied duties of excise, at the rates specified in the Schedule on all dutiable goods manufactured in India.

2. The duties aforesaid shall be leviable—

(a) where the dutiable goods are manufactured in bond, in the State in which such goods are released from a bonded warehouse for home consumption whether such State is the State of manufacture or not;

(b) where the dutiable goods are not manufactured in bond, in the State in which such goods are manufactured.

3. Subject to the other provisions contained in the Act, the duties aforesaid shall be collected in such manner as may be prescribed."

Explanation:— Dutiable goods are said to be manufactured in bond within the meaning of this section if they are allowed to be manufactured without payment of any duty of excise leviable under any law for the time being in force in respect of alcohol, opium, Indian hemp or other narcotic drug or narcotic which is to be used as an ingredient in the manufacture of such goods."

7. The actual levy is made in accordance with the Schedule. The Schedule prior to the amendment in 1961 read thus:—

Item No. 1	Description of dutiable goods. 2	Rate of duty. 3
1.	Medicinal and toilet preparations, containing alcohol, which are prepared by distillation or to which alcohol has been added, and which are of the strength of capable of being consumed as ordinary alcoholic beverages.	Rupees Seventeen and annas eight per gallon of the strength of London proof spirit.
2.	Medicinal and toilet preparations not otherwise specified containing alcohol:— (i) Ayurvedic preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages. (ii) Ayurvedic preparations containing self generated alcohol which are capable of being consumed as ordinary alcoholic beverages. (iii) All others...	Nil Rupees three per gallon. Rupees five per gallon of the strength of London proof spirit.
8.	Medicinal and toilet preparations, not containing alcohol, but containing opium, Indian hemp, or other narcotic drug or narcotic.	Nil

8. After the amendment in 1961 the Schedule was recast thus —

Item No. 1	Description of dutiable goods. 2	Rate of duty. 3
Medicinal preparations :		
1.	Medicinal preparations, being patent or proprietary medicines, containing alcohol and which are not capable of being consumed as ordinary alcoholic beverages.	Ten per cent <i>ad valorem</i> .
2	Medicinal preparations, containing alcohol, which are prepared by distillation or to which alcohol has been added, and which are capable of being consumed as ordinary alcoholic beverages.	Rupees three and eighty-five paise per litre of the strength of London proof spirit.
8.	Medicinal preparations, not otherwise specified containing alcohol— (i) Ayurvedic preparations containing self-generated alcohol which are not capable of being consumed as ordinary alcoholic beverages.	Nil

9. Learned Counsel Sri K. Raja Iyer, Sri Chengalvarayan and Sri Narayanaswamy Mudaliar, appearing for the petitioners, referred to the provisions of the Act and the Rules and in particular, to Section 3 (2) (a) and (b) extracted above, (which provide for manufacture in bond or manufacture outside bond), Rule 20 and the licence in Form L-2 for supporting the argument that the words, 'containing alcohol' in item 1 of the Schedule as amended in 1961, must necessarily refer to the direct use of free alcohol and not alcohol used indirectly in the form of tinctures or spirits. Their argument is that the provisions of the manufacture in bond and manufacture outside bond, must imply the direct use of alcohol as a dutiable preparation, but when it is used as a tincture or spirits, there is no question of paying duty on the tinctures as such, or spirits as such and therefore the charging section will not apply. Rule 20 states that manufacture of medicinal and toilet preparations containing alcohol shall be permitted in bond without payment of duty as well as outside bond, in the case of manufacture in bond alcohol on which duty has not been paid shall be used under excise supervision and in the case of manufacture outside bond, only alcohol on which duty has already been paid shall be used. Clause (3) in Form L-2 licence provided a condition limiting the quantity of spirit in the licensee's possession upto a certain quantity. According to the learned Counsel, these provisions also would show that the Act contemplated the use of alcohol directly in the course of manufacture for purposes of bringing the medicinal preparations within the scope of its levy, but it was not intended to levy excise duty on preparations in whose manufacture alcohol did not directly enter in its pure form but only as tinctures or spirits. Reference was also made

in this connection to the Preamble to the Act which states that it was intended to provide for the levy and collection of excise on medicinal and toilet preparations containing alcohol, opium etc. It is urged that under the broad scheme of the Act thus expressed in the provision of the Act, the Rules thereunder as well as in the Preamble, the Act was intended to tax only preparations in whose manufacture alcohol directly was used, and not alcohol contained in tinctures or in spirits.

10. I am unable to accept this line of reasoning. Section 3 (2) (b) of the Act, dealing with manufacture outside bond, is sufficiently general, to include the preparations in the present cases. The provision contained for manufacture outside bond in R 20 and also in CL (3) of L-2 licence are not exhaustive. They deal with safeguards where spirit as such is used, but they are not authority for the conclusion that a preparation containing alcohol comes into existence, only if alcohol in its free condition had been used but not as tincture or spirits. The aforesaid rules are intended to safeguard the case of manufacture outside bond where alcohol in unmixed form is used. But they will have no application where alcohol in tinctures or spirits is used in a preparation, the preparation will come within the category of preparations containing alcohol for the levy of excise duty on which the Act as well as the schedule thereunder have made provision.

11. I will take up next the argument advanced by the learned Counsel for the petitioners under the heading 'double taxation.' The argument of the learned Counsel is that tinctures have already suffered excise duty on their alcoholic component, and levy of excise duty on the medicines again will involve double taxation. It appears to me that this is not a very clinching argument. The scope of the Act is obviously to pass on

the duty to the customers. Further, the tax on the alcoholic content of the tinctures or spirits was paid by the manufacturers of these tinctures or spirits and not by the petitioners. Therefore there is no question of double taxation so far as the petitioners are concerned. Again, if in a given case the manufacturer used alcohol for manufacture on which he has paid duty, he can claim a rebate on such duty under Section 4 of the Act. I am of opinion that the attack made on the levy from the point of view of double taxation has no substance.

12. I will take up next the attack made against the levy on the ground of discrimination. Sri K. Raja Iyer appearing for the petitioners has made a careful analysis of items 1 and 2 in the Schedule which I have already extracted above. He draws my attention to the point that the essential distinction between the two items is what may be called for brevity "potability as beverage" the formula used for this purpose in the Schedule is "capable of being consumed as ordinary alcoholic beverage." According to the learned Counsel's submission, this ground of distinction has been relied on to make certain preparations, which are not potable as beverages and falling under Item 1, liable to 10 per cent. ad valorem duty, and other preparations, which are potable as beverages are liable to excise duty according to the alcoholic content calculated at Rs. 3.85 per litre. Learned Counsel also lays stress on the fact that in the Schedule to the old Act before the amendment there was no provision for such a duty levied ad valorem but only upon the alcoholic content by volume and this would be more in consonance with the purpose of the Act namely, levy of excise duty on preparations containing alcohol. Learned counsel also urges that the distinction on the basis of potability for levying ad valorem duty, is a distinction based on caprice without any reasonable basis to the object of the legislation. He referred to the following observation found at page 596 of Willis Constitutional Law:—

"Another classification for taxation frequently used is one according to objects. The Legislature has a wide discretion in this respect. It may levy a tax on all houses, excluding barns, and on all horses, excluding sheep and cows. However, any such classification must have some basis other than mere caprice. A tax on white horses would be an illustration of a classification without basis." He also referred to the amendment of the Schedule in 1963 and a further amendment in 1964 whereby uniformity as against item 1 and item 2, 10 per cent. ad valorem or the rate based upon

alcoholic content of the preparation whichever is higher, had been introduced. By these amendments, it was urged, both items 1 and 2 were brought into a state of uniformity but in the amendment of 1961 which governs the present case, that uniformity had not been attained, and there was discrimination in the method adopted for levying duty between items 1 and 2.

13. As against this argument, the learned Government Pleader submits that under Item 14 (E) of the Schedule to the Central Excise Act, there was already a provision for levying 10 per cent. ad valorem excise duty on patent or proprietary medicines not containing alcohol, opium etc. At the same time when the Medicinal and Toilet Preparations Act (16 of 1955) was passed with the old schedule which contained the "potability" test as well as a levy of duty based upon alcoholic content, several medicinal preparations which contained alcohol in small quantities which did not satisfy the "Potability" test, and which were in all respects similar to patent or proprietary medicines falling under Item 14 (E) of the Schedule to the Central Excise Act, were escaping levy of excise duty and gaining an unfair advantage by reason of this lacuna in the legislation. It was to get over this anomaly, that the amendment made in 1961 to Act 16 of 1955 introduced item 1 classification in the Schedule imposing 10 per cent ad valorem duty on preparations which contained alcohol as an ingredient but without the medicine being suitable for being used as an alcoholic beverage. This argument appears to me to be a valid one for explaining the circumstances which led to the imposition of 10 per cent. ad valorem duty on preparations containing alcohol and which did not satisfy the "potability" test.

14. This apart, the "potability" test constituting a distinction between items 1 and 2, on a careful analysis, does not appear to be a capricious or absurd test like the distinction between a white horse and black horse, for the purpose of taxation to quote Willis. On the introduction of the Prohibition Acts in various States, it became apparent that many preparations under the name of medicinal preparations were being put on the market but which were medicines only in a nominal sense, they were being bought up and consumed in large quantities by addicts to alcohol, valuing them exclusively for their alcoholic content. Customers of this kind will not care to buy medicines which contain only a trace of alcohol used as a preservative because such preparations would not readily help them to achieve their object of getting inebriated. It was therefore, considered to be a proper method to levy excise duty on preparations which contain alcohol and which are

potable in the sense of their being fitted for consumption as ordinary alcoholic beverages on a rate calculated upon the volumetric content of alcohol. Thus appears to be a perfectly rational basis for drawing a distinction between item 1 and item 2 of the Schedule based upon their suitability or non-suitability for being used as ordinary alcoholic beverages. In item 1, stress is laid not so much on the value of alcoholic content as on the value of the medicines that go into their preparations. In item 2, the value of the medicines that go into the preparations may be little when compared with the value of the higher alcoholic content that went into the preparation, and that has necessitated the levy on item 2 on the basis of the alcoholic content. From this point of view there appears to be a valid basis of distinction between items 1 and 2. Again, when by the amendments in 1963 and 1964 ad valorem duty as an alternative to the duty based on the value of the alcoholic content was used for taxing both items 1 and 2 preparations, apparently a certain uniformity was introduced where such uniformity did not exist before, but still the provision even after such amendment, for the levy of the higher duty out of two alternative rates might have helped to lay stress in the case of item 2, on alcoholic content, and in the case of item 1 on the value of the medicines. Further, it is not possible to say by merely looking at the Schedule that item 1 will operate more oppressively than item 2. It may happen that a particular manufacturer may be able to sell large quantities of preparations which are being put into the market not so much for their medicinal content as for their alcoholic content, and seeing that the rate for item 2 is quite high, namely, Rs. 3.85 per litre of alcohol, the actual duty in such cases may work out of more than 10 per cent. ad valorem if calculated on the value of the medicinal content alone. I am, therefore, of the opinion that the argument based on discrimination is without substance.

15. I will next deal with the argument on the question of limitation. The relevant rules in this connection are Rr 6, 9, 11 and 12 of the Rules framed under the Act, which read thus:

"6 Recovery of duty.— Every person who manufactures any dutiable goods, or who stores such goods in a warehouse, shall pay the duty or duties leviable on such goods under the Act, at such time and place and to such person as may be designated in, or under the authority of these Rules whether the payment of such duty or duties is secured by bond or otherwise.

9. Time and manner of payment of duty.—

(1) No dutiable goods shall be removed from any place where they are manufactured or any premises appurtenant thereto, which may be specified by the Excise Commissioner in this behalf whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty leviable thereon has been paid at such place and in such manner as is prescribed in these Rules or as the Excise Commissioner may require.

Provided that such goods may be deposited without payment of duty in a warehouse or may be exported out of India under bond as provided in R 97.

Provided further that the Excise Commissioner may, if he thinks fit, instead of requiring payment of duty in respect of each separate consignment of goods removed from the place or premises specified in this behalf or from a warehouse keep with any person dealing in such goods an account-current of the duties payable thereon and such account shall be settled at intervals not exceeding three months, and the account-holder shall periodically deposit a sum therein sufficient in the opinion of the Excise Commissioner to cover the duty on the goods, intended to be removed from the place of manufacture or storage.

(2) If any dutiable goods are, in contravention of sub-rule (1) deposited in, or removed from, any place specified therein the manufacturer thereof shall pay the duty leviable on such goods upon written demand made by the proper officer, whether such demand is delivered personally to him or is left at the manufactory or his dwelling house, and he shall also be liable to a penalty to be determined by the Excise Commissioner which may extend to two thousand rupees, and such goods shall also be liable to confiscation.

11 Recovery of duties or charges short-levied or erroneously refunded.— When duties or charges have been short-levied through inadvertence, error, collusion or misconstruction on the part of an Excise Officer or through misstatement as to the quantity or description of such goods on the part of the owner, or when any such duty or charge, after having been levied, has been, owing to any such cause, erroneously refunded the person chargeable with the duty or charge, so short-levied, or to whom such refund has been erroneously made, shall pay the deficiency or repay the amount paid to him in excess as the case may be, on written demand by the proper officer being made within six months from the date on which the duty or charge was paid or adjusted in the owner's account-current, if any, or from the date of making the refund.

12. Residuary powers for recovery of sums due to Government.— Where these

rules do not make any specific provision for the collection of any duty, or of any deficiency in duty if the duty has for any reason been short-levied, or of any other sum of any kind payable to the collecting Government under the Act or these Rules, such duty, deficiency in duty or sum shall, on written demand made by the proper officer, be paid to such person and at such time, and place, as the proper officer may specify."

These rules have to be read also with the Rules for the manufacture of preparations outside bond, contained in Section B of the Rules, namely, Rr. 46 to 58, as well as Section 6 (1) of the Act and the licence in Form L-2. Under Section 6 (1) of the Act, no person shall engage in the production or manufacture of any dutiable goods or of any specified component parts or ingredients of such goods except under the authority and in accordance with the terms and conditions of a licence granted under the Act. Section 6 (2) says that every licence under sub-section (1) shall be granted for such area and for such period, subject to such restrictions and conditions, and in such form and containing such particulars as may be prescribed. The licence in Form L-2 requires the manufacturer to describe the premises where the goods are to be manufactured. Rules 46 to 58 in Section B provide for the conditions and safeguards under which the manufacture takes place outside bond. It is against the background of the requirements of Rules 46 to 58 that one has got to view the provision in Rule 9, extracted above that duty under the Act has to be ordinarily paid at the time of their removal from the place where they are manufactured or other premises as may be specified by the Excise Commissioner, for consumption, export etc. Rule 9 (2) provides for levy of duty where there is removal of the goods, in contravention of Rule 9 (1), from the place where they are deposited, with a penalty for such illegal removal. In the present case, the petitioners, though they had manufactured dutiable goods containing alcohol as found above, never cared to take a licence as required under Section 6 (1) of the Act, with the consequence that all the restrictions and safeguards regarding manufacture of the products contained in Rr. 46 to 58 had been avoided by them in this case. There was, therefore, no scope for levy of the duty either as provided under Rule 9 or under Rule 9 (2). Rule 11 which I have extracted above, deals with a limited set of contingencies as mentioned therein. The first contingency is where there has been a short-levy because of inadvertence, error, collusion or misconstruction on the part of the Excise Officer; the second contingency arises where there is a misstatement on the part of the

owner as to the quantity or description of such goods. There is a third contingency under Rule 11, of erroneous refund; but we are not concerned with this. Obviously in the present case there is no question of short-levy due to any of the acts or omissions attributed to the Excise Officer under the first contingency; nor is there a question of short-levy due to misstatement as to the quantity or description by the owner under the second contingency. What has happened, in fact, is a failure on the part of the manufacturer to pay duty due to his default in complying with the requirement of the Act after obtaining a licence under Section 6 (1) and after ensuring the manufacture of the goods within the safeguards contained in Rules 46 to 58 with the result that the manufactured goods have not been assessed to duty as they should have been in the normal manner under Rule 9 of the Rules. In my opinion, it is Rule 12 which one will have to look to, for finding the appropriate provision for levy of duty in this case. Rule 12, which I have also extracted above, deals with cases where the rules do not make any specific provision for the collection of any duty or of any other sum of any kind payable to the collecting Government under the Act. The rules other than Rule 12 do not contain any specific provision for a case where the manufacturer, due to his own default, fails to take a licence and fails to ensure the proper safeguards for the manufacture under Rules 46 to 58. Had he done so, it would have ensured the levy of duty at the proper time and proper place. But that does not mean that the goods which are dutiable under the Act should escape from duty due to the default of the manufacturer. It is for such cases that R. 12 provides the appropriate power for levy, it being in the nature of a residuary power, as the heading itself states. For the application of Rule 12, there is no period of limitation. A limitation of six months is provided only for rule 11 and I have already referred to the reasons which make me hold that it is not a case where the question relates to the recovery of a duty or charge short-levied or erroneously refunded.

16. Learned Counsel for the petitioners referred to M/s. Chhotabhai Jethabhai Patel and Co. v. Union of India, AIR 1962 SC 1006, Mewar Textile Mills Ltd. v. Union of India, AIR 1955 Raj 114, and the decision of Srinivasan, J., in A. Peria Nachimuthu Gowndar v. Assistant Collector of Central Excise, Coimbatore, W. P. Nos. 125 and 126 of 1961 (Mad). Each one of these cases deals with a particular situation where it was not possible to levy the appropriate duty on certain goods in the manner provided by the earlier provisions in the Rules, like Rr. 9, 11 and so on and it was held that a levy under

Rule 12 (or Rule 10-A which is the corresponding provision under the Central Excise Act) could be levied. Thus in the Supreme Court decision in AIR 1962 SC 1006 an additional duty was leviable under a later enactment which was directed to have retrospective effect and therefore, the levy could not be made under Rule 9 or the other provisions of the Rules and the residuary provision under Rule 10-A under the Central Excise Act was held to be applicable. Before Srinivasan, J., in W. P Nos 125 & 126 of 1961 (Mad), it was discovered as a result of a subsequent finding arrived at by the department, that the two mills, though they were normally in the names of different persons, really belonged to single manufacturer and this required a further payment of excise duty for which a demand was made under the residual provision in Rule 10-A of the Central Excise Act. The learned Judge held that Rule 10-A would cover such a case. In AIR 1955 Raj 114, by reason of the retrospective operation of an Act, additional duty was found payable in respect of goods which had been already cleared without payment of duty in the ordinary way at the time of clearance, it was held that the residual provision in Rule 10-A would apply. Learned Counsel for the petitioners argued that these decisions would show that the proper situation to apply the residual provision, will be where a subsequent amendment of the laws in force at the time of the actual removal of the goods, and therefore, the residual provision cannot apply to a case like the present where liability to pay a duty under a later enactment is not relied upon, but only a failure on the part of the department to collect the legitimate duty from the manufacturers at the time when the goods were removed from the place of manufacture the law in force having continued to be the same at all material times. I am of opinion that the decisions do not provide an exhaustive list of all the cases or situations where the residual provisions can be applied. They should be considered only as illustrative of certain situations. What we have in this case is a situation, where owing to the default of the manufacturer, he failed to take a licence and failed to pay the duty at the appropriate time and place. Later on, the department found out the omission on the part of the manufacturer to comply with the Rules and called upon him to pay the required duty. It appears to me that such a demand will fall under the residuary power in rule 12, and therefore the provision about limitation contained in R 9 will not apply.

17. I will now consider a final argument of the petitioner's learned Counsel which appears to have a great deal of substance, and which is based upon the

presumption in Rule 60 (3) of the Rules as amended on 18th June, 1960.—

"60 Maintenance of restricted list of preparations— (1) A list of medicinal and toilet preparations which are considered as capable of being misused as ordinary alcoholic beverages, hereinafter referred to as restricted preparations, is given in the Schedule. All other medicinal preparations being manufactured from a date prior to 1st April, 1957 shall be considered to be not capable of being misused as ordinary alcoholic beverages (hereinafter referred to as unrestricted preparations).

(2) If, however, a preparation falling in the unrestricted category is found to be widely used as ordinary alcoholic beverage, the Central Government may on the request of a State Government or suo motu refer the matter to the Standing Committee referred to in R 68. The Central Government shall declare the preparation as a restricted preparation, if so advised by the said Committee and thereupon include the said preparation in the Schedule.

(3) Medicinal preparations other than official allopathic preparations and toilet preparations which are manufactured in India for the first time on and subsequent to 1st April, 1957 shall be presumed to be restricted preparations unless declared to the contrary by the Central Government on the advice of the Standing Committee. Any manufacturer intending to produce a new alcoholic preparation other than an official allopathic preparation, shall submit two samples of such preparation with the recipe to the State Government. The State Government shall forward such request with recipe to the Central Government for a decision. The Central Government shall refer the matter to the Standing Committee and in accordance with the advice tendered by it declare the category in which the preparation should be placed. The decision of the Central Government shall be communicated to all State Governments. In case the preparation is declared to be a restricted preparation it shall be included in the Schedule.

The advice of the Standing Committee shall be communicated within a reasonable time and in no case, later than six months from the date of submission of sample to the Committee."

A majority of the preparations in the present cases were manufactured after 1st April, 1957. In their cases, a presumption will arise under Rule 60 (3) that they are restricted preparations. Rule 2 (xiv) defines "restricted preparation" as:

"'restricted preparation' means every medicinal and toilet preparation specified in the Schedule and includes every preparation declared by the Central Government as restricted preparation under these Rules."

This definition read with Rule 60 (1) would show that a restricted preparation is one which the Government have considered after adopting the prescribed procedure and after taking the advice of the Standing Committee, to be capable of being misused as ordinary alcoholic beverages. In the present case also the petitioners want to rely on the presumption contained in Rule 60 (3) that since their preparations have not been declared to be unrestricted by the Central Government on the advice of the Standing Committee, such of their preparations manufactured after 1st April, 1957 shall be presumed to be restricted and therefore, capable of being misused as ordinary alcoholic beverages. It is urged by them that they could take advantage of this presumption, and claim that such preparations fall under Item 2 of the Schedule already mentioned, for the purpose of being assessed to excise duty on the basis of the alcoholic content. They also referred to an opinion given by a former Member of the Board of Revenue, Sri S. K. Chettur, which is marked as Exhibit B in W. P. No. 1139 of 1964, and also a reply given by another former Member of the Board of Revenue, Sri C. A. Ramakrishnan in answer to a memorandum from the Honorary Secretary, Pharmaceutical, Chemical and Allied Manufacturers Association, on 6th October, 1964. These communications indicate that in the view of these authorities of the Revenue Department where particular manufacturers do not obtain a declaration to the contrary by the Central Government in respect of preparations manufactured after 1st April, 1957, there shall be a presumption about their being restricted, and with the consequent liability to pay excise duty under item 2. As against this, the learned Government Pleader contends that what the aforesaid R. 60 (3) lays down is only a presumption, that such presumption can be rebutted by contra evidence, and that if the petitioners want to take advantage of the presumption thus claimed, the department also should be given an opportunity to afford contra evidence to rebut the presumption and also to establish that the preparations in question are not really capable of being consumed as ordinary alcoholic beverages. But no decision can be given by this Court on these rival contentions while dealing with the matter in a proceeding for the issue of a writ under Art. 226 of the Constitution, because such decision requires an analysis of data and also taking evidence, if necessary. These necessary steps before a decision can be arrived at should necessarily be delegated to the authorities who are charged with the duty of considering the representations by the manufacturers and passing appropriate orders on those representations in the

light of the law. It is also mentioned by the learned Government Pleader that against the decisions of the assessing authorities, appeals are provided under the Act and the Rules, to higher tribunals or departmental authorities and the petitioners can obtain adequate relief by resort to these provisions. On the other hand, what the petitioners really feel aggrieved about in the present case is due to a two-fold cause. One is, that even though the amendment to the Act came into force in 1961 and they had submitted returns promptly when the department called for such returns, they were given no opportunity to put forward the proper representations as against the proposed levy at any time, and that they were suddenly faced with the demand by the authorities for payment of the duties calculated ad valorem on the nature of the medicines as if they were products containing alcohol, to be assessed under item 1 of the Schedule. They had no opportunity of meeting this demand by adducing adequate data both regarding the presumption abovementioned as well as the dates of the manufacture of the goods. The second cause of grievance is stated to be that by the time these demands were made, they had sold their products, and that if they are now asked to pay duty with retrospective effect, it would make a deep cut into their profits, especially if the 10 per cent. ad valorem duty is to be made payable. It appears to me that both these representations one from the point of view of want of proper opportunity and the other from the point of view of the undue hardship which may be caused to the petitioner by making a demand retrospectively long after the Amending Act was passed, are matters which should be properly considered by the appropriate authorities. Necessary relief has to be given to them under Rules in regard to the first contention about the benefits they would be entitled to get under the presumption in Rule 60 (3). The second contention is a matter which the administrative authorities will have to consider in their discretion and decide whether there should be any waiver of duty in these cases, because of the long delay in making the demand and also because the petitioners had long ago sold out their goods without adding the burden of the duty to the prices charged to the customers, and also bearing in mind the fact that the higher authorities of the Department had at one time taken a view which would imply that the products were to be treated as restricted preparations with a liability to pay duty under item 2 of the Schedule at Rs. 3.85 on the volumetric content of alcohol. In view of the above considerations I allow the Writ Petitions (other than W. P. Nos. 1093, 1095, 1098 and 1156 of 1964) and quash

the orders making demands for the payment of the duty. It will be open to the authorities to call upon the petitioners to show cause against the levy of the duty, and proceed to make the proper levy after hearing their representations contra and in the light of the observations above-mentioned in this judgment.

18 The excepted writ petitions, W. P. Nos 1093, 1095, 1098 and 1156 of 1964, are directed against the demand of the authorities against the petitioners asking them to take out L-2 licences on the ground that the preparations manufactured by them contain alcohol and therefore, licences are necessary under Section 6 (2) of the Act. In view of my above decision that the preparations do contain alcohol the writ petitions filed against the demand for taking out L-2 licences, have to be dismissed and they are hereby dismissed. There will be no order as to costs
VGW/D.V.C. Order accordingly

AIR 1969 MADRAS 458 (V 56 C 107)
M. ANANTANARAYANAN, C J
AND NATESAN J

Sri Raja Rajeswari Bus Service, Vridhachalam, Petitioner v Regional Transport Authority South Arcot Cuddalore and another, Respondents

Writ Petns Nos 1055 and 1794 of 1968 and W. A. No 128 of 1968 D/-23-7-1968
Motor Vehicles Act (1939), Ss. 47 (3), 57 (3) — Proceedings under S 57 (3) without prior determination of number of permits to be granted under S 47 (3) — Failure of petitioner to make representations under S. 57 (3) within prescribed time — Proceedings if vitiated

Section 47 envisages two stages of inquiry (i) fixation of number of permits under Section 47 (3) and (ii) consideration thereafter of the applications for the grant of permit and representations, if any by persons mentioned in S 57 (3). While Section 57 (3) provides for making applications for the grant of permit and inviting of representations on receipt of such applications, the proviso to that sub-section authorises the Regional Transport Authority to reject even summarily the applications without following the procedure laid down in the sub section, if the grant of permit in accordance with the applications would go beyond the limits fixed under sub-section (3) of Section 47. That is, if a limit has been fixed under Section 47 (3) and that limit would be exceeded with the grant of permit, the Regional Transport Authority may in lumine dismiss the applications for permit. If the Regional Transport Authority, without such summary rejection, proceeds to publish the applications and calls for representations, clearly it will be open

to any person who would be affected to object to the grant, pointing out that the limit fixed would be exceeded. Equally it will be open to the objector to state, where no limit has been fixed, that the route is well served or the condition of the road is such that more buses cannot ply on the road etc. all germane and relevant considerations under Section 47 (1). Such representations can quite properly find a place in the representations made when called for, under S 57. The rule that where an inquiry under Sec. 47 (3) is necessary it must precede the disposal of applications for permit on their merits does not preclude the raising of all germane objections and relevant representations within the time prescribed. Once the objections raised and representations made call for a determination under Section 47 (3) under the rulings it is incumbent upon the Regional Transport Authority to take proceedings under Section 47 (3) first before embarking upon the merits of the applications under Section 57. But where the petitioner has not notified his objections to the grant of permit on the route, sub-sections (3) and (4) of Section 57 read together would preclude the Regional Transport Authority from hearing the petitioner at the inquiry under Section 57 (3). Section 57 (4) bars the authority from considering any representation in connection with an application referred to in sub-section (3), unless the application is made in writing before the appointed date

(Paras 4, 5 and 7)

The contention that the petitioner could not, in proceedings under Section 57 (3) raise objection as to want of a prior determination under Section 47 (3), is devoid of merits. It was open to him to raise that point before the Regional Transport Authority as an objector, being an operator on the route.

(Para 5)

Cases Referred:	Chronological	Paras
(1969) AIR 1969 Mad 441 (V 56) =		
W. A. Nos. 264 to 266 of 1967, D/-10-1-1968 (Mad) Gobald Motor Service (P) Ltd. Mettupalayam v Regional Transport Authority Coimbatore	2, 4, 5, 6, 7	
(1968) AIR 1968 SC 410 (V 55) =		
Civil App No 636 of 1967, Laxmi Naran Agarwal v. State Transport Authority		2
(1968) W. P. No 406 of 1968 and W. A. No 92 of 1968 (Mad) K Nainiappan v Regional Transport Authority North Arcot at Vellore	4, 5	
(1967) 1967-2 SCWR 857, Javaram Motor Service v. S Rajarathnam	2, 6	
(1966) AIR 1966 Mad 8 (V 53) =		
ILR (1965) 2 Mad 461 Taj Mahal Transport Ltd. v Secy., Regional Transport Authority Tirunelveli		7
(1964) C. A. No. 762 of 1963, D/-14-4-		

- 1964 = 1968 MPLJ (Notes) 2
 (SC), Purushotham Bhai Punambhai Patel v. State Transport Appellate Authority M. P. 7
 (1961) AIR 1961 Mad 180 (V 48) = ILR (1961) Mad 110, Swami Motor Transport (P.) Ltd. v. Raman & Raman (P.) Ltd. 7
 (1960) AIR 1960 SC 1191 (V 47) = (1960) 3 SCR 764, Arunachalam Pillai v. Southern Roadways Ltd. 7

K. K. Venugopal for V. T. Gopalan, for Petitioner; Government Pleader, S. Mohan Kumaramangalam, for V. Subramanian and R. S. Ramanujan, for Respondents.

NATESAN, J.:— The two writ petitions under Article 226 of the Constitution and the connected Writ Appeal directed against an interlocutory order in W. P. No. 1055 of 1968 vacating the interim stay granted before notice, relate to the grant of a stage carriage permit on the route Madampooni to Ulundurpet (Via) La-Gudalur, Rishivandiam, etc. By a notification dated 16-12-1967, the Regional Transport Authority, South Arcot, under Section 57 (2) of the Motor Vehicles Act, invited applications for the grant of a stage carriage permit on the route. There were three applicants, for the route in question, the 2nd respondent in the writ petitions being one. On 12-1-1968 the applications were duly notified under Section 57 (3) and 8-2-1968 was fixed as the date, on or before which representations in connection with the applications should be submitted furnishing copies thereof simultaneously to the applicants. The applications with representations were originally scheduled to be taken up for consideration on 29-2-1968, but were adjourned to 12-3-1968.

The petitioner is a fleet owner operating 12 buses on a sector of the route in question. No representations or objections to the applications entertained by the Regional Transport Authority for permit on the route in question were submitted by the petitioner within the time prescribed. But, the petitioner sent a petition by registered post to the Regional Transport Authority which was acknowledged by the Regional Transport Authority, on 27-2-1968, praying that proceedings under Section 47 (3) should be taken before consideration of the applications for permit on the merits. Again, when the applications were actually taken up for consideration by the Regional Transport Authority on 12-3-1968, the petitioner appeared through Counsel and submitted that consideration of the applications should be postponed, pending determination under Section 47 (3). In the proceedings of the Regional Transport Authority dated 12-3-1968, the 2nd respondent in the writ petitions became grantee. From the proceedings it is seen that there was only one objector. Grant

of the permit to the 2nd respondent was duly communicated to the applicants and the representator on 3-4-1968. The proceedings did not refer to the receipt of the petition filed by the petitioner and representation made on his behalf by his Counsel on 12-3-1968.

It is under these circumstances that the petitioner came to this Court first with W. P. No. 1055 of 1968 for the issue of a writ of prohibition. Later, after the 2nd respondent came on the scene and represented that the permit in question had been granted to him on 3-4-1968 itself, the petitioner applied for amendment of the relief of prohibition into one of certiorari. He also filed an independent application, W. P. No. 1794 of 1968 for the issue of a writ of certiorari to quash the order of the Regional Transport Authority dated 12-3-1968.

2. The substantial contention of the petitioner is that there has been no inquiry under Section 47 (3) and the proceedings, taken under Section 57 (3) without a prior determination of the number of permits to be granted on the route in question, are vitiated. It is submitted that, as the petitioner, an existing operator on the route, had specifically objected to the hearing of the applications for permit on the merits without prior determination under Section 47 (3), the proceedings are void and without jurisdiction, and should be quashed. Reliance is placed on the decision of this Court in the batch of writ appeals and writ petitions, W. A. Nos. 264 to 266 of 1967 = (AIR 1969 Mad 441), Gobald Motor Services (P.) Ltd.; Mettupalayam v. Regional Transport Authority, Coimbatore and W. P. Nos. 67 and 72 of 1966 (Mad) and W. P. No. 406 of 1968 (Mad) following the decision of the Supreme Court in Jayaram Motor Service v. S. Rajarathinam, (1967) 2 SCWR 857 at p. 860 and Lakshmi Narain Agarwal v. State Transport Authority, Civil Appeal No. 636 of 1967 = (AIR 1968 SC 410).

3. There is no dispute that, for the route in question, there has been no prior determination under Section 47 (3). But the question is whether the proceedings are liable to be challenged under Art. 226 and quashed at the instance of the petitioner, who had admittedly made no representation under Section 57 (3) within the prescribed time. It is submitted for the 2nd respondent that, not having made any representation under Section 57 (3), the petitioner has no locus standi to be heard at the inquiry of the applications for permit on their merits, and that, therefore, he could not complain of the grant. It is submitted that it was open to the petitioner, by his representation under Section 57 (3), to question the need for the grant of permit on the route. Objections to the proposed grant, which

would necessitate an inquiry under Section 47 (3) particularly under sub-cl (a) and (f) of Section 47 (1) it is said could have been taken. Our attention was drawn to Section 57 (4) which precludes consideration of any representation in connection with an application for permit, unless the representation had been made in writing before the appointed date, simultaneously furnishing a copy thereof to the applicant. In the circumstances, it was submitted that the Regional Transport Authority acted perfectly in accordance with law in not taking cognizance of the representation sent by post, just two days before the date fixed for inquiry, and the representation made by the petitioner's Counsel at the hearing on the adjourned date. The petitioner having no right of audience under Section 57 (4), representations, if any, made by him it is urged were non est

4. There can be doubt — and it has been so held following the decisions of the Supreme Court—that Section 47 envisages two stages of inquiry, (i) fixation of number of permits under Section 47 (3), and (ii) consideration thereafter of the applications for the grant of permit and representations, if any, by persons mentioned in S 57(3). In W A Nos 264 to 266 of 1967—(AIR 1969 Mad 441) in fact we have remarked, with reference to the cases then under consideration, that the Regional Transport Authority had no jurisdiction to proceed to consider the applications for permit without a prior determination under S 47(3). But we have to bear in mind the facts of the cases then considered. The Regional Transport Authority there had invited applications for the grant of additional permits on the route. The applicants for the route, besides filing applications for the grant of permit to themselves, had also made representations under Section 57 (3) objecting to the addition of new buses on the route, on the ground that the route in question was more than adequately served by the existing service. When the objectors wanted the Regional Transport Authority to first fix the maximum number of permits to be granted on the route under Section 47 (3), the Regional Transport Authority took the stand that orders under Section 47 (3) would be passed at the time of consideration of the applications. It is in those circumstances that the petitioners came up to this Court praying for the issue of a writ of prohibition and we observed inter alia:

"That being so, from all aspects and angles it could be said that at any rate when the existing operators or applicants call upon the Regional Transport Authority to fix the number of buses on the route, before entertaining the applications

for permit, it is bound to do so under Section 47 (3)"

In that batch of cases the objectors in time made due representation and demanded that there must be a prior determination under S 47 (3). They had qualified themselves to be heard at the inquiry. The decision of ours in that batch of cases may be contrasted with our decision in W P No 406 of 1968 and W. A. No. 92 of 1968 (Mad), K. Naniappan v. Regional Transport Authority North Arcot at Vellore. In the later case the petitioner was one of several applicants for the grant of permit on the route. On representations being called for under Section 57 (3) to the applications received, the petitioner made no representation, on the applications of others, and raised no question about the need for a prior determination under Section 47 (3). The principal contention in this Court for the Writ petitioner was, that a determination under Section 47 (3) was an essential prerequisite and a matter which went into the jurisdiction of the authority, whether the petitioner had raised any objection before the Regional Transport Authority or not as to the need for additional bus and the adequacy or otherwise of the existing facilities. In dealing with the argument, we observed —

"Though it is a question of jurisdiction in one sense, when parties, at any rate, tacitly proceed on the basis that there is no need for fixation of a limit under Section 47 (3) or revision of the limit already fixed, it cannot be said that orders passed on such assumption are wholly void. If any of the objectors or any applicant at least in the alternative calls for a prior determination under Section 47 (3), then the objection ought to prevail before the Regional Transport Authority, and its failure to proceed under Section 47 (3) first would vitiate its order. In our view, in a matter of this kind, when an objection has not been taken by any one before the Regional Transport Authority, it cannot be said that the order is wholly void, and that objection could be raised at any stage, irrespective of other considerations and saving features."

5. The contention of Mr K. K. Venugopal that the petitioner could not, in proceedings under Section 57 (3) raise objection as to want of a prior determination under Section 47 (3), is devoid of merits. In fact, in our judgment in W. P. No 406 of 1968 (Mad) we remarked.

"It was open to him to raise that point before the Regional Transport Authority as an objector, being an operator on the route. He could have raised the point at least in the alternative."

In the batch W A. Nos 264 to 266 of 1967 — (AIR 1969 Mad 441) we said —

"Applications have been called for under Section 57 (2) and have been filed.

Objections have been preferred and affected parties have called for a determination under Section 47 (3). We see nothing in law which prevents the question of revision of the limit of stage carriages on a route being taken up even after applications have been called for and received."

It can make no difference, even if it is a case where there has been no prior inquiry at all under Section 47 (3). While Section 57 (3) provides for making applications for the grant of permit and inviting of representations on receipt of such applications, the proviso to that sub-section authorises the Regional Transport Authority to reject even summarily the applications without following the procedure laid down in the sub-section, if the grant of permit in accordance with the applications would go beyond the limits fixed under sub-section (3) of Section 47. That is, if a limit has been fixed under Section 47 (3) and that limit would be exceeded with the grant of permit, the Regional Transport Authority may in limine dismiss the applications for permit. If the Regional Transport Authority, without such summary rejection, proceeds to publish the applications and calls for representations, clearly it will be open to any person who would be affected to object to the grant, pointing out that the limit fixed would be exceeded. Equally it will be open to the objector to state, where no limit has been fixed, that the route is well served or the condition of the road is such that more buses cannot ply on the road etc. all germane and relevant considerations under Section 47 (1). Such representations can quite properly find a place in the representations made, when called for, under Section 57. The rule that where an inquiry under Section 47 (3) is necessary it must precede the disposal of applications for permit on their merits, does not preclude the raising of all germane objections and relevant representations within the time prescribed. Once the objections raised and representations made call for a determination under Section 47 (3), under the rulings it is incumbent upon the Regional Transport Authority to take proceedings under Section 47 (3) first before embarking upon the merits of the applications under Section 57.

6. We are not impressed with the contention of Mr. K. K. Venugopal that, as the legal position was not clear till the decision of this Court in W. A. Nos. 264 to 266 of 1967=(AIR 1969 Mad 441) following the decision of the Supreme Court in (1967) 2 SC WR 857 at p. 860, the petitioner could not take the objection earlier. As a matter of fact, the decision of this Court was given on 10-1-1968 and the last date for preferring objections, called

for under Section 57 (3), was 8-2-1968. Further all that we laid down, following the observations of the Supreme Court in (1967) 2 SC WR 857 at p. 860 is that, when a determination under Section 47 (3) is required, an inquiry under Section 47 (3) should not be telescoped with the inquiry under Section 57 of the applications for the grant of permit on the merits. An enquiry under Section 47 (3) may be initiated by the authority itself or duly called for by parties interested. We pointed out that, once the number of vacancies is settled, the question canvassed and decided prior to the taking up of the applications for the grant of permit on the merits, it cannot become the subject of controversy at the further stage, when the actual merits of the applications are considered.

7. Here the petitioner has not notified his objections to the grant of permit on the route, and sub-sections (3) and (4) of Section 57 read together preclude the Regional Transport Authority from hearing the petitioner at the inquiry under Section 57 (3). Section 57 (4) bars the authority from considering any representation in connection with an application referred to in sub-section (3), unless the application is made in writing before the appointed date. It is manifest that the objections now raised is a representation in connection with an application for permit contemplated in sub-section (3) of S. 57. The objections raised do relate to considerations provided under Section 47 (1). We cannot agree with the contention that the representation should be confined to the qualifications of the applicant for permit. True at the inquiry under Section 57 (5) the authority is concerned only with the choice of the operator.

It is pertinent in the context to remember the practice that was previously prevalent in this State on the receipt of applications for permit, referred to in our judgment in W. A. Nos. 264 to 266 of 1967=(AIR 1969 Mad 441) batch. Suppose a limit has been fixed under Section 47 (3) and, notwithstanding ignoring the proviso to Section 57 (3), the authority, without summarily rejecting the applications, proceed further publishing the applications and calling for representations. To accede to the petitioner's contention, would come to this, that it will not be open to an operator, on the route in his representation to raise even the patent objection that the grant of permit would exceed the limits. If he does not raise his objection in his representation, we fail to see how he can raise it at a later stage. The Motor Vehicles Code does not provide for an audience before the Regional Transport Authority at the inquiry under Section 57 (3) to persons who had made no representations. In *Purushotham Bhai Punambhai Patel v. State Transport Ap-*

pellate Authority, Madhya Pradesh, C A. No 762 of 1963 the Supreme Court held "We consider that the terms of S 57 (3) and (4) of the Act preclude any party who had not notified its objections in time to be heard at any stage of the proceedings original or appellate in relation to the grant of the permit on an application duly advertised under Section 57 (3)"

The decisions in Arunachalam Pillai v Southern Roadways Ltd., AIR 1960 SC 1191, Tai Mahal Transport Ltd v Secretary Regional Transport Authority Tirunelveli AIR 1966 Mad 8 and Swami Motor Transport (P) Ltd v Raman and Raman AIR 1961 Mad 180 relied upon by the petitioner, are clearly distinguishable and have no bearing on the question now under consideration. In the present case it does not appear whether even the only representator demanded an inquiry under Section 47 (3). The order of the Regional Transport Authority does not refer to any such objection from the representator. We do not think that the circumstances call for any interference by us in the matter under Art 226 of the Constitution. The writ petitions fail and are dismissed. As the writ appeal is from an interlocutory order in the writ petition it fails with the writ petition and is dismissed. Rules nisi in the writ petitions are discharged. No order as to costs.

JHS/DVC

Petitions dismissed.

AIR 1969 MADRAS 462 (V 56 C 108)

VEERASWAMI AND
KRISHNASWAMI REDDY JJ.

The Weavers Mills Ltd Rajapalayam, Plaintiff-Appellant v. Balkis Ammal and others, Defendants, Respondents

Appeals Nos 28 and 178 of 1962 D/-1-9-1967 against decree of Sub J., Ramanathapuram at Madurai in O. S. No. 40 of 1959

(A) Civil P. C. (1908), Ss. 11 and 9 — Decree — When can he set aside on ground of collusion and fraud.

A suit does not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence. In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic, or collateral to everything that has been adjudicated upon but not one that has been or must be deemed to have been dealt with by the Court. Suppression of evidence and even negligent conduct in the prior litigation would not be proper grounds for setting aside an earlier order. (Para 12)

On failure of the 2nd defendant to repay his personal loan, the 1st defendant obtained a decree and attached certain

property in execution of the decree. Execution proceedings were resisted by the 2nd defendant. He was also a promoter and Managing Director of the plaintiff-Company and in that capacity filed a suit for declaration that the attached property belonged to the Company. While dismissing the suit the Court relied on facts that the prospectus which ought to mention properties was not produced, nor was any resolution adopting the purchase. Second suit was filed by the Company to set aside judgment in earlier suit on ground that 1st and 2nd defendants were in collusion and obtained the judgment by fraud.

Held, that the second suit was barred by res judicata. In view of the fact that the 2nd defendant resisted execution proceedings and consistently claimed that the property belonged to the Company, the mere fact that the prospectus was not produced would not amount to fraud or collusion extrinsic to the trial in earlier suit so as to vitiate judgment and decree in that suit. AIR 1919 Mad 1044 (FB) and AIR 1916 Mad 364 and AIR 1962 Andh Pra 274 and (1967) 82 Mad LW 167, Rel. on. (Paras 9, 13)

(B) Trusts Act (1882), Ss. 94, 92, 88, 3 — Promoter of Company — Status of — Purchase of immovable property by promoter for Company — Benefit of purchase passes to Company on its incorporation — (Contract Act (1872), S. 182) — (Specific Relief Act (1877), S. 3) — (Companies Act (1956), Ss. 46, 12).

As to the exact legal status of promoters, the statutory provisions both in England and in this country are silent in most part except for a couple of sections in the Specific Relief Act, both old and new ones. A promoter is neither an agent nor a trustee of the company under incorporation but certain fiduciary duties have been imposed on him both under the English Companies Act, 1948 and the Indian Companies Act, 1956. He is not an agent because there is no principal and he is not a trustee as there is no cestui que trust in existence. There can be no agent for a non-existing principal, nor a trustee for a non-existing cestui que trust. Though a promoter is neither an agent nor a trustee of the company under incorporation, however, in respect of transactions on behalf of it, he stands in a fiduciary position. Sections 92 and 94 of the Trusts Act are not attracted. No trust as defined by Section 3 of the Act is brought about by the purchases made by the promoters. The legal position of a promoter in relation to his acts, particularly purchase of immovable properties on behalf of the company under incorporation, is a peculiar one not capable of being brought into any established or recognised norms of the law as to its character as an agent or a trustee. But,

at the same time he does stand in a certain fiduciary position in relation to the company under incorporation. When he does certain things for the benefit of it, as for instance, purchase of immoveable properties, he is not at liberty to deny that benefit to the company when incorporated. In such a case the benefit of the purchase passes on to the company when incorporated. (Paras 16, 18).

(C) Transfer of Property Act (1882), Ss. 9, 5, 54 — Purchase of immovable property by promoter of company — Adoption of benefit of purchase by Company — Absence of conveyance by promoter in favour of Company under registered document — No effect on transfer of title to Company — (Companies Act (1956), S. 46)—(Trusts Act (1882), S. 83)—(Civil P. C. (1908), Preamble — Interpretation of Statutes — Absence of prohibition implies permission) — (Registration Act (1908), S. 17 (1)).

The Transfer of Property Act is not exhaustive of the kind of transfers. The test, therefore, in this country, to determine whether a transaction (be it a transfer or not) can be made without writing is to see if it is expressly required by law to be in writing. If the transaction is a 'transfer of property' and there is no express provision of law requiring it to be in writing, Section 9 will enable it to be made without writing. If on the other hand, the transaction is not a 'transfer of property' and there is no express provision of law requiring it to be in writing, the general principle referred to above will enable it to be validly made without writing. Section 9 underlies the general principle that everything is to be taken permissible unless there is a prohibition against it and has been inserted in the statute *ex abundanti cautela*. 1959-2 Mad LJ 502, Foll. (Para 18)

Where the promoter of a Company purchased properties expressly stating that he did so as representatives of the company to be formed, that the funds therefore, did not belong to him and that on incorporation the company assumed possession and built structures upon them, it is clear that the Company adopted the benefit of purchase. The Company's title to the property purchased by its promoter before incorporation, cannot, therefore, be set aside on the ground that there is no conveyance by the promoter, in favour of the Company after its incorporation, under a registered document. (Paras 18, 19)

(D) Civil P. C. (1908), O. 20, R. 9 — Purchase of certain property by defendant 1 in execution of decree against defendant 2 — Finding by Court in suit by plaintiff for possession of property claiming the same to be his that plaintiff is entitled to that property and also to recover possession — Direction by Court

that plaintiff to deposit purchase money before recovering possession is invalid (obiter). (Para 4)

Cases Referred: Chronological Paras
(1967) A. S. No. 347 of 1962, D/- 18-4-1967 = 82 Mad LW 167, Jagannath v. Perumal Naidu 12
(1963) W. A. Nos. 85 and 86 of 1963 (Mad), Palaniswami v. Nandhi Transport (P.) Ltd. 16
(1962) AIR 1962 Andh Pra 274 (V 49) = (1963) 33 Com Cas 966, L. V. Apte v. R. G. N. Price 12
(1960) W. P. Nos. 475, 555 and 1249 of 1960 (Mad), Nandi Transports (P.) Ltd. v. S. T. A. T. 16
(1959) 1959-2 Mad LJ 502 = 72 Mad LW 206, Serandaya Pillai v. Sankaralinga Pillai 18
(1919) AIR 1919 Mad 1044 (V 6) = ILR 41 Mad 743 (FB), Kadirvelu Nainar v. Kuppuswami Naicker 12
(1916) AIR 1916 Mad 364 (V 3) = ILR 38 Mad 203, Chinnayya v. Ramanna 12
(1906) ILR 29 Mad 179 = 16 Mad LJ 59, Venkatappa Naick v. Subba Naick 12
(1904) 1904 AC 120 = 73 LJ PC 22, Natal Land and Colonisation Co., Ltd. v. Pauline Colliery Syndicate 16
(1879) 10 Ch D 327 = 39 LT 613, Flower v. Lloyd 12
(1877) 2 CPD 469 = 46 LJQB 636, Twycross v. Grant 16
(1866) 2 CP 174 = 36 LJCP 94, Kelner v. Baxter 16
(1836) 1 My and Cr 650 = 40 ER 525, Edward v. Grand Junction Rly. Co. 16
R. Gopalaswami Iyengar and M. Srinivasan, for Appellant; T. R. Mani, for Respondents.

VEERASWAMI J.:— These appeals arise out of the same judgment of the Subordinate Judge, Ramanathapuram, at Madurai, in a suit instituted by the appellant in A. S. 28 of 1962 for declaration of its title to the suit properties and for an injunction restraining the first defendant from executing the decree obtained by her (the first defendant who is the appellant in the other appeal A. S. 178 of 1962) in O. S. 16 of 1949 or in the alternative to set aside the judgment and decree in O. S. 3 of 1958, both on the file of the same Subordinate Judge. The appellant in A. S. 28 of 1962 is a limited liability company incorporated under the provisions of the Indian Companies Act, on 12-7-48, with its registered office at Rajapalayam. Two of its promoters, one of them the 2nd defendant in the suit and the other by name Ayyadurai alias Madeswamy Moopnar, purchased the suit lands under two registered sale deeds dated June 17th and June 18th of 1945, for a total consideration of Rs. 11000 from

one Ramaswami Raja and Rangammal. In O. S 16 of 1949, the 1st defendant obtained a decree against defendants 2 and 3 for a sum of Rs. 10000 due under a promissory note that had been executed by them. Admittedly, the loan was obtained by the promisors for their personal purposes. In execution of the decree, the first defendant attached the suit properties and brought them to sale in E. P. 60 of 1955. An application of the second defendant representing the company in E. A 301 of 1956 under O 21, R. 58, Civil P. C., was dismissed on 29-10-1957 and thereafter he instituted, in his capacity as Managing director of Jayam and Co, the Managing Agents of the company, O. S. No. 3 of 1958 to set aside the order in E. A. 301 of 1956, but without success. No appeal was filed from the decree in O. S. 3 of 1958.

By resolutions dated 27-7-1959, the second defendant was removed from the Managing directorship of Jayam and Co., and of the plaintiff-company and one A. M. Chinna Guruswami Moopanar was appointed in his place. The present suit out of which the appeals arise has been instituted by the company through its managing agency Jayam and Co. Ltd. represented by its Managing director Chinna Guruswami Moopanar. The plaintiff's case is that the suit properties were purchased by the second defendant and Ayyadurai alias Madasami Moopanar as representatives and on behalf of Raapalayam Weavers Mills which was to be incorporated later and that on its incorporation the Municipal registry of the properties stood in the name of the company and it has been paying the Municipal tax therefor. According to the plaintiff, nevertheless, defendants 2 and 3 colluded with the first defendant and allowed the application under O 21, R. 58, Civil P. C. and O. S. 3 of 1958, to be dismissed and thus fraudulently allowed the properties to be attached and brought to sale in discharge of their own personal debts. On those averments, the plaintiff company sought the reliefs mentioned by us at the outset. It claimed that the suit properties belonged to the company, that this position had been accepted on all hands and building for the purpose of the company has since been erected before the attachment and that though the company was eo nomine a party to the claim application and the suit, as the interests of the company were not properly placed and represented before the Court on account of the collusion between the defendants and their fraudulent conduct, the decree in O. S. 3 of 1958 was null and void and was not binding on the plaintiff.

2. The first two defendants filed separate written statements while the third defendant remained *ex parte*. The first defendant denied any collusion or

fraudulent conduct on her part and asserted that the properties belonged to the second defendant and that ever since their purchase, they had been in the possession and enjoyment of the second defendant himself. The first defendant also pleaded that both the application under Order 21 Rule 58, C. P. C. and the claim suit were hotly fought out by the second defendant and that, therefore, the present suit was barred by *res judicata* by reason of the judgment and decree in O. S. 3 of 1958. The Second defendant also denied the plaintiff allegations of fraud and collusion on his part and maintained that all the directors of the company knew full well the decree in O. S. 3 of 1958 and its execution. He did not accept that he mismanaged the affairs of the company and stated that he could not be removed from directorship until the expiry of 20 years from the date of the incorporation of the plaintiff-company. On that ground he urged that the suit itself as framed was not maintainable. At the trial, the second defendant remained absent and his counsel reported no instructions.

3. The Court below framed appropriate issues and found that the suit properties belonged to the plaintiff company, that the judgment and decree in O. S. 3 of 1958 on account of fraud and collusion on the part of defendants 2 and 3 were not binding on the plaintiff and that the plaintiff prayers should be granted. It also found that removal of the second defendant from the managing directorship was true, valid and binding on him and the suit was maintainable. This last finding is no longer in dispute before us. While granting a decree to the plaintiff as prayed for, the Court below directed it to deposit a sum of Rs. 23,301, for which the properties were purchased by the first defendant in execution of her decree within a specified period, as a condition to recover possession. The company aggrieved by the direction has appealed to this Court and likewise the first defendant against the decree declaring the title of the plaintiff-company to the suit properties and for possession.

4. On the view the Court below took on the plaintiff's claim to title and possession, we cannot but express our surprise at the Court below having directed the company to deposit a sum of money as a condition to recover possession. We fail to see how, in view of the findings arrived at by the Court below, it could properly direct the plaintiff to do that. If the plaintiff was entitled to the properties and also to recover possession, it is certainly not under an obligation to deposit any sum of money as a condition for recovery of possession. In fact, the Court below has given no justification in its judgment for making such a direction.

Since we have come to the conclusion for the reasons which would presently appear, to allow the appeal of the first defendant and dismiss the suit, it should follow that App. No. 28 of 1962 should be dismissed.

5. In the other appeal, substantial contentions for the appellant are (1) that the declaration of the Court below of the plaintiff's title to the suit properties is erroneous and (2) that in any case the judgment and decree in O. S. 3 of 1958 bar the present suit by *res judicata*. The first contention is not quite free from difficulty but we have reached the conclusion that the finding of the Court below on this question does not call for interference. But the second contention, in our opinion, has force and we accept it.

6. In O. S. 3 of 1958 the issue directly arose for decision as to whether the suit properties belonged to the company. The suit was instituted by the company through its Managing agents Jayam and Co. Ltd., represented by the Managing director the second defendant in the present litigation. The prayer was to set aside an order of the executing Court in E. A. 301 of 1956, rejecting the claim of the company that it was entitled to and was in possession of the properties. The company was the applicant represented by its Managing director the second defendant. The Court found that there was nothing to show that after 1957 the company was in possession of the properties or in February 1956. In O. S. 3 of 1958 the company sought to set aside the order in its claim petition on the ground that it was entitled to the properties, that they had been purchased by two of its promoters for purposes of the Company, that after its incorporation it adopted the transactions and got into possession of the properties and that pucca mill buildings were constructed on the land though they remained incomplete. The present first defendant also figured as the first defendant in that suit and curiously the second defendant, who, in his capacity as Managing director of the company, instituted the suit figured as the second defendant but in his personal capacity. The second issue in that suit was whether the suit properties belonged to the plaintiff the Weavers Mills Ltd. at Rajapalayam and it was decided against the plaintiff with the result that the suit was dismissed. Though the issue was framed in that manner, the court posed the question for its decision as to whether the title to the properties had passed to the plaintiff-company. In answering the question against the plaintiff, the court relied on the fact that the prospectus which ought to mention the properties was not produced, nor was any resolution adopting the purchase of the properties proved. The Court also notic-

ed that patta stood in the sole name of the second defendant, that the purchase of the properties was with the funds contributed by the second defendant, and Ayyadurai and that subscriptions from other shareholders came in only subsequent to the purchase. The decree in O. S. 3 of 1958 was therefore, a clear decision on the question of title as between the very parties before us, except of course the third defendant who did not figure in the earlier suit, and would operate as *res judicata*.

7. But the company in the instant suit urged that the decree in O. S. 3 of 1958 was invalid and not binding on it because defendants 1 to 3 colluded together to have the debt owed by the second defendant to the first defendant discharged from out of the properties of the company and that in implementation of the scheme defendants 2 and 3 in collusion with the first defendant, allowed O. S. 3 of 1958 to be dismissed and wilfully failed to file an appeal against that decree. The company also urged that the other directors of the company were kept in the dark and the second defendant in collusion with the first fraudulently suppressed from them the fact of the claim suit being dismissed. The company would also have it that in order to give a colour of reality, the second defendant filed a claim petition to raise the attachment effected on the suit properties in execution of the decree in O. S. 16 of 1949 and that in truth the several execution proceedings were designed by defendants 1 and 2 in collusion to defeat its rights to the suit properties.

As we said, the Court below was prepared to accept the attack on the validity of the decree in O. S. 3 of 1958 and declared it to be null and void and not binding on the plaintiff. The main grounds for coming to that conclusion are (1) the second defendant himself did not at any time claim title in himself to the suit properties and in a sense his interest in O. S. 3 of 1958 was adverse to that of the company which he purported to represent as its Managing director; (2) the circumstances appearing in the case would show that both defendants 1 and 2 colluded together and fraudulently brought about the dismissal of O. S. 3 of 1958 thereby depriving the company of the suit properties and (3) the second defendant's conduct in the present suit in not producing certain documents though the plaintiff called upon him by notice to do so was suggestive of fraud and collusion between the first defendant and himself. The circumstances referred to in the second ground were stated by the Court below to be that in O. S. 3 of 1958 the second defendant did not produce the prospectus of the company and that was the main reason why that suit was dismissed and further he did not produce the re-

solution of the Board of Directors of the company though there was one which had ratified the purchase of the suit properties. The Court below observed that its conclusion was substantially supported by the fact that the second defendant did not properly conduct O S 3 of 1958 and by the further conduct of the second defendant in the present suit by remaining *ex parte* at the trial stage, though he had earlier filed a written statement in which he supported the claim of the company as to its title to the suit properties.

8. Before us, the argument for the appellant in A. S. 178 of 1962 is that not only there is no evidence to support the finding of collusion between defendants 1 and 2 and fraud on their part but there was no fraud or collusion extrinsic to the trial in O S 3 of 1958 to vitiate the judgment and decree in that suit and render them not binding as between the parties thereto.

9. The plaint in the present suit proceeds on the footing that defendants 2 and 3 borrowed from the first defendant for their personal use and executed a promissory note for a sum of Rs. 10,000 and that the amount was not repaid by them. There is, therefore, no challenge against the decree in O S 16 of 1949 as one obtained with any ulterior purpose. The decree in that suit was dated 27-4-1951. The present second defendant, who was the first defendant in that suit, preferred an appeal against the decree in A. S. 342 of 1952, which was dismissed. The first defendant decreeholder, as is evident from the proceedings in execution of the decree, had a tough job and had to file as many as six execution petitions. The first of them was E. P. 61 of 1951 filed on 20-8-1951 for attachment and sale of the suit properties as belonging to the second defendant and it was dismissed in October 1952 on the ground that no attachment could be properly effected for want of proper description of the suit properties. It appears that the properties were described as vacant lands but it turned out that there were incomplete buildings thereon. E. P. 33 of 1952, 52 of 1953 and 3 of 1954 were for arrest but each of them had to be dismissed as the second defendant was reported to be absconding. There were two other unnumbered execution petitions in 1953 and 1955 both for attachment and sale. Finally, the execution petition E. P. 60 of 1955 resulted in attachment of the properties on 11-2-1955. The second defendant appeared and filed a counter statement in which he claimed relief under Act 1 of 1953.

In October 1956 he filed E. A. 301 of 1956 in his capacity as the Managing director of the Mills to raise the attachment on the ground that the properties belonged to the company (Mills). This petition

having been dismissed in October 1957, the company represented by the second defendant as its Managing director instituted O S 3 of 1958 to set aside the claim order. In that suit, the second defendant himself gave evidence and produced certain documents in support of the company's title to the properties. But the dismissal of the suit was mainly rested on the ground that "the suppression of the prospectus would give rise to presumption that if produced it would go against the plaintiff's case." There is nothing in the execution proceedings or in the proceedings in O S 3 of 1958 to show that defendants 1 and 2 colluded or employed fraud jointly or each by herself or himself on the company to defeat its rights in those proceedings. On the other hand, what appears is that the second defendant had been contesting the execution of the decree in O S 16 of 1949 against the suit properties and has all along been asserting and trying to establish its title to the properties by means of the claim petition and also of the subsequent suit. It is true that the second defendant did not file an appeal against the decree in O S 3 of 1958 but his plea was want of funds and proper support from the fellow directors in this regard. So far as the first defendant is concerned, there is nothing in the record including the oral evidence in the suit as to justify the finding that she colluded with the second defendant or was guilty of any fraud of any kind as against the company's interests. As we said, the first defendant had no easy task of executing the decree both personally against the second defendant and against the suit properties.

10. The Court below was perhaps right in its view that the present second defendant's interests in O S 3 of 1958 were adverse to those of the Company, but it is only in a theoretical sense, for we find that at no time did he set up in himself the title to the properties and all the time on the other hand, he had been asserting that the properties belonged to the company ever since its incorporation. The failure on the part of the second defendant to produce the prospectus of the company in that suit is certainly not suggestive of fraud on his part or collusion between him and the first defendant. We are wholly unconvinced on the record that defendants 1 and 2 colluded together and fraudulently brought about the dismissal of O S 3 of 1958. The facts and circumstances emerging from the evidence do not lead us to that conclusion; nor can we infer from the conduct of the second defendant in the present suit any indication of any such fraud or collusion. We are unable to believe the oral evidence for the plaintiff company that its directors were either kept in dark by the second defendant as to the proceed-

ings in the Court relating to the suit properties in both the earlier suits or that they did not know about them contemporaneously. It is not possible to predicate from the materials before us that the other Directors could have better conducted O. S. 3 of 1958, than the second defendant in the present suit. We accordingly disagree with the finding of the Court below and hold that the plaintiff has failed to prove that the decree in O. S. 3 of 1958 was vitiated by fraud and collusion on the part of or as between defendants 1 and 2 against the company.

11. In any case, as is rightly contended for the appellant in A. S. 178 of 1962, the judgment and decree in O. S. 3 of 1958 do not suffer from any extrinsic fraud so as to set them at large and permit the parties to raise the same issue which has been finally and conclusively adjudicated as between them in that suit. It is suggested, and the Court below has accepted that view, that suppression of the prospectus in O. S. 3 of 1958 by the second defendant, as it was put by the Court in that suit, amounted to a fraud on Court which misled it into dismissing that suit. As we already indicated, when the Court in that suit used the phraseology "suppression" all that it meant was that the second defendant as representing the plaintiff-company failed to produce the prospectus. Even assuming that it was a deliberate suppression on the part of the second defendant while he represented the plaintiff-company that in itself would not render the judgment and decree in that suit null and void leaving the issues as to title open for a fresh trial as between the parties.

12. On that matter, though there was difference of opinion in this Court earlier, Kadirvelu Nainar v. Kuppuswami Naicker ILR 41 Mad 743 = (AIR 1919 Mad 1044) settled it by overruling Venkatappa Naick v. Subba Naick, (1906) ILR 29 Mad 179 and accepting the principle in Chinnayya v. Ramanna, ILR 38 Mad 203 = (AIR 1916 Mad 364). ILR 41 Mad 743 = (AIR 1919 Mad 1044) held that a suit did not lie to set aside a judgment in a previous suit on the ground that it was obtained by perjured evidence. ILR 38 Mad 203 = (AIR 1916 Mad 364) also was a case to set aside an earlier judgment on a similar ground. Sundara Aiyar J. who spoke for the Division Bench consisting of himself and Benson, J., elaborately discussed the question and held:—

"In order that fraud may be a ground for vacating a judgment, it must be a fraud that is extrinsic or collateral to everything that has been adjudicated upon but not one that has been or must be deemed to have been dealt with by the Court."

The learned Judges were not prepared to accept the view of Boddam and Moore,

JJ. in (1906) ILR 29 Mad 179 that deliberate perjury was a ground to set aside an earlier judgment. ILR 38 Mad 203 at 208 = (AIR 1916 Mad 364 at p. 366) explained by illustration what it meant by extrinsic fraud in the context:

"If, for instance, a party be prevented by his opponent from conducting his case properly by tricks or misrepresentation, that would amount to fraud. There may also be fraud upon the Court if, in a proceeding in which a party is entitled to get an order without notice to the other side, he procures it by suppressing facts which the law makes it his duty to disclose to the Court. But where two parties fight at arm's length, it is the duty of each to question the allegations made by the other and to adduce all available evidence regarding the truth or falsehood of it. Neither of them can neglect his duty and afterwards claim to show that the allegation of his opponent was false."

The learned Judge noticed the classical observations of Lord Justice James in *Flower v. Llyod*, 1879-10 Ch D 327 at p. 333 which are well worth reproduction:—

"Assuming all the alleged falsehood and fraud to have been substantiated is such a suit as the present sustainable? That question would require very grave consideration indeed, before it is answered in the affirmative. Where is litigation to end if a judgment obtained in an action fought out adversely between two litigants sui juris and at arm's length could be set aside by a fresh action on the ground that perjury had been committed in the first action, or that false answers had been given to interrogatories or a misleading production of documents or of a machine or of a process had been given?..... Perjuries, falsehoods, frauds, when detected, must be punished and punished severely, but in their desire to prevent parties litigant from obtaining any benefit from such foul means, the Courts must not forget the evils which may arise from opening such new sources of litigation, amongst such evils not the least being that it would be certain to multiply indefinitely the mass of those very perjuries, falsehoods and frauds."

That extrinsic fraud alone can be a ground for setting aside an earlier judgment has been at length considered and affirmed by our learned brothers Ramamurti and Alagriswami, JJ. recently in A. S. No. 347 of 1962 (Mad), *Jagannath v. Perumal Naidu*. In fact this judgment relieves us from the necessity of an extensive consideration of the question. The learned Judges held:—

"We therefore, hold that even if the plaintiff was guilty of suppression of the release deed Ex. B-15, executed by him,

the preliminary decree cannot be said to be vitiated by extrinsic fraud....."

L. V. Apte v R G N Price, AIR 1962 Andh Pra 274 is even more directly in point for our present purposes where it was held that suppression of evidence and even negligent conduct in the prior litigation would not be proper grounds for setting aside an earlier order

13 In the case before us, there is no question of any extrinsic fraud alleged or suppression on the part of the first defendant or the second defendant or both together. We hold, therefore, that the judgment and decree in O S 3 of 1958 are binding as between the plaintiff on the one hand and the first defendant as well as the second on the other and conclude the question of title against the plaintiff and it is not open to the plaintiff to re-agitate it in the present litigation as it is barred by *res judicata*. That will suffice to allow appeal No 179 of 1962

14. We shall, however, proceed to consider the first ground relating to the plaintiffs' title to the suit properties on the merits. It is said that though they were purchased in June 1945, by the 2nd defendant and another, they did so as representatives of the Weavers Mills Ltd, Rajapalayam, that the purchasers as promoters stood in a fiduciary position to the company to be incorporated and that on its incorporation in July 1948, the properties automatically vested in it as the true owner. The contention is reinforced by stating that the prospectus set out the properties as those belonging to the company, that there was a resolution of the General body adopting the purchases of the properties by the second defendant for the company and that subsequently after the incorporation, the plaintiff-company assumed possession and constructed pucca buildings thereon. It is pressed upon us that when property was purchased by promoters, they held the same in trust which on incorporation vested in the company and that such a transfer was a valid one not required to be in writing. On this process of reasoning, it is maintained for the company that at the time of the attachment of the properties, they belonged to it by adoption and recognition. The argument for the decree-holder purchaser is that short of a conveyance by the promoters, who purchased the properties, to the company after its incorporation, the company could not claim title thereto. Inasmuch as there was in fact no transfer of the properties to the company by a registered conveyance, the mere fact of its having assumed possession and put up buildings thereon or even the fact that the properties were shown in the prospectus as belonging to the company will not invest it with the ownership of the properties,

15. The question thus raised is of general importance. On facts, there is no doubt on record before us that the company after its incorporation had assumed possession of the lands purchased by the second defendant and another and built on them, though the constructions were left unfinished and the company never started its business. The prospectus has not been filed in this case, nor the resolution of the General Body, and it is not, therefore, possible to say whether the properties were treated as belonging to the company by adoption and recognition. One other fact which admits of no doubt is that the second defendant never claimed that the funds for the purchase of the properties ever came from him or the one who joined with him, personally. It is in the setting of these circumstances we have to consider whether the company became the owner of the properties

16. There is very little guidance in the Companies Act, 1913 and the new Act to decide the question before us. One of us in *W P Nos 475, 555 and 1249 of 1960 (Mad), Nandi Transport (P) Ltd. v S T. A. T.*, had occasion to consider in a different context the legal implications in relationship of a promoter and the company under incorporation. There was there an elaborate consideration of that matter with reference to authorities. A Division Bench in appeal *W. A. Nos 85 and 86 of 1963 (Mad), Palaniswami v. Nandi Transports (P) Ltd.*, and etc, arising out of those petitions also covered the question in some detail. But, for our present purpose, we think it is not necessary to cover the entire ground. A promoter according to *Cockburn C J* in *Twycross v. Grant, (1877) 2 C P D 469* is one who undertakes to form a company with reference to a given project and to set it going and who takes the necessary steps to accomplish that purpose. 6 *Halsbury's Laws of England, 3rd Edn.*, page 91 and *Palmer's Company Law 19th Edn. 322*, elaborate this idea. In the writ petitions, one of us after referring to these authorities summed up the position of a promoter:—

"A 'Promoter' therefore, is a comprehensive term given to a person who undertakes, does and goes through all the necessary and incidental preliminaries, keeping in view the objects, to bring into existence an incorporated company. This process leading to the genesis of a company may include a variety of things, not the least of them, I think, being some of the steps taken by a promoter to ensure commencement, within a reasonable time, of the business, for the carrying on of which the company is formed. He makes purchase of moveable and immoveable assets, enters into contracts involving rights and obligations and applies to authorities for a variety of

things, all on behalf of the company to be formed."

As to the exact legal status of promoters, the statutory provisions, both in England and in this country are silent in most part except for a couple of sections in the Specific Relief Act, both old and new ones. It appears that a promoter is neither an agent nor a trustee of the company under incorporation but certain fiduciary duties have been imposed on him both under the English Companies Act 1948 and the Indian Companies Act, 1956. He is not an agent because there is no principal and he is not a trustee as there is no *cestui que trust* in existence. There can be no agent for a non-existing principal, nor a trustee for a non-existing *cestui que trust*. It is on this ground that the doctrine of ratification by the company was regarded as inapplicable to the actual promoter vis-à-vis the company under incorporation. We do not refer to the earlier view held in 1821 in England which assumed that Corporation could on its incorporation ratify, or hold the promoter personally liable as it liked. The dictum of Lord Cottenham in *Edwards v. Grand Junction Ry. Co.*, (1836) 1 My & Cr 650, at p. 672 that 'if the company and the projectors cannot be identified, still it is clear that the company have succeeded to, and are now in possession of, all that the projectors had before; they are entitled to all the rights and subject to all their liabilities', does not appear to have been endorsed as correct in every respect by the House of Lords after 1856. In *Kelner v. Baxter*, 1866-2 CP 174, it was held that a contract entered into by a promoter could not be ratified by a company after its incorporation. Willes, J. one of the learned Judges who decided that case observed at page 184—

"I apprehend the company could only become liable, upon a new contract. It would require the assent of the plaintiff to discharge the defendants. Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done—by a person in existence either actually or in contemplation of law."

Lord Davey in *Natal Land and Colonisation Co. Ltd. v. Pauline Colliery Syndicate*, 1904 AC 120, speaking for the Judicial Committee stated that a company could not by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence and that in order to do so a new contract must be made with it after its incorporation on the terms of the old one. Sections 21 (f), 23 (h) and 27 (e) of the Specific Relief Act, 1877, were perhaps based on the doctrine of Lord Cottenham that a company

after its incorporation was a successor to and took the place of the promoters in relation to contracts entered into by them for the purposes of the company and warranted by the terms of the incorporation. Though the first two sections do not seem to be rested on any theory of agency or trust, Section 27 (e) was possibly founded on some kind of quasi agency or of trust. To this extent, the Indian Legislature in enacting the Specific Relief Act, 1877, would appear to have departed from the English view in 1866-2 CP 174 and 1904 AC 120. These sections in the Specific Relief Act are concerned with executory contracts and cannot possibly be applied to conveyances of immoveable properties in favour of promoters of a company under incorporation.

17. Section 5 of the Transfer of Property Act defines 'transfer of property' as an act by which a living person conveys property in present or in future to one or more other living persons. But a 'living person' by the statutory direction includes a company or association or body of individuals whether incorporated or not. Inasmuch as the purchases of the properties in this case were by promoters before incorporation of the plaintiff-company, it is said for the decree-holder-purchaser that in the absence of a conveyance by the promoters in favour of the company after its incorporation under a registered document, the company cannot claim title thereto. Section 54 of the Transfer of Property Act and S. 17 (1) of the Registration Act are relied on in support of the contention. In our opinion, though this is a possible view, a better view to take is that the instant case is covered by Section 9 of the Transfer of Property Act.

18. That section says that a transfer of property may be made without writing in every case in which a writing is not expressly required by law. The Transfer of Property Act is not exhaustive of the kind of transfers. We are inclined to agree with the proposition of Ramaswami J., in *Sarandaya Pillai v. Sankarlinga Pillai* 1959-2 Mad LJ 502 at p. 503 namely, that "the test, therefore, in this country to determine whether a transaction (be it a transfer or not) can be made without writing is to see if it is expressly required by law to be in writing. If the transaction is a 'transfer of property' and there is no express provision of law requiring it to be in writing, Section 9 will enable it to be made without writing. If on the other hand, the transaction is not a 'transfer of property' and there is no express provision of law requiring it to be in writing, the general principle referred to above will enable it to be validly made without writing." The learned Judge, if we may say so with respect, rightly pointed out that Section 9 underlines the general principle that everything

is to be taken permissible unless there is a prohibition against it and has been inserted in the statute ex abundanti cautela.

While we accept the position that a promoter is neither an agent nor a trustee of the company under incorporation, we are inclined to think that in respect of transactions on behalf of it, he stands in a fiduciary position. For the plaintiff-company Sections 92 and 94 of the Indian Trusts Act, 1882, were relied upon. It seems to us that neither of these sections is of assistance to it. These sections, as we think, contemplate transactions as between persons in existence. In any case, it seems to us that no trust as defined by Section 3 of the Act is brought about by the purchases made by the promoters. The legal position of a promoter in relation to his acts, particularly purchase of immoveable properties on behalf of the company under incorporation, is a peculiar one not capable of being brought into any established or recognised norms of the law as to its character as an agent or a trustee. But, at the same time it is impossible, to our minds, to deny that he does stand in a certain fiduciary position in relation to the company under incorporation. When he does certain things for the benefit of it, as for instance, purchase of immoveable properties, he is not at liberty to deny that benefit to the company when incorporated. We are prepared to hold that in such a case the benefit of the purchase will pass on to the company when incorporated. 6 Halsbury's Laws of England, 3rd Edn paragraph 194, says that a promoter stands in a fiduciary position with respect to the company which he promotes from the time when he first becomes until he ceases to be a promoter thereof. It is also pointed out that a promoter may acquire assets as a trustee for a company. Though the cases relied on for these propositions were of the year 1877 or thereabouts, we do not see why the principle of the dictum of Lord Cottenham should not, in justice and equity, be invoked to clothe the promoter with the mantle of fiduciary position with respect to the company under incorporation with the implication that when incorporated the company will succeed to the beneficial acts transacted on its behalf by the promoter.

19. As we already noted, the second defendant and another purchased these properties expressly stating that they did so as representatives of the company to be formed, that the funds therefor did not belong to them and that on incorporation the company assumed possession and built upon them. These facts clearly show that the company adopted the benefit of the purchase if adoption is a requisite at all for passing of such benefits to the company on incorporation. On

this view, it follows that the suit properties did belong to the plaintiff company.

20. App No 178 of 1962 is allowed with costs. App No 28 of 1962 is dismissed but with no costs.

DVT/D V.C. Order accordingly.

AIR 1969 MADRAS 470 (V 56 C 109)

ALAGIRISWAMI, J

Ramachandra Sarma, Appellant v. Ayesha Begum and others, Respondents
Second Appeal No 204 of 1964, D/-1-3-1968 against decree of Dist Court, Salem in A S No 485 of 1962.

Specific Relief Act (1877), Section 21 — Contract Act (1872), Sections 2 (d) and 10 — Agreement for resale of properties in favour of minor plaintiffs' father — Father assigning his rights to plaintiffs — Suit for specific performance in favour of plaintiffs can be decreed — Doctrine of want of mutuality — Test — Must be judged as on date of contract.

Where an infant plaintiff claims under a party who himself could have obtained specific performance such infancy is no ground for refusing specific performance.

(Para 2)

A contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say such that it might at the time it was entered into, have been enforced by either of the parties against the other of them. The relevant date on which this test of mutuality is to be applied is the date of the contract itself and not the date on which it is sought to be enforced.

(para 1)

Therefore, where the father of the minor plaintiffs sold his property to the defendant and on the same date the defendant executed a registered deed of agreement for resale in favour of the plaintiffs' father who assigned his rights under the agreement of resale to the plaintiffs.

Held, there could be no valid legal objection to granting a decree for specific performance in favour of the plaintiffs. The original contract was between the two adults and it was valid. It was not hit by the doctrine of want of mutuality. It was not a case of contract by a guardian of a minor on behalf of the minor to purchase the property for the minor. The fact that the assignee happened to be a minor did not mean that the contract could not be enforced by the assignee minors or that it could not be enforced as against the assignee minors. Case law discussed.

(Para 1)

Cases Referred Chronological Paras
(1958) AIR 1958 Madh Pra 373
(V 45) = 1959 MPLJ 36, Abdul Sattar v. Ismail

(1948) AIR 1948 PC 95 (V 35) =
 ILR (1949) Mad 141, Subrah-
 manyam v. Subba Rao 1
 (1933) AIR 1933 Mad 322 (V 20) =
 ILR 56 Mad 433 (FB), Venkata-
 chalam Pillai v. Sethuramarao 1
 (1911) ILR 39 Cal 232 = 39 Ind
 App 1 (PC), Mir Sarwarjan v.
 Fakhraddin 1
 (1895) 1895-1 QB 683 = 64 LJ QB
 441, Lumley v. Ravenscroft 1
 (1827-28) 4 Russ Rep 298 = 38 ER
 817, Flight v. Bolland 1

V. V. Raghavan and T. S. Subramanian,
 for Appellant; C. S. Swaminathan, for
 Respondents.

JUDGMENT: This appeal arises out of a suit for specific performance. The suit property belonged to the father of the plaintiffs. He sold the suit property on 24-1-1956 to the defendant. On the same date, the defendant executed a registered deed of agreement for resale in favour of the plaintiffs' father. On 12-7-1957, the plaintiffs' father assigned the rights under the agreement of resale in his favour to the plaintiffs. To the plaintiffs' claim for specific performance, the defendant's contention was that the father of the plaintiffs had no right to assign the agreement of reconveyance, that there was no valid tender and that the suit was not maintainable, as the plaintiffs were minors. The only question of substance that was argued before this Court was that the plaintiffs could not maintain this suit as they are minors and the test of mutuality is not satisfied in this case. The plaintiffs based their contention on the decision in *Mir Sarwarjan v. Fakhrudin*, (1911) ILR 39 Cal 232 (PC) which was followed by a Full Bench of this Court in *Venkatachalam Pillai v. Sethuramarao*, AIR 1933 Mad 322 (FB). In the Privy Council case in (1911) ILR 39 Cal 232 (PC) the guardian of a minor entered into an agreement with another for the purchase of certain immoveable property by the minor. The minor after attaining the majority sued for specific performance of the contract. Their Lordships laid down the law as follows—

"They are however of opinion that it is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property, and they are further of opinion that as the minor in the present case was not bound by the contract, there was no mutuality, and that the minor who has now reached majority cannot obtain specific performance of the contract".

In AIR 1933 Mad 322, there was a sale in respect of a minor's property executed by his guardian and there was a

covenant that in case the vendee sold the property, he should resell it to the minor or his heirs. It was held as follows—

"that the agreement for sale in the sale deed being an executory contract without mutuality was unenforceable by either party in a suit for specific performance irrespective of the question whether the contract was for the benefit of the minor or not".

Before the Full Bench an attempt was made to get over the effect of the Privy Council decision by urging that as in the case before the Full Bench, the contract was for the benefit of the minor he should be able to enforce specific performance of the contract. But the Full Bench pointed out that in the case before the Privy Council the contract was validly entered into and was for the benefit of the minor and was even ratified by him. The effect of these decisions seems to be considerably shaken by a later decision of the Privy Council in *Subrahmanyam v. Subbarao*, AIR 1948 PC 95. Dealing with this question under the heading "Minors and the Doctrine of Mutuality" in his book, "The Law of Specific Relief" Prof. G. C. Venkatasubba Rao at page 159 observes as follows—

"Since the decision of the Privy Council in (1911) ILR 39 Cal 232 (PC), it must be taken as settled law that the doctrine of mutuality applies to India". He observes at page 160 as follows—

"Thus it is clear that an executory contract for the transfer of immoveable property in favour of a minor is not capable of specific performance. In AIR 1933 Mad 322 (FB), dealing with an agreement of resale contained in a sale deed executed by a guardian and sought to be enforced by the minor after attainment of majority, the Madras High Court observed — "The validity or enforceability of such a contract does not therefore, depend upon the question whether it was conducive to the benefit of the minor or not". That contract was held to be unenforceable specifically as it was lacking in mutuality

"It may, therefore, be taken as well settled that an executory contract for the purchase of immoveable property entered into by a guardian on behalf of the minor is not capable of specific performance either at the instance of the seller or at the instance of the minor purchaser".

At page 162 it is observed as follows—

"A recent decision of the Privy Council in AIR 1948 PC 95 has considerably shaken the authority of the long catena of decisions noticed above. In the case before the Privy Council the mother as the guardian of her minor son entered into an agreement for the sale of the minor's lands. The intended transferee

was put in possession pursuant to the contract. The minor, however, sued by his next friend for recovery of possession of the properties. The defendant vendee relied upon the doctrine of part performance embodied in Section 53-A of the Transfer of Property Act, IV of 1882. The Madras High Court held that Section 53-A could not be invoked by the defendant as the minor plaintiff was not a 'transferor' as contemplated by that section. This decision was reversed by the Privy Council. Referring to the power of the guardian to enter into the contract of sale the Privy Council observed—

"Their Lordships entertain no doubt that it was within the powers of the mother as guardian to enter into the contract of sale of 29th November 1935, on behalf of the respondent for the purpose of discharging his father's debts, and that if the sale had been completed by the execution and registration of a deed of sale, the respondent would have been bound under Hindu Law". The conclusion of their Lordships is thus formulated

"It would appear, therefore, that the contract in the present case was binding upon the respondent from the time when it was executed. If the sale had been completed by a transfer, the transfer would have been a transfer of property of which the respondent, not his mother, was owner. If an action had been brought for specific performance of the contract it would have been brought by or against the respondent and not by or against his mother".

It may also be noticed that Lord Morton of Henryton in the above case expressly refers to and approves a passage in Pollock and Mulla's Commentary on the Indian Contract and Specific Relief Acts 7th Edn. page 70, where the learned authors observe that in the case of a contract entered into on behalf of a minor by his guardian, 'the contract can be specifically enforced by or against the minor, if the contract is one which it is within the competence of the guardian to enter into on his behalf so as to bind him by it, and, further, it is for the benefit of the minor. But if either of these two conditions is wanting, the contract cannot be specifically enforced at all'. That the first of these conditions is wanting in the case of a contract by the guardian for the purchase of immoveable property on behalf of the minor is perfectly clear from *Mir Sarwarjan's case*, (1911) ILR 39 Cal 232 (PC). That neither of the two conditions need be wanting when the contract is for the sale of the minor's immoveable property is equally clear from the latest decision of the Privy Council in AIR 1948 PC 95. A contract

for the purchase of immoveable property can rarely be demonstrably for the benefit of the minor's estate or for legal necessity but the same cannot be said of a contract for sale of the minor's property. This seems to be the basis for drawing a distinction between contract for the purchase of property and contracts for sale entered into on behalf of minors".

At page 163 occurs the following passage—

".....A Full Bench of the Madras High Court has taken a different view. Govinda Menon J expressed the view that the effect of the later Privy Council decision is to render the principle of mutuality inapplicable to contracts for sale of the minor's property leaving that doctrine still applicable to a contract of purchase of property for the minor which was the specific case dealt with by the earlier Privy Council decision. These conflicting decisions were considered in *Abdulsattar v Ismail*, AIR 1958 Madh Pra 373 by the Madhya Pradesh High Court. Newaskar J was inclined to the view that the decision of the Privy Council in *Mir Sarwarjan's case*, (1911) ILR 39 Cal 232 (PC) is not overruled by the later decision thus endorsing the opinion of the Full Bench of the Madras High Court. The other learned Judge, Srivastava, J, however, did not share this view and was inclined to agree with the Full Bench decision of the Andhra Pradesh High Court.....".

"This case focuses attention on the incompatibility between the decision in *Mir Sarwarjan's case*, (1911) ILR 39 Cal 232 (PC) & AIR 1948 PC 95. The learned Judges who have distinguished the later Privy Council decision and have held that it has not shaken the authority of the earlier Privy Council ruling have not pondered over a situation in which both vendor and vendee are minors acting through their guardians. That the minor purchaser can say 'I rely on *Mir Sarwarjan's case*, (1911) ILR 39 Cal 232 (PC). This is a contract of purchase. So it is beyond the power of my guardian to bind me. Ergo it cannot be specifically enforced against me.' To this the minor seller would say 'I rely on AIR 1948 PC 95. This is a contract of sale. It is for legal necessity. My guardian can enter into this contract. Ergo, I can specifically enforce it'. How are we to resolve this tangle? It is respectfully submitted that the Full Bench decision of the Madras High Court has erred in supposing that the two Privy Council decisions can stand together. The Full Bench of the Andhra High Court has rightly held that the earlier Privy Council decision must be deemed to have been overruled by the later pronouncement".

It appears to me that on principle the contention on behalf of the appellant

cannot be supported. In this case the agreement for reconveyance was in favour of the plaintiffs' father. That contract was not hit by the doctrine of want of mutuality. The only question that arises, therefore, in this case whether because the plaintiffs, who are the assignees of the contract in favour of their father, are all minors, they cannot enforce the contract for specific performance on the ground that the defendant would not be able to enforce contract for specific performance as against the plaintiffs. It would not be correct to say that the defendant would not be entitled to enforce the contract of specific performance as against the plaintiffs. A contract by a minor is void. The effect of the Privy Council decision in (1911) ILR 39 Cal 232 (PC) is that a contract on behalf of a minor for purchase of a property is not valid and binding on the minor. The present is not a case of a contract by a guardian of a minor on behalf of the minor to purchase the property for the minor. The original contract is between the two adults and the contract is certainly valid. The fact that the assignee happens to be a minor does not mean that the contract cannot be enforced by the assignee-minors or that it cannot be enforced as against the assignee-minors. The relevant date on which this test of mutuality is to be applied is the date of the contract itself and not the date on which it is sought to be enforced.

In AIR 1933 Mad 322 (FB), it was pointed out at p. 325, that want of mutuality must be judged as on the date of the contract. In *Fry's Specific Performance of Contract*, 6th Edn. at 219 it is stated that a contract to be specifically enforced by the Court must, as a general rule, be mutual, that is to say, such that it might at the time it was entered into, have been enforced by either of the parties against the other of them. The further observation of the learned author that an infant cannot sue, because he could not be sued for a specific performance can only, therefore, refer to a case where the infant himself enters into a contract. The two cases relied on by him in support of this observation are both cases of contracts entered into by minors. (*Flight v. Bolland* (1827-28) 4 Russ 8 and 9 *George IV* P. 298, and *Lumley v. Revenscroft*, (1895) 1 QB 683) In both those cases, if the defendants had sued for specific performance the minor plaintiffs could have successfully urged that the contracts entered into by them could not be enforced against them as they were minors at the time the contracts were entered into. There being thus no mutuality the plaintiffs were not entitled to sue.

2. In *Corpus Juris Secundum* Volume LXXXI, the position regarding mutuality is stated thus at page 430--

"Where an infant plaintiff claims under a party who himself could have obtained specific performance, such infancy is no ground for refusing specific performance. Likewise, specific performance has been allowed, for or on behalf of, an infant where the contract involved was made for him by one competent to do so. Where there has been complete performance by the infant, his infancy has been held to be no bar to specific performance".

There is, therefore, no valid legal objection to granting a decree for specific performance in favour of the plaintiffs in this case.

3. The defendant's appeal, therefore, fails and it is dismissed with the costs of the plaintiffs to be paid by the defendants. No leave.

LGC/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 473 (V 56 C 110)

M. NATESAN J.

S. Venkataramanaswami Ayyar, Appellant v. S. Abdul Wahab, Respondent.

Second Appeal No. 787 of 1965, D/- 20-9-1968, against Decree of District Court, Tiruchirapalli, D/- 15-2-1965.

(A) Civil P. C. (1908), Sections 100-101 — Question of fact — Agreement between landlord and tenant to pay enhanced rent — Finding of lower Court as to truth or otherwise of such agreement is essentially question of fact — High Court sitting in second appeal has to accept it.

(Para 6)

(B) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), Sections 7, 5, 6 — Variation of rent — Validity — Fair rent not fixed — Agreement for enhancing rent is valid — Section 7 (2) does not invalidate such agreement — Scope of Sections 5, 6 and 7 explained — "Agreed rent" — Meaning explained — (Words and Phrases — "Agreed rent") — (Contract Act (1872), Section 10).

There is nothing illegal in a landlord asking for higher rent so long as fair rent has not been fixed. Restrictions on the rights of parties to enter into a contract cannot be imposed, purely by implication, particularly when the existence of such rights is not inconsistent with the provisions of the Act. There is no specific provision in Madras Act 18 of 1960, prohibiting the parties to agree between themselves and vary the prevailing rent, so long as the fair rent has not been fixed. The Act makes a distinction between a case where the fair rent has been fixed and the one where it has not been fixed under the Act.

CM/DM/B88/69

Under Sections 5 and 6, if the tenant is not willing to an increase in rent the landlord can have the rent revised under the provisions of the Act. Section 7 (1) (a) provides for the landlord claiming excess in terms of the provisions of Sections 5 and 6 and the only provision which has to be considered where the fair rent has not been fixed is Section 7 (2), and that section does not prohibit any agreement between the parties increasing the rent. (Para 8)

Nothing in sub-sections (2) and (3) of Section 7 can invalidate an agreement for a rent different from the then prevailing rent. The fresh agreement can be for enhancement or even for a reduced rent. What sub-section (2) prohibits is the receipt by the landlord of any amount as premium or like sum in addition to the agreed rent. The expression "agreed rent" has not been defined in the Act and its ordinary meaning is, rent agreed between the parties, not any unilateral demand to which the tenant has not consented. For, any unilateral action of the landlord increasing the rent will not avail him, as in the absence of an agreement with the tenant, he cannot recover the same in a Court of law. Held, further that the Act deals with tenancies commenced before the Act and those which may come into existence after the Act. C R P. 2319 of 1965 (Mad) and (1966) 2 Mad LJ 139. Foll. (Para 8)

(C) Houses and Rents — Madras Buildings (Lease and Rent Control) Act (18 of 1960), Section 7 (2) — Words "Premium or other like sums" — They are sums paid in excess of agreed rent in consideration of grant, continuance or renewal of tenancy — The Act does not define rent but makes clear distinction between rent and premium or other like sums — (T. P. Act (1882), Section 105) — (Words and Phrases — "Premium or other like sums"). (Para 7)

Cases Referred: Chronological Paras

- (1966) 1966-2 Mad LJ 139 = 1966
 Mad LJ (Cri) 570 Ranganayaki
 Ammal v Chockalingam 8
 (1966) 79 Mad LW (SN) 22 = C R P.
 No 2319 of 1965, P. Subbar v.
 Madurai Sowrashtra Sabha 8
 (1965) AIR 1965 Andh Pra 33 (V 52)
 = (1964) 1 Andh WR 69. Aswatha-
 narayanaiah v Sanjeeviah 8
 (1959) AIR 1959 Andh Pra 108
 (V 46) = (1958) 2 Andh WR 493,
 Jamuna Bai v Narayanamurthi 8
 (1961) ILR (1961) Mad 1243 = (1962)
 1 Mad LJ 272 Abdul Rahim v.
 State of Madras 7
 (1948) AIR 1948 Mad 346 (V 35) =
 (1948) 1 Mad LJ 51. Moses Pillai
 v Govindan 8
 (1953) AIR 1953 Mad 705 (V 40) =
 (1953) 1 Mad LJ 490, Venkate-
 swararao v Mohammed Mohibulla 8

(1915) 1915-3 KB 485 = 84 LJ KB

2069, King v. Earl of Cadogan 7

R. Gopalaswami Iyengar and N R. Natarajan, for Appellant, K. S. Naidu and M. Mani Narayanan, for Respondent.

JUDGMENT:— This Second Appeal has been filed, by the defendant in a suit for recovery of a sum of Rs 2,562-50 as arrears of rent due in respect of the defendant's tenancy of a building.

2. The defendant has been a tenant of the building in question, except for two upstairs rooms, for a number of years, running a coffee and meals hotel in the premises. It is the common case of the parties that the agreed rent till 8th February, 1960, was Rs 112-50 per month. There is evidence on record that, in the middle of 1959 itself, the plaintiff had been seeking to evict the defendant and had been refusing to receive the rent at the rate of Rs 112-50 per month. The plaintiff would have it that it was not his intention to get an enhanced rent, but to secure vacant possession of the building for the purpose of repairs and improvements.

It is the plaintiff's case that, on 8th February, 1960, there was an agreement between him and the defendant at the intercession of one Natesan Pillai, P. W. 2 in this case whereunder the defendant agreed to pay rent at the rate of Rs. 200 per mensem from 1st of Masi, 1960, that notwithstanding this agreement, the defendant failed to pay the agreed rent of Rs 200 even in the first month and that he sent only a Bank draft for Rs 112-50. The plaintiff returned this draft for Rs 112-50 sent for Masi 1960, protesting against the conduct of the defendant in sending that amount only. This protest letter has not been produced by the defendant. On the refusal of the plaintiff to accept rent at Rs 112-50 per month, the defendant paid the rents into the Karur Vysa Bank Ltd., without any reference to the plaintiff. For about a year after this rejection we find no correspondence between the parties.

On the plaintiff issuing a notice in February, 1961, the defendant, along with his reply notice Exhibit A-2, sent a draft for Rs. 1,350/- being the accumulated rent at Rs 112-50 per month which had been put into the Bank. The plaintiff accepted this draft for Rs 1,350 without prejudice to his contention and the defendant continued to send rent at Rs. 112-50 per month thereafter. The plaintiff accepted the subsequent rents also of course without prejudice to his claim. This suit was instituted on 5th February, 1963, claiming the balance of rent on the basis that the agreed rent was Rs 200/- per mensem. Proceedings for eviction were also started under the Madras Buildings (Lease and Rent Control) Act, on the

basis that there was wilful default in the payment of the balance of rent.

3. The defendant denied any agreement on 8th February, 1960, to pay rent from 1st Masi, 1960 at the rate of Rs. 200 per mensem. He would state that he never agreed to pay rent at Rs. 200 per month unequivocally as alleged, and that there was no concluded agreement in this regard, much less a completed contract. There is no denial that there were talks on 8th February, 1960, between the plaintiff and the defendant. Nor is there any denial of the intercession of Natesan Pillai, P. W. 2, in the matter. According to the defendant, he wanted the two upstairs rooms also to be made available to him and his case is that he did not accept to a rent of Rs. 200 per month, as such without reference to the two upstairs rooms. In the written statement it is stated that the defendant expressly informed the plaintiff that the question of paying enhanced rent will arise only after the tenants occupying the two upstairs rooms vacated and the rooms were given delivery to the defendant. It is the defendant's case that everything was kept in suspense and the plaintiff proposed to take suitable steps to have the tenants in the upstairs rooms evicted outside or through Court.

4. From the records it is seen, and it is the finding of the Courts below, that the plaintiff had asked for arrears of rent prior to 1960 at Rs. 175 per month, but that the matter was settled between the parties on 8th February, 1960, the defendant agreeing to pay, along with the arrears of rent, a further sum of Rs. 150. It is the admitted case of the plaintiff that there was an advance of Rs. 500 left with the plaintiff, and that the defendant had paid the arrears of rent due prior to the date of the fresh agreement, together with a sum of Rs. 150 immediately after the agreement on 8th February, 1960. On the plaintiff's side, the plaintiff, besides himself, examined Natesan Pillai as P. W. 2, and the defendant was the sole witness for the defence. Admittedly there was none else present at the time of the agreement. The Courts below have concurred in upholding the plaintiff's case of an agreement to pay rent at Rs. 200 per month from Masi, 1960. They overruled the legal plea put forward for the defendant that, even if the agreement was established as a fact, the agreement to pay enhanced rent was void and unenforceable in view of the provisions of the Madras Buildings (Lease and Rent Control) Act (XVIII of 1960).

5. Counsel for the defendant challenges before me the finding of the Courts below as to the agreement between the plaintiff and the defendant to pay rent at Rs. 200 per month. He also contends that the agreement, even if it is true, is

void under the provisions of Madras Act (XVIII of 1960).

6. The finding of the Courts below as to the truth or otherwise of the agreement is essentially a question of fact and the matter is now before me in second appeal. Learned Counsel for the defendant urges that certain essential and important pieces of evidence have not been given consideration, and that their materiality has been ignored. x x x x x (After discussing the evidence, his Lordship proceeded). In the circumstances, when the Courts below accept the evidence of P. Ws. 1 and 2 and hold that there was a clear agreement to pay rent at Rs. 200 per month, sitting in second appeal, I have to accept the finding. The appellate Court concludes the matter thus:

"Taking all the circumstances into consideration, certainly the evidence of P. Ws. 1 and 2 is preferable to that of the defendant and the conclusion of the learned District Munsif that the agreement set up by the plaintiff is true, cannot be seriously challenged".

7. I shall now take up the next question that the agreement entered into on 8th February, 1960, enhancing the then prevailing rent is void in law and, therefore, unenforceable. The contentions of learned Counsel for the appellant is that except under the provisions of the Madras Buildings (Lease and Rent Control) Act, no landlord is entitled to increase the rent, and that, even if the parties voluntarily enter into an agreement to increase the rent, the agreement is unenforceable in law. Reliance is placed on Section 7 of the Madras Act (XVIII of 1960) and the general scheme of the Act, to protect the unreasonable eviction of tenants and the regulation and control of rents of buildings. Admittedly no fair rent has been fixed for the building in question and the relevant provisions are sub-sections (2) and (3) of section 7 of the Act:

"7. (2) Where the fair rent of a building has not been so fixed —

(a) the landlord shall not claim, receive or stipulate for the payment of, any premium or other like sum in addition to the agreed rent:

Provided that the landlord may receive, or stipulate for the payment of, an amount not exceeding one month's rent, by way of advance.

(b) Save as provided in clause (a), any sum paid in excess of the agreed rent, whether before or after the date of the commencement of the Act, in consideration of the grant, continuance or renewal of the tenancy of the building after the date of such commencement, shall be refunded by the landlord to the person by whom it was paid or, at the option of such person, shall be otherwise adjusted by the landlord.

3 Any stipulation in contravention of sub-section (2) shall be null and void".

I fail to see how anything in the above sub-sections can invalidate an agreement between a landlord and tenant for a rent different from the then prevailing rent. The fresh agreement need not necessarily be for enhancement of rent. It can equally be for a reduced rent. What sub-section (2) prohibits is the receipt by the landlord of any amount as premium or like sum in addition to the agreed rent. The expression "agreed rent" has not been defined in the Act and its ordinary meaning is, rent agreed between the parties, not any unilateral demand to which the tenant has not consented. The contention of Counsel for the appellant that there can be no fresh agreement for rent after coming into force of the Act, cannot stand, as the Act deals with tenancies commenced before the Act and those which may come into existence after the Act. When a tenant, for the first time after the Act, is inducted into a building, the landlord and tenant, it is not contended, cannot agree for the rent payable for occupation. The Act does not define "rent," but makes a clear distinction between "rent" and "premium or other like sum". Section 105 of the Transfer of Property Act defines that the price paid or promised in consideration of a lease is called the premium, and that the money, share of crops, service or other things paid periodically or on specific occasions or to be rendered at such times by the tenant is called the rent. Clause (b) of section 7(2) brings out clearly the meaning of the words "premium" or "other like sum". They are sums paid in excess of the agreed rent in consideration of the grant, continuance or renewal of the tenancy. In *Abdul Rahim v State of Madras*, ILR (1961) Mad 1243 = (1962) 1 Mad LJ 272 at p 275, Veeraswami J., points out that "premium" as ordinarily understood is a lump sum payment made outright as price for a lease. Referring to the words "other like sum", the learned Judge observes

"The question then is whether such an amount is within the scope of 'other like sum'. The scope of those words has to be understood in the light of the doctrine of ejusdem generis. Only a sum which has some resemblance to what is comprehended by the word 'premium' will come within the scope of the words 'other like sum'."

In *King v Earl of Cadogan*, (1915) 3 KB 485 at p 492, which the learned Judge has cited, Warrington, L. J., said.—

"Now the Legislature in expressing its intention has chosen to use two words—"rent" and "premium"—both of which in connection with leases have perfectly well

known, legal meanings. I need not say anything about the meaning of the word rent, but "premium", as I understand it, used as it frequently is in legal documents, means a cash payment made to the lessor, and representing, or supposed to represent, the capital value of the difference between the actual rent and the best rent that might otherwise be obtained. It is a very familiar expression to everybody who knows the forms and powers of granting leases. It is in fact the purchase money which the tenant pays for the benefit which he gets under the lease."

8. The question, in fact, is not res integra and has been considered at length by Venkataraman, J., in *P. Subbar v. Madurai Sowrashttra Sabha*, C R P No. 2319 of 1965 (Mad), and again by Sadasivam, J., in *Ranganayaki Ammal v. Chockalingam*, (1966) 2 Mad LJ 139 at 141 = 1966 Mad LJ (Cri) 570. In *Jamuna Bai v Narayanamurthi*, (1958) 2 Andh WR 493 = (AIR 1959 Andh Pra 108) Chandra Reddy, Officiating Chief Justice, and Srinivasachari, J. considered this question and held that, where fair rent has not been fixed, it is open to the parties to come to an agreement with regard to an increase in the rent. The matter was again considered by the Andhra Pradesh High Court in *Aswathanarayanaiah v. Sanjeeviah*, (1964) 1 Andh WR 69 = AIR 1965 Andh Pra 33. Referring to the Madras Buildings (Lease and Rent Control) Act (25 of 1949), it was held in that case that, subject to what was specifically provided in the Act, the freedom of contract had not been taken away, that what Section 6 in that Act stipulated was that in case a fair rent was fixed, the landlord was not permitted to charge an increased rent except as provided in the Act, and that in case the landlord entered into an agreement with the tenant to get an increased rent over and above the fixed rent, such a contract was not enforceable in law. However, it was held that, so long as the fair rent was not fixed, the parties were at liberty to enter into a contract as regards the rent. In C R P. No. 2319 of 1965 (Mad), Venkataraman, J., refers to these cases of the Andhra Pradesh High Court, and distinguishing the two earlier decisions of this Court in *Moses Pillai v Govindan*, (1948) 1 Mad LJ 51 = (AIR 1948 Mad 346) and *Venkat-swara Rao v Mohammad Mohabulla*, (1953) 1 Mad LJ 490 = (AIR 1953 Mad 705) as not applicable after Act (25 of 1949) was amended, where the fair rent had not been fixed, upheld the validity of a fresh agreement for enhanced rent. In (1966) 2 Mad LJ 139 at 141 = (1966) Mad LJ (Cri) 570 Sadasivam, J. examined at length the nature of "premium" or "other like sum", and, pointing out that there is a clear distinction between "rent" on

the one hand and "premium" or "other like sum" on the other, holds that "premium" does not include "rent". The learned Judge observes:—

"There is nothing illegal in a landlord asking for higher rent so long as fair rent has not been fixed. If the tenant does not agree to pay it, the remedy of the landlord may be only to file a petition for fixation of fair rent."

I am in entire agreement with the learned Judge, Venkataraman, J. in C.R.P. No. 2319 of 1965 (Mad) and with the learned Judge Sadasivam, J., in (1966) 2 Mad LJ 139 at p. 141 = (1966) Mad LJ (Cri) 570. My attention has not been drawn to any specific provision in Madras Act (25 of 1949), particularly its amendment in 1951, or in Madras Act (18 of 1960), prohibiting the parties to agree between themselves and vary the prevailing rent, so long as the fair rent has not been fixed for the premises under the provisions of the Act. Restrictions on the rights of parties to enter into a contract cannot be imposed, purely by implication, particularly when the existence of such rights is not inconsistent with the provisions of the Act. The Act makes a distinction between a case where the fair rent has been fixed and the one where the fair rent has not been fixed under the Act. Section 5 of the Act provides against an increase of rent, where the fair rent has been fixed. Provision for an increase or decrease in the fair rent would be unenforceable. Similarly, Section 6 provides for an increase in the rent when taxes are increased. The provisions for variation of rent in Sections 5 and 6 are, it must be appreciated, such that if the tenant is not willing and agreeable to an increase in accordance with the provisions, the landlord could have the rent revised under the provisions of the Act. Section 7 (1) (a) provides for the landlord claiming excess in terms of the provisions of Sections 5 and 6 and the only provision which has to be considered where the fair rent has not been fixed is Section 7 (2): and this section does not prohibit any agreement between the parties increasing the rent. It is needless to point out that any unilateral action of the landlord increasing the rent will not avail him, as, in the absence of an agreement with the tenant, he cannot recover the same in a Court of law.

9. The second appeal fails and is dismissed with costs. No leave.

HGP/D.V.C.

Appeal dismissed.

AIR 1969 MADRAS 477 (V 56 C 111)

M. ANANTANARAYANAN C. J. AND
NATESAN J.

Madras District Automobile and General Employees' Union, Appellant v. State of Madras and another, Respondents.

Writ Appeal No. 382 of 1964, D/-20-3-1968 against order of Veeraswami, J. reported in 1964-2 Lab LJ 407 (Mad).

(A) Industrial Disputes Act (1947), Sections 10 and 12 (5) — Reference of disputes to Boards etc.—Matters which government may take into consideration.

Where there are two unions of workers in the concerned industry or unit of industry, and one Union which contains the majority of the workers, claims to have arrived at a settlement with the Management through negotiation in respect of the very matters in controversy, or some of them, a minority Union cannot urge that these facts should be altogether omitted from consideration by Government, in deciding on the expediency of the reference. On the contrary, those facts would be perfectly relevant, and it would be equally relevant whether developments subsequent to the period or date when the issues in controversy were raised, may render the reference itself otiose: 1964-2 Lab LJ 407 (Mad), Affirmed. (Para 3)

(B) Industrial Disputes Act (1947), Sections 10 and 12 (5) — Constitution of India, Art. 226 — Mandamus — Writ of — Powers of High Court — Court cannot direct a reference — No bar of limitation applies to reference — Union can always agitate for fresh reference on conditions of employment.

It is indisputable that the power of the High Court in Mandamus is not either to direct a reference or to constrain the Government to do so, but only to ask the Government to reconsider the issue. Again, it appears to be equally indisputable that there is no bar of limitation applicable to such cases. It may be that conditions have bettered so much, that the original issues are now academic. It may be that other grievances have developed, or even that they are more controversial than they were, when the Union originally agitated for their consideration. It is always open to the Union to agitate for a fresh reference on conditions of employment as between the Union and the Management: 1964-2 Lab LJ 407 (Mad), Affirmed. (Para 4)

(C) Industrial Disputes Act (1947), Sections 10, 12(5) and 2 (k) — Reference of disputes to Boards etc. — Workman concerned becoming member of Union long back after his dismissal—Dispute sponsored by Union — Government declining to make reference on the ground of

belatedness — Held, the action of Government was not unreasonable or perverse. 1964-2 Lab LJ 407 (Mad), Affirmed.

(Para 5)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 1617 (V 51) =

1964-1 Lab LJ 351, Bombay Union of Journalists v State of Bombay 2

(1960) AIR 1960 SC 1223 (V 47) =

1960-2 Lab LJ 592, State of Bombay v K. P. Krishnan 2

B R Dola for Aiyar and Dola, for Appellant, Government Pleader and A R Ramanathan, for Respondents

M. ANANTANARAYANAN, C. J.—

The writ appeal is by a Trade Union of the workmen of Messrs Sundaram Motors (Pte) Ltd, from the judgment of Veeraswami, J in W P No 1345 of 1962 declining to issue a writ of Mandamus to the State of Madras, to dispose of the alleged dispute afresh under Section 10 read with Section 12 (5) of the Industrial Disputes Act. It is not necessary to canvass the facts at any length. It is sufficient for us to state that the points in controversy related to revision of wage scales, dearness allowance, leave facilities bonus for 1961 and gratuity, and lastly, to the non-employment of one P Sambasivan

2. A great deal of the area covered in the judgment of the learned Judge by way of discussion, may now be regarded as unnecessary. The learned Judge referred to the decisions of the Supreme Court in State of Bombay v K. P. Krishnan 1960-2 Lab LJ 592 = (AIR 1960 SC 1223) and Bombay Union of Journalists v State of Bombay, 1964-1 Lab LJ 351 = (AIR 1964 SC 1617), and emphasised that the Government, on these authorities, would be justified in considering the *prima facie* merits of the dispute, and in taking into account other relevant data which may assist the Government to decide whether a reference would be expedient or otherwise. The learned Judge then came to the conclusion that the Government did not act, in this case, on anything extraneous or irrelevant, and that the Government would be justified in taking into account, in the manner that they did, the settlement reached by another union of the workers, namely, T V S Workers Union, with the Management, in regard to certain aspects of the points in controversy.

3. It is needless for us to emphasise that where there are two unions of workers in the concerned industry, or unit of industry as in this case, and one Union which contains the majority of the workers claims to have arrived at a settlement with the Management through negotiation in respect of the very matters in controversy, or some of them, a minority Union like the present appellant cannot

urge that these facts should be altogether omitted from consideration by Government, in deciding on the expediency of the reference. On the contrary, those facts would be perfectly relevant, and it would be equally relevant whether developments subsequent to the period or date when the issues in controversy were raised, may render the reference itself otiose. Mr Dola, for the appellant Union, does concede that such developments might have taken place, and, hence, that, at the present moment, in view of the considerable lapse of time since the original issues in controversy were raised, it may be very difficult to state whether they are live issues, or whether they are not.

4. We may therefore, point out that the learned Judge was entirely justified in taking these facts into consideration, and in coming to the conclusion that it cannot be held in this case, that Government acted arbitrarily or upon consideration of matters not germane to the subject, when they declined reference under Sections 10 and 12 of the Act. It is indisputable that our power in Mandamus in this case is not either to direct such a reference or to constrain the Government to do so but only to ask the Government to reconsider the issue. Again, it appears to be equally indisputable that there is no bar of limitation applicable to such cases. It may be that conditions have bettered so much, that the original issues are now academic. It may be that other grievances have developed, or even that they are more controversial than they were when the Union originally agitated for their consideration. It is always open to the Union to agitate for a fresh reference on conditions of employment as between the Union and the Management. Accordingly, we shall leave the matter there, as far as this aspect of the writ appeal is concerned.

5. But Mr Dola for the Union urges that the matter is on a somewhat different footing upon the last of the issues, namely, non-employment of P. Sambasivan. This was an independent dispute, at the inception, and later, the worker became a member of this minority Union, and the Union appears to have sponsored his cause. We are not now stating anything on the merits of the alleged dismissal, indeed, we cannot do so, since the Government declined to make a reference. But we find that the dismissal was in September 1960 and that it was only 12 months later that the Union which subsequently came into existence sponsored the dispute. Actually, the dismissed workman himself became a member of the union, only subsequently. This belatedness was the reason given by the Govern-

ment for declining to make the reference. We cannot state that that is necessarily unreasonable or perverse. Further, conditions might have changed now, and it may even be that the individual workman is employed elsewhere, or is no longer desirous of returning to this unit of industry. Only the Union is the appellant here, and if the workman is still in need of relief with regard to his alleged dismissal, it may be open to the Union to move the Government afresh, on the existing state of facts with regard to the worker.

6. With these observations, the writ appeal is dismissed. The parties will bear their own costs.

VGW/D.V.C.

Order accordingly.

AIR 1969 MADRAS 479 (V 56 C 112)

ALAGIRISWAMI J.

Vellinayagi, Petitioner v. T. Subramaniam, Respondent.

Civil Revn. Petn. No. 2665 of 1966, D/-18-6-1968 from Order of Sub. J. Tanjore D/-7-9-1966.

Hindu Marriage Act (1955), S. 12 (1) (d) and S. 12 (2) (b) (ii) — Petition under S. 12 (1) (d) filed beyond period mentioned in S. 12 (2) (b) (ii) — Petition is not maintainable — What is laid down in Section 12 (2) (b) (ii) is condition subject to which alone petition can be entertained — It is not period of limitation — Section 5 of Limitation Act has no application. AIR 1962 Bom 190, Foll; AIR 1935 Mad 857 (FB), Applied. (Para 1)

Cases Referred: Chronological Paras

(1962) AIR 1962 Bom 190 (V 49) =	
64 Bom LR 27, Savlaram	
Kacharoo v. Yeshodabai	2
(1935) AIR 1935 Mad 857 (V 22) =	
ILR 58 Mad 794 (FB), Chenchuram-	
mana v. Arunachalam	2

V. N. Krishna Rao, for Petitioner; S. Ramalingam, for Respondent.

ORDER:— This is a petition to revise the order of the learned Subordinate Judge of Thanjavur in I. A. 11 of 1966 in O. P. 6 of 1966. O. P. 6 of 1966 was filed by the present respondent for annulment of his marriage with the petitioner. Along with the original petition No. 6 of 1966, he filed the interlocutory application out of which this civil revision petition arises for condonation of the delay of one year, six months and twenty four days in presenting the petition. The parties were married on 18-6-1963. The peti-

tioner gave birth to a child on 26-2-1964. The petitioner intimated to the Municipal authorities on 8-3-1964 disowning the said child. Thereafter he filed the petition for annulment of marriage on 5-1-1966. On behalf of the petitioner (herein) objection was taken that the Court had no jurisdiction to condone the delay in the presentation of the petition for annulment of the marriage and that the conditions laid down in Sec. 12 (2) of the Hindu Marriage Act were conditions subject to which alone an application for annulment of a marriage under Cl. (d) of sub-section (1) of Section 12 could be maintained.

The learned Judge thought that the question for decision in the case was whether the petition for excusing the delay was a bona fide one and whether the petitioner had not filed the petition under Section 12 on a bona fide mistake of fact. He also thought that in a matrimonial case it would be very difficult to apply strictly the law of limitation because when the Hindu Marriage Act alone provides for dissolution of the marital tie on the ground of the wife being proved to have been conceived on the date of the marriage by a person other than the petitioner it would not be possible for the husband to obtain the relief under any other law and that by excusing the delay no injustice would be caused. I am afraid question of bona fide mistake of fact does not arise in this case. We are not now concerned with the question whether the requirements of sub-Cls. (i) and (iii) of Cl. (b) of sub-section (2) of Section 12 are satisfied. We are only concerned with the question whether the requirements of S. 12 (2) (b) (ii) have been satisfied. Sub-clause (ii) of Cl. (b) of sub-section (2) of Section 12 is as follows—

"Notwithstanding anything contained in sub-section (1) no petition for annulling a marriage—

(a)

(b) on the ground specified in Cl. (d) of sub-section (1) shall be entertained unless the Court is satisfied—

(i).....(ii) that proceedings have been instituted in the case of a marriage solemnised before the commencement of this Act within the year of such commencement and in the case of marriages solemnised after such commencement within one year from the date of the marriage; and (iii)....."

What is laid down in sub-cl. (ii) is a condition subject to which alone a petition for annulling a marriage could be entertained. It is not a period of limitation. Section 5 of the Limitation Act cannot apply to this case, because Section 29 (3) of the Limitation Act of 1963 provides—

"Save as otherwise provided in any law for the time being in force with respect to marriage and divorce, nothing in this Act shall apply to any suit or other proceeding under any such law"

2. The wording of Section 12 (2) of Hindu Marriage Act is more or less similar to the wording of Section 9 of the Provincial Insolvency Act, which is as follows—

"9(1) A creditor shall not be entitled to present an insolvency petition against a debtor unless.... (c) the act of insolvency on which the petition is grounded has occurred within three months before the presentation of the petition."

A Full Bench of our Court in the decision reported in *Chenchurammana v Arunachalam*, ILR 58 Mad 794=(AIR 1935 Mad 857) (FB), has laid down that the period of three months fixed in Section 9 (1) (c) of the Provincial Insolvency Act is not a period of limitation but is a condition to an adjudication and accordingly an act of insolvency, which has occurred more than

three months prior to the presentation of the petition, is not available as a ground of adjudication. I may also point out that a Bench of the Bombay High Court in *Savilaram Kacharoo v. Yeshodabai*, 64 Bom LR 27 = (AIR 1962 Bom 190) has taken the view that—

"Compliance with Section 12 (2) (b) of the Hindu Marriage Act 1955, is a condition precedent to the entertainment of a petition under Section 12 (1) (d) of the Act, and therefore, a petition filed beyond the period mentioned in Section 12 (2) (b) (u) of the Act cannot be saved by reason of the provisions of Section 10 of the General Clauses Act, 1897."

With respect I follow the decision of the Bench. It follows, therefore, that the learned Subordinate Judge had no jurisdiction to allow I A 11 of 1966 and condone the delay. The civil revision petition is allowed. I A. 11 of 1966 will as a consequence stand dismissed. No order as to costs.

JHS/D.V.C.

Revision allowed.

E N D

Takyel Khongbal village No. 93, in favour of the respondents 3 to 5 and two others viz. the deceased Maipakpi Devi and Chaobiton Devi or in the alternative to issue a writ in the nature of mandamus directing the first respondent to hear and decide the case of the petitioners on merits according to law.

2. The brief facts of the case, which have led to the institution of the present petition, are as follows :

The petitioners allege that C. S. plots Nos. 83, 284, 523, 538 etc. in C. S. plot No. 284 in Takyel Khongbal village 93 is immemorial grazing ground for the cattle of the villagers of Bijoy Govinda Gram Panchayet, Takyel Gram Panchayet and Lamjaotongba Gram Panchayet. The Government of Manipur took up the matter of allotment of a portion of the land on 6-5-1965 in favour of 5 political sufferers. The Director of Settlement and Land Records, Manipur granted certain lands on 7-10-1966 to the respondents 3 to 5 and two others namely, Smt. Wai-khom ongbi Kumari Devi, Smt. Ayekpam ongbi Rajani Devi, Smt. Pebam ongbi Chamu Devi and late Laimayum ongbi Maipakpi Devi and late Aribam ongbi Chaobiton Devi, (vide Exts. B/1 and A/5). The petitioners allege that in the first week of May 1967 they came to know of the allotment, that they held a public meeting on 28-5-1967 objecting to the allotment and that they made a representation on 17-6-1967 to the Secretary R. & M., Government of Manipur, requesting him to cancel the allotment but that no action was taken by the second respondent. (Vide Exts. A/6 and A/7).

The petitioners filed a revision petition (C. C. Rev. Revision Petition No. 178/1967) on 26-7-1967 in the Court of the first respondent (Chief Commissioner, Manipur) under section 95 of the Manipur Land Revenue and Land Reforms Act of 1960 (hereinafter called as the Act of 1960) to set aside the allotment. Also, they filed a petition under section 5 of the Indian Limitation Act read with para 62 of schedule III of the Manipur Land Revenue and Land Reforms Rules of 1961 framed under the Act of 1960 (hereinafter called as the Rules of 1961). But, the learned Chief Commissioner, Manipur summarily dismissed the case without hearing the petitioners on the ground that the petition was barred by limitation, though no period of limitation is prescribed by section 95 of the Act (Vide Exts. A/9 and A/10). Hence, the present writ petition.

3. The writ petition was opposed by the respondents 1, 2 and 7 who filed a joint counter. The other respondents also filed a joint counter. Their allegations are the same.

4. The points which were argued and which arise for determination are:

(i) Whether the order of the first respondent is correct?

(ii) Whether the writ petition is not maintainable?

5. Points i and ii:— Ext. A/10 shows that the learned Chief Commissioner dismissed C. C. (Revenue) Revision Petition No. 178 of 1967 summarily on the ground that the petition was filed on 26-7-1967 questioning the order of the Director of Settlement and Land Records dated 7-10-1966 after lapse of nearly eight months and that there was no reason why such delay had occurred and why the revision petition was not filed "in time".

6. But, Section 95 of the Act runs thus: "The Administrator or the Deputy Commissioner may, at any time, either on his own motion or on the application of any party, call for the records of any proceedings before any revenue officer subordinate to him for the purpose of satisfying himself as to the legality or the propriety of any order passed by such revenue officer, and may pass such order in reference thereto as he thinks fit:

Provided that he shall not vary or reverse any order affecting any right between private persons without having given to the parties interested notice to appear and be heard." Section 95 does not lay down any period of limitation. On the other hand, it gives wide powers of interference to the Administrator and the Deputy Commissioner, who may at any time, call for the records of any proceedings before any revenue officer subordinate to him and may pass such orders as they think fit. But, the order in question shows that the learned Chief Commissioner was under the impression that Section 95 of the Act prescribes some period of limitation, though it does not. As such, his order is liable to be set aside.

7. Further, Ext. A/9 shows that the petitioners filed a petition under Section 5 of the Indian Limitation Act to condone the delay, if any, in filing the revision petition. Under Section 81 of the Act of 1960, a revenue officer sits as a Revenue Court when he exercises the powers under the Act of 1960. Paragraph 62 of Schedule III of the Rules of 1961 directs that a Revenue Court should hold an enquiry in the manner prescribed by the Code of Civil Procedure. So, the learned Chief Commissioner should have exercised his jurisdiction and considered the merits of the petition filed by the petitioners under Section 5 of the Limitation Act to condone the delay, if any. But, he failed to do so. For this reason also the order of the first respondent is liable to be set aside.

8. The contention of the learned Government Advocate is three-fold. His first contention is that the land in question is not a grazing ground, that the respondents deny the nature of the land and that the writ petition is not maintainable, as there is a disputed question of fact. He relied on

Union of India v. T. R Varma, AIR 1957 SC 882 and Ganesh Chandra Khan v. State of West Bengal, AIR 1958 Cal 114 in support of his contention. Though the respondents dispute the nature of the land, the very counter filed by the respondents 1, 2 and 7 shows that in the recent cadstral survey, the land in question was entered as grazing ground in the Dag Chitha Vide paras 2 and 4 of their counter. The petitioners produced Exts A/1 to A/4 certified copies of Dag Chithas in the land records (record of rights) wherein C S Plots Nos 83, 284, 523 and 538 in village No 93, were recorded as "village grazing ground". The entries were made according to the sub-rule (u) of Rule 55 and sub-rule (1) of Rule 66 of the Rules of 1961. The entries in the Dag Chitha were made by the Revenue Officers concerned in Form VII prescribed by the Rules of 1961 after consulting the previous records and after making local investigation. Under Section 74 of the Indian Evidence Act, a Dag Chitha is a "Public document" forming the act or the record of the act of a public officer. Section 2 (17), Civil P C defines a "public officer" as a person falling in any one of the categories mentioned therein including an officer, whose duty is to make any survey of Government property etc. Section 35 of the Indian Evidence Act makes an entry in any public or official record made by a public servant in the discharge of his official duties as a relevant fact. So, the entries in Exts A/1 to A/4 are relevant to show prima facie that the land in question is a "village grazing ground".

But, the survey is said to be still going on and the record of rights has not been finally published under Section 43 of the Act of 1960. A presumption that the record of rights is correct arises only after it is finally published. So, the weight to be attached to the entries in Exts A/1 to A/4 has to be decided by the learned Chief Commissioner. But, their admissibility in evidence is quite a different matter and they are admissible in evidence to prove that the lands were tentatively recorded in the Dag Chithas as "village grazing ground". Also, the petitioners filed Ext. A/12 to show that the then Chief Commissioner cancelled the allotment of neighbouring land in C. C. (Revenue) Revision Case No 6 of 1981 on the ground firstly that no consideration was given by the S O to the question whether there was enough grazing ground left for the village after the settlement of the land in dispute was made, secondly that notices calling for objections to settlement were not effectively served and, thirdly, that a number of persons to whom settlement was made appeared to be fictitious. The petitioners also filed Exts A/15 and A/16 to show that notices were issued by the S D C., I W, in the Eviction Cases Nos. 33 and 36/A S & 80 of 1960 and that eviction cases were started against them. The petitioners also

rely on Ext. A/17 proceedings in the Manipur Assembly to show that the Government admitted that the land in question is village grazing ground. Thus Ext. A/12 and A/15 to A/17 further probabilise the petitioners' contention that the land in question was set apart as common village grazing ground and that there is justification for the petitioners' complaint that a portion of the village grazing ground was granted away to some political sufferers. As the matter is being remanded, I do not wish to enter deeper into this aspect of the case.

9. The second contention of the learned Government Advocate is that the petitioners have an alternative remedy under S 11 of the Act of 1960 and that Section 159 of the Act of 1960, bars the jurisdiction of the Civil Court with respect to any matter arising under the Act. He argued that the land in dispute is vested in the Government under Section 11 (1) of the Act of 1960, that the petitioners should have filed a petition before the Deputy Commissioner claiming the land under sub-section (3) of Section 11 of the said Act and that, if the petitioners felt aggrieved with his order or any order passed in appeal or revision, then they should institute a civil suit within a period of six months from the date of the order under sub-section (4) of Section 11 of the Act. He relied on the passages at pages 34, 35 and 37 of the Fundamental Rights and Constitutional Remedies by V G Ramachandran—Vol III—1963 edition, where the learned author states that in the matter of domestic tribunals there is a certain amount of finality in the exercise of their powers on account of their being vested with autonomy within their sphere in the interest of public good and that the Court can intervene in a limited way, either when such domestic authorities have acted under bias or in bad faith and mala fide or when they have violated the principles of natural justice or when such authorities have exceeded their jurisdiction under the statute. Vide also Raj Krushna Bose v. Binod Kanungo, AIR 1954 SC 202.

Though the learned counsel for the petitioners contended that Section 11 of the Act does not apply to the land in question, his contention is not correct. Section 11 of the Act of 1960 is very general in scope, which vests the property in all the lands etc., which are not the property of any person, in the Government. The petitioners have got only an easementary right of pasturage over the lands. They are not the owners of the same. But, it has to be seen that under Section 13 of the Act, the Deputy Commissioner has to set apart land belonging to the Government for pasturage for the village cattle etc. Rules 9 to 13 of the Rules of 1961 lay down the procedure to be adopted by him when he sets apart land for pasturage for the village cattle. But, it appears that, so far, he did not allot any land under Section 13 of the Act for pasturage for the village cattle.

In Manipur the Assam Land and Revenue Regulation, 1886 (Assam Act 1 of 1886) was in force before the Act of 1960 repealed it. The petitioners claim that their right of pasturage under the Regulation is saved by section 170 of the Act 1960. Thus, the petitioners have got 2 remedies under the Act of 1960. Either they could file an application under sub-section (3) of Section 11 of the Act of 1960 before the Deputy Commissioner questioning the grant. Alternatively, they could also file revision petition under Section 95 of the Act questioning the order of the Settlement Officer which affected the petitioners' right, which are preserved and saved by Section 170 of the Act of 1960. They pursued the latter remedy. But, the first respondent failed to exercise jurisdiction vested in him by disposing of the revision petition and the petition filed under Sec. 5 of the Limitation Act on merits. The existence of an alternative remedy is not always a bar to the exercise of writ jurisdiction by the High Court. Vide *Ravi Pratab Narain Singh v. State of Uttar Pradesh*, AIR 1952 All 99, *State of U. P. v. Mohammad Nooh*, AIR 1958 SC 86, *M. Velayudhan v. State of Kerala*, AIR 1960 Kerala 220 and *Collector of Monghyr v. Keshav Prasad Goenka*, AIR 1962 SC 1694. As the order of the first respondent is manifestly incorrect and against natural justice, a writ of Mandamus has to issue to set right the illegality and the writ petition is maintainable. It is desirable that the first respondent should direct the Deputy Commissioner to set apart land under Section 13 of the Act of 1960 for the purpose of pasturage for the village cattle, after due enquiry according to the Rules of 1961 to avoid further litigation.

10. The third contention of the learned counsel for the respondents is that the petitioners did not file any petition under O. I, R. 8, Civil P. C. so that they may represent the body of villagers and that the writ petition is not maintainable. He referred to the American Law on the subject and relied on sub-articles (a) and (b) of Article 47 at pages 77 to 81 of Vol. 55 of *Corpus Juris Secundum*. But, the Indian Law is different. Even a right to graze, which is an easementary right to land, is "property" within the meaning of Article 19 (1) (f) of the Constitution of India, and is a fundamental right guaranteed by the Constitution of India. Vide *Brij Bhukan Kalwar v. D. O. Siwan*, AIR 1955 Pat 1 (SB) and *State of Manipur v. Nongthombam Amubi Singh*, AIR 1957 Manipur 1. The petitioners and every other villager of the 3 villages in question have a right to graze his cattle on the village grazing ground and if the land is allotted to others, the petitioners' right is affected and it is not necessary for the petitioners to represent other villagers also. The issuing of writs or directions by the High Court is founded only on its decision that a right of the aggrieved party under Part III of the Constitution of India had been infringed. The

existence of the right is the foundation for the exercise of jurisdiction of the High Court under Article 226 of the Constitution. The petitioners have to make out some personal interest, which the law recognises, to invoke the writ jurisdiction of the High Court. Vide *State of Orissa v. Madan Gopal Rungta*, AIR 1952 SC 12, *Bhanwarlal v. Rajasthan State*, AIR 1953 Raj 180, *Damodar Goswami v. Namaravan Goswami*, AIR 1955 Assam 163 and *Dr. P. S. Venkataswamy Setty v. University of Mysore*, AIR 1964 Mys 159. So, the writ petition is not liable to be dismissed on this ground.

11. The petitioners' counsel also referred to certain merits of the case. Firstly, he stated that there are executive instructions by the Central Government and the Government of Manipur that, before any village land is allotted to others, notice should be issued to the village Panchayet concerned and that no allotment should be made before such notice is issued. He produced Exts. A/13 and A/14 which are copies of the instructions of the Government of India and the Government of Manipur respectively, which support his contention. But, no writ lies for violation of and disobedience to the executive instructions. Vide *G. J. Fernandez v. State of Mysore*, AIR 1967 SC 1753. It is for the first respondent to consider the executive instructions.

Secondly, the petitioners' counsel stated that the allotment was made to two dead persons, namely, Laimayum Ongbi Maipakpi Devi and Aribam Ongbi Chaobiton Devi. The learned counsel for the respondents 1, 2 and 7 stated that the proposal for the allotment to political sufferers was taken up on 6-5-1965, that as one of the ladies was found dead long ago, her name was excluded from the list of recommended persons, but that her name was entered in the list and that the order of the allotment in her name was cancelled on 3-11-1966 when the mistake was detected. But, still there was another person Maipakpi Devi, who too died. The respondents' counsel stated that the proposal for settlement was made in her favour when she was alive and that therefore the allotment order was not cancelled. This has to be considered by the first respondent.

Thirdly, the petitioners' counsel stated that all the ladies are widows and "disqualified persons" within the meaning of Sec. 2 (q) of the Act, that under Section 46 (2) of the Act, a minor's contract is void as a minor is a disqualified person and that similarly a widow is equally disqualified and is not entitled to a grant. But, there is no force in this contention, inasmuch as, even a widow can be a landless poor person and a cultivator within the meaning of Rule 6 of the Allotment of Land Rules, 1962. But, under Rule 6 (1) of the said Rules, a person who is evicted is entitled to preference. The bearing of the Allotment of Land Rules is

also to be considered by the learned Chief Commissioner.

12. For the above reasons I find point (i) in the negative. I find on Point (u) that the writ petition is maintainable.

13. In the result, the writ petition is allowed and the order of the first respondent dated 27-7-1967 in C. C. (Revenue) Revision Petition Case No 178 of 1967 is set aside. He should dispose of the case in the light of observations made in this order. There shall be no order for costs in this petition. TVN/D.V.C. Petition allowed.

**AIR 1969 MANIPUR 84 (V 56 C 25)
C JAGANNADHACHARYULU, J. C.**

Tronglaobi Pisciculture Co-operative Society Ltd., Petitioner v. Chief Commissioner (Administrator) of Manipur and others, Respondents

Civil Writ Appln. Case No. 5 of 1965, D/- 13-1-1969

(A) T. P. Act (1882), S. 8 — Construction of documents — Settlement of land describing the boundaries — Recital about extent found incorrect — Boundaries to prevail over extents — (Words and Phrases — Falsa demonstratio).

In a case where the document settling the land described it by boundaries and further stated it to be of an extent of 5 paris and it was later on found to consist of 6¼ paris in extent, the boundaries must prevail over the wrongly mentioned measurements. The fact that the boundaries brought in portions low-lying and portions like mounds, was immaterial. The incorrectly described quantity has to be rejected as falsa demonstratio. AIR 1924 Mad 493 & AIR 1939 Rang 896 & AIR 1948 PC 207 & AIR 1968 Andh Pra 260 and Passage at 760 of the Evidence Act by Sarkar, 8th Edn., Rel on (Para 12)

(B) Evidence Act (1872), Ss. 35 and 74 — Record of rights — Entries in — Admissible even though the record is not finally published. (Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), Ch. V). (Para 12)

(C) Constitution of India, Art. 226 — Writ challenging order of Settlement Officer — Documents filed along with the reply affidavit could be relied upon — Fact that those were not relied on before the officer could not bar their being considered — Disputed questions of fact have to be decided on basis of affidavits — Plea taken in the affidavit in rejoinder could also be considered. AIR 1965 SC 1578 & AIR 1967 SC 295, Foll. (Para 12)

(D) Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 93 — Manipur Land Revenue and Land Reforms Allotment of Land Rules, 1962, Rr. 6 and 8 — Landless agricultural worker is to be preferred in allotting land for agri-

cultural purposes — A registered Co-operative Society to be preferred to the individual — Allotment ignoring the above is liable to be set aside. (Para 14)

(E) Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 14 (1) and (2) — Manipur Land Revenue and Land Reforms Rules, 1961, R. 6 — Deputy Commissioner alone can allot land for purposes of agriculture or construction of dwelling houses — The Administrator can, however, direct the Deputy Commissioner to allot the land — Impugned order, a direct allotment by the Administrator and not a direction to Deputy Commissioner — Allotment, held, illegal. (Para 15)

(F) Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), S. 94 (1) (a) — Manipur Land Revenue and Land Reforms Rules, 1961, R. 135 — Revenue Court to follow procedure under Civil P. C. — Order by Settlement Officer without hearing party is void and can be ignored — Hence an appeal against can be filed even beyond the 30 days period prescribed under S. 94 (1) (a) — (Words and Phrases — 'Void' judgment).

In a case where the Settlement Officer passed orders without hearing the party and who, aggrieved by it preferred an appeal under Section 94 (1) (a) but beyond the period of 30 days prescribed for filing such appeal, the order of the Settlement Officer being void could be challenged even beyond the time prescribed for appeal. Under R 135 of the Rules, the Revenue Court has to decide the cases following the provisions of Civil P. C. (Para 16)

A "void" judgment has been defined as one which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. Black's Law Dictionary, p. 1745, 4th Edn. and AIR 1953 Manipur 20, Foll. (Para 16)

(G) Co-operative Societies — Assam Co-operative Societies Act (1 of 1950), S. 85 — Writ petition by a society said to be represented by the named Chairman is maintainable. (Constitution of India, Art. 226). (Para 17)

(H) Evidence Act (1872), S. 115 — On facts, held, estoppel did not operate.

The petitioner was claiming all the land lying within the boundaries mentioned in the settlement in question. His case was not that he should be given fresh settlement of the land found in excess of the description as to extent appearing in the settlement.

Held that his application before the Director of Settlement and Land Records to grant the excess land in its favour, did not operate as estoppel. Under Section 115, Evidence Act if a person, by his declaration, act or commission intentionally causes or permits another person to believe a thing to be true and act upon such belief, then the former is estopped from denying the truth of the thing. AIR Commentaries on Constitution

of India, Vol. 2 Page 1559 and AIR 1953 Raj 1, Rel. on. (Para 18)

(I) Constitution of India, Art. 226 — Existence of other remedy is not always a bar to exercise of writ jurisdiction — (Tenancy Laws — Manipur Land Revenue and Land Reforms Act (33 of 1960), Ss. 11 (4) and 159 — Remedy of a Civil suit challenging order of Dy. Commissioner under S. 11 (4) — Bar of Civil and other proceedings under S. 159 — Provisions do not bar filing of a writ petition) — (Civil P. C. (1908), S. 9).

It is too late in the day to argue that where there is an alternative remedy, no writ petition lies. The existence of an alternative remedy is not always a bar. It is pre-eminently a matter of discretion. Where the remedy suggested is not equally convenient or efficacious or effective and when it involves very onerous, expensive and lengthy proceedings, a writ lies. Thus, the provision under S. 11 (4) of the Manipur Land Revenue and Land Reforms Act for a suit challenging an order of the Deputy Commissioner within six months from the date thereof and the provision under S. 159 of the same Act barring civil or other proceedings in respect of any matter arising under the Act, held did not bar the filing of a writ petition. AIR 1965 SC 1321 & AIR 1966 SC 197 & AIR 1967 SC 81 & AIR 1967 SC 1401 & 1968 Lab IC 722 (Punj) & 1968 Lab IC 1145 (Manipur), Rel. on. (Para 19)

(J) Constitution of India, Art. 226 — Existence of legal right and its infringement is basis for exercise of writ jurisdiction — Orders of tribunals disturbed by Judicial Commissioner's Court in exercise of extraordinary jurisdiction and not sitting as an appellate authority. Passages at Pages 2882, 2884, 2885, 2892 and 2903 in Vol. III of AIR Manual 2nd Edn.; AIR 1952 SC 192 & AIR 1955 SC 425, Ref.; AIR 1954 SC 207 & AIR 1961 Cal 545 (SB) & AIR 1962 SC 1044 & AIR 1963 SC 507 & AIR 1964 SC 685, Foll. (Para 20)

Cases Referred: Chronological Paras

(1968) 1968 Lab IC 1145 (Mani), Iuwangjao Kabui v. Union of India	19
(1968) 1968 Lab IC 722 (Punj)=ILR (1967) 1 Punj 747, Surgical Dressings Mfg. Co., Pvt. Ltd. Amritsar v. Punjab State	19
(1967) AIR 1967 SC 81 (V 54)=(1966) 3 SCR 84, I.T. Officer, Salem v. Short Brothers (P) Ltd.	19
(1967) AIR 1967 SC 295 (V 54)=(1966) Supp SCR 311, Barium Chemicals Ltd. v. Company Law Board	12
(1967) AIR 1967 SC 1401 (V 54)= (1967) 2 SCR 751, Tata Engineer- ing & Locomotive Co. Ltd. v. Asstt. Commr. of Commercial Taxes	19
(1966) AIR 1966 SC 197 (V 53)= (1966) 1 SCR 284, Addl. Collector of Customs, Bombay v. Shantilal and Co.	19

(1966) AIR 1966 Andh Pra 260 (V 53)= (1965) 2 Andh WR 366, Basavapunna Reddy v. Krishnayya	12
(1965) AIR 1965 SC 1321 (V 52)= (1965) 2 SCR 653, Municipal Coun- cil, Khurai v. Kamal Kumar	19
(1965) AIR 1965 SC 1578 (V 52)= (1965) 3 SCR 17, Sri-la Sri Subra- mania Desika Gnanasambanda Pan- darasannia v. State of Madras	12
(1964) AIR 1964 SC 685 (V 51)= 1964 SCD 278, State of Orissa v. Ram Chandra	20
(1964) AIR 1964 SC 825 (V 51)= (1964) 5 SCR 508, Commr. of I.T. Andhra Pradesh v. Sri Raja Reddy Mallaram	12
(1963) AIR 1963 SC 507 (V 50)= (1962) 2 SCR 711, State of Punjab v. Suraj Prakash Kapur	20
(1963) AIR 1963 Assam 168 (V 50), Ramchandra Malpani v. State of Assam	19
(1963) AIR 1963 Madh Pra 218 (V 50)=1963 Jab LJ 163, Kailash Chandra v. District Judge, Bhopal	19
(1962) AIR 1962 SC 1044 (V 49)= (1963) 1 SCJ 106, Calcutta Gas Co. (Proprietary) Ltd. v. State of W. B.	20
(1961) AIR 1961 Andh Pra 253 (V 48)= 1961-43 ITR 344, E. Nawasaiah v. Dist. Collector, Kurnool	12
(1961) AIR 1961 Cal 545 (V 48)= 65 Cal WN 920 (SB), Pramatha Nath Mitter v. Chief Justice of the High Court, Calcutta	20
(1958) AIR 1958 Manipur 20 (V 45), Maopha Tangkhul v. Vakam	16
(1957) AIR 1957 SC 397 (V 44)=1957 SCR 233, M/s. Pannalal Binraj v. Union of India	12
(1955) AIR 1955 SC 425 (V 42)= 1955-2 SCR 1, Sangram Singh v. Election Tribunal, Kotah	20
(1954) AIR 1954 SC 207 (V 41)= 1954 SCR 738, K. S. Rashid & Sons v. Income-tax Investigation Commis- sion	20
(1954) AIR 1954 All 447 (V 41)= 1954 Cri LJ 879, Basant Singh v. Janak Singh	12
(1954) AIR 1954 Bom 202 (V 41)= ILR (1954) Bom 247, Gandhinagar Motor Transport Society v. State of Bombay	12
(1953) AIR 1953 Raj 1 (V 40)=ILR (1952) 2 Raj 265, Shiv Narain v. Regional Transport Authority, Jaipur Region, Jaipur	18
(1952) AIR 1952 SC 192 (V 39)= 1952 SCR 583, G. Veerappa Pillai v. Raman & Raman Pillai, Kumba- konam	19, 20
(1948) AIR 1948 PC 207 (V 35)=62 Mad LW 21, Palestine Kupat Am Bank Co-op. Society v. Govt. of Palestine	12

- (1939) AIR 1939 Rang 396 (V 26)=
185 Ind Cas 641, Baker Ali v.
Amir Ali Meah 12
- (1924) AIR 1924 Mad 493 (V 11)=
46 Mad LJ 182, Subbaya Chakki-
lyan v M Muthua Goundan 12
- A Nilamani Singh, for Petitioner, Ibotombi
Singh Govt. Advocate, for Respondents Nos.
1 & 2

ORDER The petitioner Tronglaobi Pisciculture Co-operative Society Ltd., by its Chairman, Maimom Iboton Singh of Kiyam Siphai village under Thoubal Police Station obtained rule nisi under Articles 226 and 227 of the Constitution of India against (1) the Chief Commissioner of Manipur, (2) the Union Territory of Manipur and (3) Khundrakpam Khamba Singh of Kiyam Siphai village calling upon the respondents to show cause why a writ of certiorari should not be issued quashing the order of the first respondent dated 8-12-1964 passed by him in C. C. Revenue Appeal Case No 5 of 1964, under which 177 acres of land covered by new Dag No 4004 situate in Kiyam Siphai village was ordered to be settled in favour of the 3rd respondent under the Manipur Land Revenue and Land Reforms Act (Act XXXIII of 1960), hereinafter called as the Act of 1960

2. The respondents showed cause.

3 The brief facts of the case leading to the institution of the present writ petition are thus. An extent of 1662 acres of land covered by patta No 96/1(A) Thoubal Tahsil situate in Kiyam Siphai village formed part of Wathou Soirel Fishery No 226, having been declared as such under Section 16 of the Assam Land and Revenue Regulation (Regulation 1 of 1886) which was made applicable to Manipur. It was temporarily settled by the Government in 1953-54 with the Wathou Phumnon Fishing Co-operative Society Ltd. The said Society enjoyed the land as lessee of the Government till 1961-62, during which period the third respondent was employed as Chowkidar of a brick-field and was allowed to occupy a portion of the land. The Society was dissolved in 1962-63.

4. Some of the members of the aforesaid Society, who are landless agricultural workers, proposed to form a Pisciculture Co-operative Society and to have the above-mentioned land settled with the latter for piscicultural purposes. The Deputy Commissioner of Manipur submitted to the Government of Manipur proposal to de-reserve the said land from Wathou Soirel Fishery No 226 to settle it with the petitioner's Society. The first respondent accorded sanction to the dereservation of land measuring 5 paris out of the said Wathou Soirel Fishery No 226 in favour of the petitioner's Society and described the boundaries of the land. They are Wathou Fishery and foot-path on the northern side and on the three remaining sides there are "Burma Road and hill". Vide Ext. A/1 dated 1-5-1962 certified copy of the order of the first respondent.

5. The petitioner's Society was registered on 16-8-1962 as Tronglaobi Pisciculture Co-operative Society Limited with 42 landless agricultural workers as members, who reside within a distance 2 kilometres from the said land. The Deputy Commissioner passed an order (under Section 14 (1) of the Act of 1960 and Rules 8 (ii) and 12 (a) of the Manipur Land Revenue and Land Reforms (Allotment of Land) Rules, 1962) settling the land with the petitioner's Society. He directed that the petitioner's Society should lay an earthen boundary bund, so that 5 paris might be separated from the Wathou Soirel Fishery No 226. He described the land settled with the petitioner by the same boundaries as mentioned in Ext A/1. Vide Ext A/2 certified copy of his order dated 8-12-1962.

6. In the course of the survey and settlement operations in 1962-63, it was discovered that the actual extent of the land is 6½ paris and not 5 paris. The entire extent was put in the name of the petitioner in the Dag Chitha prepared in 1962. Vide Ext. A/7 certified copy of the Dag Chitha. There were criminal proceedings between the petitioner and the 3rd respondent regarding the excess land. When the third respondent interfered with the disputed excess portion of the land, the S D M Thoubal directed him to execute a bond under Section 107, Criminal Procedure Code for keeping the peace in N. F. I. R. case No. 21 of 1963. Vide Ext. A/10 certified copy of the police report and the order of the S D. M. dated 21-2-1964. Again, when the third respondent interfered with the petitioner's possession of the land, the S D M, Thoubal restrained him by an order under Section 144 (2), Criminal Procedure Code from causing any interference. Vide Ext. A/8 certified copy of his order in Criminal Misc Case No 8 of 1964 dated 9-4-1964. Subsequently, the S D M, Thoubal, restrained both the parties from interfering with the disputed extent of area. Vide Ext A/9 certified copy of his order in Criminal Misc Case No. 8 of 1964 dated 17-7-1964. Finally, the third respondent entered upon the disputed land and raised a long bund.

7. The petitioner's Society filed an application dated 15-5-1964 before the Director of Settlement and Land Records stating the facts and requested him to assess all the available land within the boundaries described in Exts A/1 and A/2 in favour of the petitioner. It also objected to proposal for settlement of any portion of the land with the third respondent. On the report of the Assistant Survey and Settlement Officer, Thoubal and of Shri A. K. Biswas, Deputy Settlement Officer having the powers of the Survey and Settlement Officer under the Act of 1960, Shri A. C. Bhattacharye Settlement Officer having the powers of the Director of Settlement and Land Records passed an order on 12-8-1964 approving of the recording of the entire area of 1662

acres in the name of the petitioner's Society and recording the third respondent as an encroacher in respect of 1.77 acres within the said land. Vide Ext. A/3 certified copy of their orders.

8. The third respondent preferred a memorandum of appeal D/- 26-9-1964 under S. 93(1) (c) of the Act of 1960 to the first respondent against the order of the Settlement Officer D/- 12-8-1964 in C. C. Revenue Appeal No. 5 of 1964. The first respondent allowed the appeal on 8-12-1964 and granted settlement of 1.77 acres out of the disputed land in favour of the third respondent and ordered that the remaining excess land should be settled with the petitioner society.

9. Hence, the present petition for an appropriate writ to quash the order of the first respondent dated 8-12-1964.

10. The respondents 1 and 2 filed a counter affidavit narrating the facts that the third respondent filed N. L. Case No. 261 of 1962 on the file of the A. S. & S. O. (B), Thoubal seeking settlement of 3 sangams within Waithou Fishery area claiming that it was in his possession, that the Supervisor Kanungo recommended his application, that the third respondent had also filed another petition Misc. Case No. 333 of 1963 A. S. & S. O. (B) before the Director of Settlement and Land Records for the same relief, that the petitioner filed Misc. Case No. 986/1964/A. S. & S. O. Thoubal for assessment of land revenue in respect of the excess area of acres 4.12. claiming that it was included within the area settled by the Deputy Commissioner on 8-12-1962 as seen from Exts. A/1 and A/2 and that the Director of Settlement and Land Records held in favour of the petitioner while the first respondent set aside his order on appeal by the third respondent.

11. The third respondent stated in his counter affidavit that the order of the Director of Settlement and Land Records dated 12-8-1964 is illegal, that the third respondent has been in possession and enjoyment of the excess land, that only 5 paris, i.e., ac. 12.50 of land was settled with the petitioner's Society, that the Society has no right to the remaining excess land and that the first respondent properly settled 1.77 acres of land in favour of the third respondent.

12. The first question that arises for determination is whether the land mentioned within the 4 boundaries described in Exts. A/1 and A/2 which has been subsequently found to be 6¾ paris, that is, 16.62 acres was settled with the petitioner or whether only 5 paris, equal to 12.50 acres of land mentioned in Exts. A/1 and A/2 was settled in favour of the petitioner society. In other words, the question is whether the boundaries prevail over the extent. Though the extent of the land was described as 5 paris i.e., 12½ acres of land in both Exts. A/1 and A/2, the land, which was settled with the petitioner, was described by boundaries. The northern

boundary was described as Waithou Fishery and foot-path. The eastern, western and southern boundaries were described as "Burma Road and hill". It transpired in the Survey and Settlement operation of 1962-63 that the land is actually 6¾ paris, equal to 16.62 acres and not 5 paris i.e., 12½ acres. The contention of the respondents' counsel is that the extent was described as 5 paris in both Exts. A/1 and A/2 and that therefore 5 paris of land only were settled with the petitioner's Society.

Though, it is true to say that the extent was described as 5 paris, the land which was settled with the petitioner was further identified by boundaries. It appears that there is a mound between the low-lying area and the Burma Road and the hill on the southern side which is the material boundary in this case. It also appears that when the land was enjoyed by Waithou Soirel Fishery No. 226, the third respondent was employed as Chowkidar of a brick-field and was allowed to occupy a portion of the mound. So, he has been in possession of the elevated portion of the mound. But, in view of the fact that the land described within the boundaries mentioned in Exts. A/1 and A/2 was settled with the petitioner's Society, it follows that the boundaries must prevail. It can be seen from Ext. A/3 also that the area allotted is bounded by Burma Road and hill on the southern and the western sides. According to the petitioner's counsel the Burma Road and the hill on the southern side are in a zig-zag condition. It is immaterial whether a portion of the land settled with the petitioner is low-lying and another portion is like a mound, inasmuch as, the fixed boundaries have to prevail over the wrongly mentioned measurements. The incorrectly described quantity has to be rejected as falsa demonstratio. This proposition of law cannot be disputed. Vide passage at page 760 of the Indian Evidence Act by Sarkar 8th Edition and Subbayya Chakkiliyan v. M. Muthia Goundan, AIR 1924 Mad 493, Baker Ali v. Amir Ali Meah, AIR 1939 Rang 396, Palestine Kupat Am Bank Co-operative Society Ltd. v. Govt. of Palestine, AIR 1948 PC 207 and A. Basavapunnareddy v. K. Krishnayya, AIR 1966 Andh Pra 260. That the respondents 1 and 2 understood that the settlement covered the entire land within the 4 boundaries described in Exts. A/1 and A/2 is clear from Exts. A/5 and A/6, under which the arrears of land revenue and other dues were realised from the former Waithou Phumnom Fishing Co-operative Society Limited for the entire area and from Ext. A/7 under which the name of the petitioner's Society was registered with reference to the entire 16.62 acres of land. Though the record of rights under Chapter V of the Act of 1960 is not yet finally published, Ext. A/7 is admissible in evidence to show that the entire land in question was mutated in the name of the petitioner's Society. The weight to be attached to this

entry is, of course, a different matter. Exts. A/8 to A/10 show that the third respondent was also restrained by the S. D. M. from interfering with the disputed land.

The learned Counsel for the respondents argued that the petitioner did not rely on Exts. A/5 to A/10 before the 1st respondent and that it cannot rely on them in the High Court. He cited *Basant Singh v Janak Singh*, AIR 1954 All 447, *Gandhinagar Motor Transport Society v State of Bombay*, AIR 1954 Bom 202, *M/s Pannalal Binraj v. Union of India*, AIR 1957 SC 397, *Nawasah v District Collector, Kurnool*, AIR 1961 Andh Pra 253 and *Commr of I-T, Andhra Pradesh, Hyderabad v Sri Raja Reddy Mallaram*, AIR 1964 SC 825 in support of his contention. The first three decisions lay down that the question of jurisdiction of a Tribunal to pass an order cannot be challenged in a writ petition. The fourth case lays down that the plea of illegality of assessment, which was not raised at any stage cannot be raised in a writ petition. The last case decided that a question, not arising out of the order of a Tribunal and out of the question referred to the High Court by the Tribunal, cannot be raised before the Supreme Court in an appeal against the answer given by the High Court upon the reference. But, Exts A/5 to A/10 were filed by the petitioner along with the reply affidavit. They too can be looked into. Disputed questions of fact have to be decided on the basis of affidavits and a plea taken in the affidavit-in-rejoinder can also be considered. Vide *Sri-Lai Sri Subramania Desika Gnanasambanda Pandarasanna v State of Madras*, AIR 1965 SC 1578 and *Barum Chemicals Ltd. v Company Law Board*, AIR 1967 SC 295.

13 Secondly, it is to be seen from Ext. A/1 that the first respondent accorded sanction to the de-reservation of the land within the 4 boundaries for piscicultural purposes. In Ext. A/2 the petitioner was directed to use the land in question only for piscicultural purposes. So, the de-reservation of the land within the 4 boundaries was made only for piscicultural purposes. Under Section 2 (b) of the Act of 1960, "Agriculture" includes "pisciculture". But, the first respondent did not mention in his order in C. C. Revenue Appeal Case No 5 of 1964 (vide Ext. A/4) for what purpose 1.77 acres of land, out of the excess land, were settled with the third respondent, though he settled the remaining excess land of 2.35 acres with the petitioner's Society. The land could be settled only for some agricultural purposes including pisciculture. But, Ext. A/4 does not show that the excess of 1.77 acres was granted to the third respondent for agricultural purposes. Besides, no order was passed for fresh de-reservation of the excess land in favour of the third respondent.

14 Thirdly, according to the Manipur Land Revenue and Land Reforms Allotment

of Land Rules, 1962, which were framed by the first respondent in exercise of the powers conferred on him by Section 98 of the Act of 1960, the third respondent could not be preferred for allotment of the land in question. For, under Rule (6) (u) of the said Rules, in allotting land for agricultural purposes, a landless agricultural worker should be preferred in the order of preference individually mentioned in Rule 6. Under Rule 8 of the said Rules, when there are claims by an individual and a registered Co-operative Society constituted for the purpose for which the land is to be allotted, then the Society has to be given the land in preference to the individual. So, in this regard, the learned Chief Commissioner erred in allotting the land to the third respondent in preference to the petitioner's Society.

15. Fourthly, there is also a lacuna in the order of the first respondent. Under Section 14 (1) of the Act of 1960, it is the Deputy Commissioner who alone can allot land belonging to the Government for agricultural purposes or for construction of dwelling houses, in accordance with the rules. The Administrator can allot land under sub-section (2) of Section 14 of the Act for the purpose of an industry or for any purpose of public utility on such conditions as may be prescribed or he may entrust the management of any such land or any rights therein to the Gram Panchayat of the village established under any law for the time being in force. Under Rule 6 of the Manipur Land Revenue and Land Reforms Rules of 1961, a Revenue Officer may exercise any power or discharge any function, which may be exercised or discharged as the case may be by any officer subordinate to him, save as otherwise provided by the Act of 1960. So, the first respondent could not exercise the powers of the Deputy Commissioner, who is subordinate to him, in view of sub-section (1) of Section 14 of the Act, under which it is only the Deputy Commissioner who can allot land of the Government for agricultural purposes. But, the first respondent could direct the Deputy Commissioner to allot the land of 1.77 acres (if he is otherwise competent to do so) to allot the land to the third respondent. But, Ext. A/4 shows that the learned Chief Commissioner stated that the third respondent encroached upon 1.77 acres of land out of the excess area of 4.12 acres, that considering that he is also a landless person, that he encroached upon the land and that he was in possession of it for about 7/8 years, it would meet the ends of justice, if 1.77 acres of land were settled with him, while the remaining excess land was settled with the petitioner's Society. The third respondent states in para 4 of his counter affidavit that the first respondent acted within his jurisdiction in granting settlement of the land in favour of the third respondent. The order of the first respondent as per Ext. A/4 is an order granting settlement of the land of 1.77

acres in extent in favour of the third respondent and not a mere direction to the Deputy Commissioner to allot the said land to him. So, in this regard also the order of the first respondent is illegal.

16. The petitioner's learned Counsel contended that under S. 94(1)(a) of the Act of 1960, the third respondent should have filed C. C. Revenue Appeal Case No. 5 of 1964 within 30 days from 12-8-1964, the (date of) order of the Settlement Officer in N. L. Case No. 61 of 1962-A. S. S. O. (B) and Misc. Case No. 986/1964-A. S. & S. O. Thoubal and that, therefore, the appeal was incompetent. No doubt, under S. 94(1)(a) of the Act of 1960, the appeal should have been preferred within 30 days from the date of the order. But, the Settlement Officer decided the case in the absence of the third respondent. Under Rule 135 of the Manipur Land Revenue and Land Reforms Rules of 1961 he was bound to follow the provisions of the Code of Civil Procedure in deciding the cases. But, he passed the order without hearing the third respondent. So, his order is a void one. A "void" judgment has been defined as one which has no legal force or effect, invalidity of which may be asserted by any person whose rights are affected at any time and at any place directly or collaterally. Vide the definition of "void judgment" at page 1745 of Black's Law Dictionary — 4th edition. Vide also *Haopha Tangkhul v. Vakam*, AIR 1958 Manipur 20. The order of the Settlement Officer does not bind the 3rd respondent and can be ignored by him. As such, it cannot be said that C. C. Revenue Appeal Case No. 5 of 1964 could not be entertained by the first respondent after the expiry of the period of 30 days.

17. The learned counsel for the respondents formulated the following contentions in support of their plea that the writ petition is not maintainable. Firstly, he urged that under Section 85 of the Assam Co-operative Societies Act (Assam Act 1 of 1950), which is applicable to Manipur the writ petition by the Chairman of the Society is not maintainable. This contention is not correct. Section 85 lays down that every registered Society shall be deemed to be a body corporate by the name, under which it is registered with perpetual succession and a common seal, and with power to hold property, to enter into contracts, to institute and defend suits and other legal proceedings and to do all things necessary for the purposes for which it was constituted. In the present case the petitioner is the Society. But, the petitioner has further added in the cause title that it is represented by the Chairman Maimom Iboton Singh. So, the petitioner filed the writ petition as a body corporate.

18. The second contention of the respondents' Counsel is that the petitioner also ap-

plied to the Director of Settlement and Land Records on 15-5-1964 to grant excess land in its favour and that, therefore, it is estopped from contending that the entire land within the 4 boundaries was settled in the first instance with the petitioner. An estoppel may operate under Section 115, Evidence Act, if a person, by his declaration, act or omission intentionally causes or permits another person to believe a thing to be true and act upon such belief, then the former is estopped from denying the truth of the thing. Vide also page 1559 of Vol. 2 of AIR Commentaries on the Constitution of India — First Edition and *Shiv Narain v. Regional Transport Authority, Jaipur Region, Jaipur*, AIR 1953 Raj 1. But, in the present case it is clear from para 5 of the writ petition that the petitioner never alleged that the excess land should be granted to it under a fresh settlement. But para 5 shows that the petitioner laid a claim to the excess land on the ground that it was included in the original settlement of the entire land included within the boundaries mentioned in Ext. A/2. So, there is no question of estoppel.

19. The third contention of the respondents is that this writ petition is barred by the provisions of Section 159, of the Act of 1960, which bar any suit or other proceedings in respect of any matter arising under the Act, and which provide for remedy by way of a suit if a question of title is involved between the parties, except as otherwise provided in the Act and that the petitioner had a remedy under sub-section (4) of Section 11 of the Act to file a civil suit within a period of six months from the date of the order of the Deputy Commissioner whom the petitioner should have approached for settlement of the excess land or within a period of six months from the date of the order passed in appeal or in revision against his order and that the petitioner should have resorted to the special procedure prescribed by the Act of 1960. He relied on *G. Veerappa Pillai v. Raman and Raman Ltd., Kumbakonam*, AIR 1952 SC 192, *Ram Chandra Malpani v. State of Assam*, AIR 1963 Assam 168 and *Kailashchandra v. District Judge, Bhopal*, AIR 1963 Madh Pra 218, in support of his contention that when there is an alternative remedy, no writ petition lies. But, now it is too late in the day to advance such an argument. The Supreme Court has made it clear that the existence of an alternative remedy is not always a bar. It is pre-eminently a matter of discretion. Where the remedy suggested is not equally convenient or efficacious or effective and when it involves very onerous, expensive and lengthy proceedings, a writ lies. Vide *Municipal Council, Khurai v. Kamal Kumar*, AIR 1965 SC 1321, *Addl. Collector of Customs, Bombay v. Shantilal & Co.*, AIR 1966 SC 197, *Ist I.T. Officer, Salem v. Short Brothers (P) Ltd.*, AIR 1967 SC 81, *Tata Engineering and Locomotive Co. Ltd. v. Asstt. Commr. of Com-*

mercial Taxes, AIR 1967 SC 1401 and Surgical Dressings Mfg. Co., Pvt. Ltd., Amritsar v Punjab State, 1968 Lab IC 722 (Punj), Vide also my own latest decision in Iuwang-jao Kabui v. Union of India, 1968 Lab IC 1145 (Manipur).

20 The last contention of the respondents' Counsel is that the High Court cannot sit as an appellate authority and interfere with the orders of the tribunals. He relied on the passage at pages, 2882, 2884, 2885, 2892 and 2903 in Vol III of AIR Manual, 2nd Edition and AIR 1952 SC 192 and Sangram Singh v. Election Tribunal, Kotah, AIR 1955 SC 425. But, the foundation for the exercise of the extraordinary jurisdiction under Article 226 of the Constitution of India is the existence of a legal right and its infringement. Vide K. S. Rashid and Son v Income-tax Investigation Commission, 1954 SCR 738=(AIR 1954 SC 207), Prama-tha Nath Mitter v Chief Justice of Calcutta High Court, AIR 1961 Cal 545 (SB), Calcutta Gas Company (Proprietary) Ltd. v. State of West Bengal, AIR 1962 SC 1044, State of Punjab v Suraj Parkash Kapur, AIR 1963 SC 507 and State of Orissa v Ram Chandra, AIR 1964 SC 685. In the present case, the petitioner had legal right to the entire land covered by the 4 boundaries mentioned in Exts A/1 and A/2. Its right was infringed by the order of the first respondent and it is, therefore, liable to be set aside.

21. The respondents' counsel pointed out that the petitioner did not make any prayer for any relief in the writ petition and that, therefore it is liable to be dismissed. It may be seen that this contention is not wholly correct. In paragraph 10 (a) the petitioner states that a rule nisi should be issued to show cause why a writ of certiorari should not be issued quashing the impugned order and the proceedings mentioned in the writ petition. No doubt, if the entire order of the first respondent evidenced by Ext. A/5 is set aside, that portion of the order under which he granted the settlement of the remaining 2.35 acres in favour of the petitioner will also be quashed. But, the petitioner will be entitled to settlement of the entire excess land.

22. In the result, the rule nisi is made absolute and the order of the first respondent evidenced by Ext. A/4 is set aside. It is hereby ordered that all the excess land should be settled with the petitioner Society and that the 3rd respondent should be recorded as an encroacher. The petitioner is entitled to costs. Pleader's fee — Rs 100 00 nP.

TVN/D.V.C.

Petition allowed.

AIR 1969 MANIPUR 90 (V 56 C 26)
C. JAGANNADHACHARYULU, J. C.
Khangembam Kokchao Singh and others,
Petitioners v. Haojam Damudor Singh, Respon-
dents.

Criminal Revn. Case No. 9 of 1968, D/ 8-1-1969, against order of Addl. Dist. Magistrate, Manipur, D/- 6-5-1968.

(A) Criminal P. C. (1898), S. 107 — "Is informed" — No restriction as to source of information — Action on basis of police report and complaint petition — Action, held, not incompetent. Note 3 at p. 395 of Vol. I of AIR Commentaries on Cr. P. C. 6th Edn. and AIR 1953 Cal 109, Rel. on. (Para 7)

(B) Criminal P. C. (1898), Ss. 107, 112 and Proviso to 114 — On facts, held, order passed under the above provisions was proper.

The order of the Magistrate showed that he was satisfied that there was imminent breach of the peace between the parties and that it could only be prevented by the immediate arrest of the petitioners. He, therefore, directed the petitioners to show cause why they should not execute a bond for Rs. 500/- with one surety for a like amount for keeping the peace for 12 months from date of disposal of the proceedings and issued warrant of arrest against the petitioners.

Held, that under S. 112 and the proviso to S. 114, Criminal P. C. he was competent to pass the above order, as he deemed it necessary to require the petitioners to show cause why action should not be taken under S. 107, Criminal P. C. (Para 8)

(C) Criminal P. C. (1898), Ss. 117 (3), 112 and 114 — Composite order — Appending of an order under S. 117 (3) to an order under S. 112, held, illegal.

In a case, the Magistrate passed a composite order made up of three portions. The first portion of the order related to initiation of proceedings under Section 107 Criminal P. C. on the basis of police report and a complaint petition. Considering the fact that the existing imminent breach of the peace could only be prevented by the immediate arrest of the petitioners, he passed the second portion of the order directing execution of a bond and further issued a warrant of arrest against them. In the third portion of the order he stated that he had reason to believe that the petitioners would not attend his court unless compelled to do so and therefore he ordered the officer-in-charge of the outpost to arrest and produce them on the hearing date. This portion of the order appeared to have been passed under S. 117 (3).

Held, that the third portion of the order under S. 117 (3) appended to the order under Sec 112 was bad and liable to be set aside, because, before the Magistrate proceeded to take action under S. 117 (3), the order passed by him under S. 112 must have

been read or explained to the petitioners. It was, however, not necessary that the Magistrate should have commenced taking evidence before he passed the order under S. 117 (3).

(Paras 9 & 10)

The impugned portion of the order if construed as one under S. 114 must be upheld, though it would be redundant in the face of the order of arrest passed in the second portion. (Para 9)

The Magistrate could pass the order subsequently under Sec. 117 (3), Cr. P. C. if he was satisfied that an emergency existed and that urgent orders were necessary by acting upon the application of the police officer or upon the oral testimony of the police prosecutor etc. Pt. 4, Note 6, Page 472 of AIR Commentaries on Cr. P. C. Vol. I, 6th Edn., AIR 1953 Cal 238 & AIR 1962 Pat 51, Foll. (Para 9)

(D) Criminal P. C. (1898), Ss. 117 (3) and 112 — Magistrate passing an order under S. 112 — Subsequently, emergency compelling him to make an order under S. 117 (3) — Order under S. 117 (3) not bad for being on the same information and evidence as the order under S. 112. AIR 1953 Cal 238 & AIR 1962 Pat 51, Ref. (Para 9)

(E) Criminal P. C. (1898), Ss. 435, 438, 117 (3) and 514 — Composite order of Magistrate — Illegal order under S. 117 (3) with consequential order under S. 514 — One revision petition challenging the composite order maintainable. AIR 1958 Pat 314 & AIR 1968 Mani 74, Dist. (Para 11)

(F) Criminal P. C. (1898), S. 117 (3) — Order under, to be with reasons in writing. (Para 12)

Cases Referred:	Chronological	Paras
(1968) AIR 1968 Mani 74 (V 55). Aribam Pishak Sharma v. Aribam Tuleswar Sharma		11
(1962) AIR 1962 Pat 51 (V 49) = 1962 (1) Cri LJ 181, Amir Singh v. State		9
(1958) AIR 1958 Pat 314 (V 45) = 1958 BLJR 239, Bankim Chandra Chakravarti v. Regional Provident Fund Commr.		11
(1953) AIR 1953 Cal 109 (V 40) = 1953 Cri LJ 344, Tulsibala Rakshit v. N. N. Khosal		7
(1953) AIR 1953 Cal 238 (V 40) = 1953 Cri LJ 574, Dulal Chandra Mondal v. The State		9
R. K. Nokulsana Singh, for Petitioners; Ng. Mohendra Singh, for Respondent.		

ORDER: This is a revision petition filed by the petitioners in Criminal Revision Case No. 1 of 1967 on the file of the Additional District Magistrate Manipur under Sections 435 and 439, Cr. P. C. to set aside his order dated 6-5-1968, under which he upheld the order of the S. D. M., Bishenpur passed in Criminal Misc. Case No. 37 of 1967 under Section 107, Cr. P. C.

2. The Police Officer in charge of Kumbi Outpost filed a report on 7-8-1967 before

the S. D. M. Bishenpur recommending the initiation of proceedings under Section 107, Cr. P. C. against the petitioners. The learned S. D. M., Bishenpur passed a composite order on the same date of 7-8-1967 stating, firstly, that he heard the respondent herein, who stated that certain land in dispute mentioned in the schedule of the order passed by him was cultivated by him for about 11 years, that on 3-8-1967 the petitioners ploughed away the land and threatened to murder the respondent if he interfered that the learned S. D. M. was satisfied with the information filed by the Police, which was supported by the complaint petition, that there was imminent breach of the peace between the parties and that the only measures to be taken to prevent the breach of peace was immediate arrest of the petitioners.

So, he registered the case as Criminal Misc. Case No. 37 of 1967 under Section 107, Cr. P. C. Secondly, he directed the petitioners to show cause why they should not execute a bond for Rs. 500/- with one surety for a like amount for keeping peace for a period of 12 months from the date of the disposal of the proceeding and ordered issue of a warrant of arrest against the petitioners returnable at 9-30 a.m. on 16-8-1967 and appended schedule of the disputed land to his order. Thirdly, below the schedule he passed another order on the same day of 7-8-1967 stating that the petitioners committed an offence under Section 107, Cr. P. C. in respect of the disputed land by entering into it forcibly with deadly weapons, that the Magistrate had sufficient reason to believe that the petitioners would not attend his Court for hearing of the case unless they were compelled to do so and that, therefore, they should be arrested and brought before him before 9-30 a.m. on 16-8-1967.

3. On 16-8-1967, 10 of the petitioners were brought under arrest and produced before the learned Magistrate. They moved for bail. But, the Magistrate remanded them to Jail on the ground that they did not produce sureties and directed that they should execute interim bonds. He posted the case to 31-8-1967.

4. On 17-8-1967, the petitioner executed interim bonds and they were released from Jail.

5. On 31-8-1967, the Magistrate posted the case to 28-9-1967 to enable the petitioners to file their statements to show cause against the notices issued to them. In the meanwhile the S. D. M. started proceedings in Criminal Misc. Case No. 37 of 1967 under Section 514, Cr. P. C. against six persons out of the petitioners on the ground that they violated the terms of the interim bonds executed by them.

6. The petitioners filed Criminal Revision No. 1 of 1967 on the file of the Additional District Magistrate, Manipur u/ss. 435 & 438, Cr. P. C. to make a reference to this Court to set aside the various orders of the S. D. M. The learned Additional District Magis-

trate dismissed the petition. Hence, the present revision petition.

7. The first question that arises for determination is whether the composite order of the learned S D M dated 7-8-1967 (consisting of three portions mentioned above) under Sections 107 and 112 and evidently under Section 117 (3), Cr. P. C. is a valid one. Regarding the first portion of his order, it is seen that he was entitled to act upon the Police report as well as the complaint petition filed by the respondent. There is no restriction as to the source of the information, on which a Magistrate can act under Section 107, Cr. P. C. Vide also Note 3 at page 395 of Vol I of AIR Commentaries on Cr P C 6th Edition and also Tulsibala Rakhut v. N N Khosal, AIR 1953 Cal 109. As such, the Magistrate was competent to initiate the proceedings under Section 107, Cr. P C

8. The second portion of the order of the S. D. M. dated 7-8-1967 shows that he was satisfied that there was imminent breach of the peace between the parties and that it could only be prevented by the immediate arrest of the petitioners. He, therefore, directed the petitioners to show cause why they should not execute a bond for Rs 500/- with one surety for a like amount for keeping peace for a period of 12 months from the date of the disposal of the proceedings and issued warrant of arrest against the petitioners. Under Section 112 and the proviso to Section 114, Cr P C. he was competent to pass the above order in question, as he deemed it necessary to require the petitioners to show cause why action should not be taken under Section 107, Cr P C.

9. Then, the third portion of the order of the S D M dated 7-8-1967 shows that he attached a further order stating that he had sufficient reason to believe that the petitioners would not attend his Court for the hearing of the case, unless they were compelled to do so and that, therefore, he authorised the Officer in charge of Kumbi Outpost to arrest the petitioners and produce them before him on 16-8-1967 at 9-30 a.m. Under Section 114, Cr. P C. the Magistrate shall issue a summons to the person against whom proceedings are drafted under Section 112 read with Section 107, Cr P. C. if he is not present in the Court. But, under the proviso to Section 114, Cr P C he is competent to issue a warrant of arrest if he is of the opinion that the commission of the breach of the peace cannot be prevented otherwise than by the immediate arrest of the person, against whom proceedings are taken under Section 107 read with Section 112, Cr. P. C. So, if this order of the Magistrate is to be construed only to show that the Magistrate issued the warrant of arrest under the proviso to Section 114, Cr. P. C. it is not illegal, though it is redundant, as he had already passed an order of arrest of the petitioners in the second portion of

his order. But, the notes paper maintained by the Magistrate shows that this order was construed by him as one under Section 117 (3), Cr. P. C., whereunder pending the completion of the inquiry under sub-section (1) of Section 117, Cr. P. C. he could call upon the petitioners by passing a separate order recording his reasons to execute bonds with or without sureties for keeping the peace until the conclusion of the enquiry, etc.

That the Magistrate construed it as an order under Section 117 (3), Cr. P. C. is clear from the fact that he initiated separate proceedings against some of the petitioners under Section 514, Cr. P C in Criminal Misc. Case No 37 of 1967 on the ground that they violated the terms of the interim bonds. An order under sub-section (3) of Section 107, Cr. P. C can be passed when the proceedings have reached the stage of enquiry under Section 117 (1), Cr. P. C. The latter stage arises after the order under Section 112, Cr. P. C. had been read or explained to the petitioners after they were produced before the Magistrate and when the Magistrate proceeded to enquire into the truth of the information, upon which he took action. The Magistrate need not commence to take evidence before he passes the order under sub-section (3) of Section 117, Cr. P. C. But, it is necessary, before he proceeds to take action under sub-section (3) of Section 117, Cr P. C., that the order passed by him under Section 112, Cr. P. C has been read or explained to the petitioners. That this is the correct view is also evident from Pt. 4 note 6, page 472 of AIR Commentaries on Cr P. C.—Vol. I—6th Edition. The learned Commentators state that an order under sub-section (3) of Section 117, Cr. P C. is not a mere routine order to be appended to an order under Section 112, Cr P. C. and is not meant merely to anticipate the final order which may be made under Section 118, Cr. P. C., that it is designed to meet an emergency and that a composite order drawing up a proceeding under section 107, Cr P. C. and calling upon the parties to furnish interim bonds under Section 117 (3), Cr P C is irregular in law. But, the Magistrate can pass the order subsequently under Section 117 (3), Cr P. C if he is satisfied that an emergency exists and that urgent orders are necessary by acting upon the application of the Police Officer or upon the oral testimony of the police prosecutor, etc. The order is not bad merely on the ground that the Magistrate passed it on the same information and on the same evidence, which were the basis of his order under Section 112, Cr P. C. Vide also Dulal Chandra Mondal v. The State, AIR 1953 Cal 238 and Amir Singh v. State, AIR 1962 Pat 51 in this connection which support this view.

10. Thus, the composite order passed by the S D. M. by appending an order under Section 117 (3), Cr. P. C. to the order under Section 112, Cr P C. is illegal. The proceedings taken by the learned S. D. M. under

Sections 107, 112 and the proviso of Section 114, Cr. P. C. will stand. But, the proceedings taken by him under Sec. 117 (3), Cr. P. C. and subsequently under Sec. 514, Cr. P. C. are hereby set aside. If the Magistrate feels that action has to be taken under Section 117 (3), Cr. P. C. he is at liberty to do so by following the provisions of Section 117 (3), Cr. P. C.

11. The learned counsel for the respondent contended that the present Revision Petition is bad in law as it was filed to set aside the orders of the S. D. M. in two different cases. He relied on Bankim Chandra Chakravarty v. Regional Provident Fund Commissioner, AIR 1958 Pat 314 and my own judgment in Aribam Pishak Sharma v. Aribam Tuleswar Sharma, AIR 1968 Mani 74, where it was held that a single writ petition does not lie in respect of different cases. But, the present one is not a matter of this type. It is the composite order dated 7-8-1967, which was passed by the S. D. M., which is now in question. It includes an illegal order under Section 117 (3), Cr. P. C. and consequential further action taken by the S. D. M. under Section 514, Cr. P. C. against the petitioners for violating the irregular order. So, these rulings have no application to the facts of the present case.

12. In the result, the revision petition is allowed in part. The interim bonds executed by the petitioners pending enquiry under Section 117 (3), Cr. P. C. and the subsequent action taken by the Magistrate under Section 514, Cr. P. C. are quashed. The Magistrate is directed to pass a fresh order under Section 117 (3), Cr. P. C. if he considers that immediate measures are necessary for the prevention of the breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety. He should record his reasons in writing, if he passes the order.

TVN/D.V.C. Petition partly allowed.

AIR 1969 MANIPUR 93 (V 56 C 27)

R. S. BINDRA, J. C.

Narendra Nath Kochar, Plaintiff; Appellant v. Sudershan Sekhar, Respondent.

Misc. Civil Appeal No. 4 of 1969, D/- 28-8-1969 against the order of Addl. Dist. Judge, Manipur, D/- 19-3-1969.

Hindu Marriage Act (1955), Ss. 19, 3 (b) — In Manipur territory expression "District Court" in S. 3 (b) includes a Court of Additional District Judge.

Having regard to provisions of Ss. 16 to 18 of the Manipur (Courts) Act which have to be read in conjunction with Ss. 2 (iii) and 20 thereof, the 'District Court' in Manipur which comprises the Courts of District Judge and that of the Additional District Judge, is

the principal Civil Court of original jurisdiction. As such, the expression "District Court" as defined in S. 3 (b) of the Act comprises in the territory of Manipur not only the Court of District Judge but also the Court of the Additional District Judge. AIR 1959 Punj 50 & AIR 1956 SC 391, Dist.; AIR 1960 Cal 565 & AIR 1962 J & K 41, Ref.

(Para 5)

Cases Referred: Chronological Paras

(1962) AIR 1962 J & K 41 (V 49) =

Ram Pal v. Mst. Ajit Kaur 7

(1960) AIR 1960 Cal 565 (V 47) =

64 Cal WN 246, Ajit Kumar Bhunia

v. Smt. Kanan Bala 7

(1959) AIR 1959 Punj 50 (V 46) =

60 Pun LR 42, Janak Dulari v.

Narain Dass 6

(1956) AIR 1956 SC 391 (V 43) =

1956 Cri LJ 781, Kuldip Singh v.

State of Punjab 6, 8

N. Ibotombi Singh, for Petitioner; R. K. Manisana Singh, for Respondent.

JUDGMENT: This appeal under Sec. 28 of the Hindu Marriage Act hereinafter referred to as the Act is directed against the judgment dated 19-3-1969 by which the Additional District Judge, Manipur, dismissed the petition of Narendra Nath Kochar claiming a decree for judicial separation from his wife Sudershan Sekhar.

2. Narendra Nath Kochar had sought judicial separation on the sole ground that Sudershan Sekhar had deserted him for more than two years before the presentation of the petition. Sudershan Sekhar opposed that prayer by traversing the allegation that she had deserted her husband. She pleaded that after their marriage had been solemnised at Delhi they both came to Imphal, where her husband is engaged in business, and took up residence there. The petitioner, however, began to treat her with cruelty. In May 1964 the petitioner took her to Delhi and there she underwent an operation in the Irwin hospital. The petitioner left Delhi for Imphal without caring to attend on her during convalescence at Delhi, nor cared thereafter to bring her back to Imphal. It was, therefore, the petitioner who had deserted her and not the other way about. She offered to live with the petitioner as behaves a dutiful Hindu wife.

3. The learned additional District Judge found, on the basis of evidence led before him, that the petitioner had failed to establish that his wife had deserted him. In consequence, he dismissed the petition with costs.

4. The sole question debated in this Court was whether the additional District Judge had the jurisdiction to try the petition. It was vigorously contended by Shri Ibotombi Singh, appearing for the appellant, that since according to Section 19 of the Hindu Marriage Act a petition under the Act has to be presented to the District Court and since the Court of the Additional Dist-

dict Judge is not the District Court within the meaning of that expression as defined in clause (b) of Section 3 of the Act, the Additional District Judge had no jurisdiction to try the petition. Shri Manisana Singh, representing the respondent, urged, on the contrary, that in view of the definition of District Court given in Section 2 (iii) of the Manipur (Courts) Act, 1955, hereinafter called the Manipur Act, the Court of Additional District Judge is a District Court and as such the Additional District Judge had the jurisdiction to try the petition.

After examining the relevant provisions of the two Acts, the Hindu Marriage Act and the Manipur (Courts) Act, and the authorities cited at the bar, I have reached the conclusion that the submission made by Shri Manisana Singh, is well founded and so must prevail. I may mention here, before proceeding with the discussion of the relevant provisions of the two Acts and the authorities, that the petition was originally presented to the District Judge Manipur, and since he was taken ill this Court transferred that petition to the Additional District Judge for disposal.

5. Section 19 of the Act prescribes that every petition under the Act shall be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnized or the husband and the wife reside or last resided together. In Section 3 (b) of the Act, the expression "District Court" is defined to mean, in any area for which there is a City Civil Court, that Court, and in any other area the principal Civil Court of original jurisdiction, and includes any other Civil Court which may be specified by the State Government by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in the Act. There is no dispute on the point that the Court of Additional District Judge, Manipur, is neither a City Civil Court, nor is it a Court which has been specified by the State Government as having jurisdiction in respect of matters dealt with in the Act. Therefore, we are left to examine whether that Court is the principal Civil Court of original jurisdiction in the territory of Manipur.

The expression "principal Civil Court of original jurisdiction" is not defined in the Act. It was not disputed by Shri Ibotombi Singh that the meaning of that expression shall have to be determined with the aid of the Manipur Act. Shri Ibotombi Singh invited my attention to Sections 16, 17 and 18 of the Manipur Act to convince me that they do not contemplate any Court of Additional District Judge and as such the Additional District Judge, Manipur, cannot be described as the principal Civil Court of original jurisdiction. Section 16 enacts that in addition to the Court of the Judicial Commissioner and the Courts of Small Causes established under the Provincial Small Cause Courts Act, and the Courts established under any other

law for the time being in force, there shall be the following classes of Civil Courts in the State of Manipur—

- (i) the District Court;
- (ii) the Court of Subordinate Judge;
- (iii) the Court of a Munsiff.

Section 17 provides that the Chief Commissioner, Manipur, may divide the State of Manipur into civil districts and appoint as many persons as he thinks necessary to be District Judges. He shall then post those persons as District Judges in charge of the various districts. Section 18 (1) states that when the business pending before the Court of District Judge requires the aid of Additional District Judge for its speedy disposal, the Chief Commissioner may appoint such number of Additional District Judges as may be necessary. Sub-section (2) of Section 18 prescribes that the Additional District Judges appointed under sub-section (1) shall discharge any of the functions of a District Judge which the District Judge may assign to them and in the discharge of those functions they shall exercise the same powers as the District Judge.

The provisions contained in Sections 16 to 18 have to be read in conjunction with Sections 2 (iii) and 20 of the Manipur Act to comprehend their exact scope. According to Section 2 (iii) the expression "District Court" means "the Court of the District Judge and includes the Court of the additional District Judge". This definition makes it abundantly clear that the District Court in Manipur means not only the Court of District Judge but it also includes within its ambit the Court of the additional District Judge. Section 20 of the Manipur Act states that the District Court shall be the principal Civil Court of original jurisdiction in the District. Therefore, the District Court in Manipur, which comprises the Courts of District Judge and that of the additional District Judge, is the principal Civil Court of original jurisdiction. As such, the expression "District Court" as defined in Section 3 (b) of the Act comprises in the territory of Manipur not only the Court of District Judge but also the Court of the Additional District Judge. The matter appears to be so clear and simple as to not to necessitate the consideration of authorities cited at the bar by the parties' Counsel. In fairness to them, however, I have decided to make a short reference to them.

6. Shri Ibotombi Singh placed reliance on the authority reported in AIR 1959 Punj 50, Janak Dulani v. Naram Dass, to support the contention that the Court of Additional District Judge in Manipur cannot be said to be the principal Civil Court of original jurisdiction under Section 19 of the Act. The Punjab High Court undoubtedly held that the Court of an Additional District Judge in the Punjab cannot be considered to be the principal Civil Court of original civil jurisdiction within the meaning of Section 19 of the Act,

and that as such a District Judge to whom a petition under the Act is presented cannot transfer it to an Additional District Judge, and if such a transfer is made the latter Court would have no jurisdiction to hear and decide the case. This decision was founded on the authority of *Kuldip Singh v. State of Punjab*, AIR 1956 SC 391, wherein the Supreme Court held, after examining the various provisions of the Punjab Courts Act of 1918, that the Court of the Additional Judge or Additional District Judge in the Punjab is not a Division Court of the Court of the District Judge but is a separate and distinct Court of its own. The Division Bench of the Punjab High Court in the case of *Janak Dulari*, AIR 1959 Punj 50 (supra) held that although they were bound to accept and act upon the pronouncement of their Lordships of the Supreme Court in the case of *Kuldip Singh*, AIR 1956 SC 391 (supra), they could not "refrain from observing with the utmost respect that it runs counter to the way in which the Punjab Courts Act has been interpreted and acted upon in the State of Punjab and also the State of Delhi to which Punjab Courts Act has been extended". It would, therefore, appear that the Punjab High Court left to itself would have negatived the contention that the Court of Additional District Judge in the Punjab does not answer the description of the principal Civil Court of original jurisdiction contemplated by Secs. 19 and 3 (b) of the Act.

Further, it remains to be emphasised that the Supreme Court gave its finding on the basis of the specific provisions of the Punjab Courts Act and if those provisions happen to differ from the provisions of the Manipur Act, there would be no obligation on this Court to hold that in Manipur the Court of Additional District Judge is either not the "District Court" or "principal Civil Court of original jurisdiction". The Supreme Court clarified the position by observing as under in para 24 of the judgment:

"We make it clear that our decision on this point is confined to the Punjab Act. We understand that similar Acts in other States are differently worded so that what we decide for the Punjab may not hold good elsewhere. We say this because rulings were cited before us from other parts of India which take differing views. We do not intend to refer to them because it would not be right to examine the language of Acts that are not directly before us. Accordingly, we confine ourselves to the Punjab Act (Act VI of 1918)".

The Punjab Courts Act contemplates three classes of Civil Courts, besides the Courts of Small Causes and Courts established under other enactment. The three classes of Civil Courts are:

- (1) the Court of District Judge;
- (2) the Court of Additional Judge; and
- (3) the Court of the Subordinate Judge.

Shri Ibotombi Singh was not able to bring to my notice any provision of the Punjab Courts

Act corresponding to Section 2 (iii) of the Manipur Act, where the expression "District Court" is defined to mean the Court of the District Judge including the Court of the Additional District Judge. Therefore, the Supreme Court and the Punjab High Court authorities relied upon by Shri Ibotombi Singh are clearly distinguishable and so are not helpful in comprehending the meaning and scope of the expressions "principal Civil Court of original jurisdiction" and "District Court" as used in Section 3 (b) of the Act for the purposes of the territory of Manipur.

7. Shri Manisana Singh cited before me the authorities reported in AIR 1960 Cal 565, *Ajit Kumar Bhunia v. Sm. Kanan Bala*, and AIR 1962 J & K 41, *Ram Pal v. Mst. Ajit Kaur*, to support the rival contention propounded by him. On the basis of their respective Acts, the two High Courts, of Calcutta, AIR 1960 Cal 565, and of Jammu & Kashmir, AIR 1962 J & K 41, held that the Additional District Judge is competent to decide a petition lodged under the Act if transferred to him by the District Judge. Since the decisions given by the two High Courts turned on the provisions of the Acts prevalent in the two States, I feel clear that not much help can be derived from them in deciding the point canvassed before this Court. I feel clear that in each State the answer to the question raised in this appeal will depend upon the provisions of the respective Act under which the Courts are constituted. Since, however, in Manipur the Court of the Additional District Judge is specifically declared as constituting or forming part of, the "District Court" within the meaning of that expression as defined in Section 2 (iii) of the Manipur Act, and since Section 20 of that Act provides that the District Court shall be the principal Civil Court of original jurisdiction, I have no misgivings that the Additional District Judge had the necessary jurisdiction to decide the petition made by Narendra Nath Kochar to the District Judge after this Court had transferred the same to him for disposal.

8. The decisions of the Calcutta and Jammu & Kashmir High Courts however, call for one observation. It appears that both the High Courts tried to distinguish the Supreme Court decision from the cases they had to deal with on the assumption that the appeal by *Kuldip Singh*, AIR 1956 SC 391 in the Supreme Court case against the order of the Senior Subordinate Judge Mr. Pitam Singh had been filed directly in the Court of the Additional District Judge. The two High Courts also appear to be of the opinion that if *Kuldip Singh* had filed the appeal in the Court of the District Judge and the latter had assigned the same to the Additional District Judge for disposal, the order made by the latter would not have suffered from any legal infirmity. However, the factual assumption made by the two High Courts, viz. that the appeal had been filed directly

in the Court of the Additional District Judge, does not appear to be correct. I know it from my personal experience in the Punjab that all cases are filed in the Court of the District Judge and it is he who assigns some out of them to the Additional District Judge for disposal. No case is directly instituted in the Court of the Additional District Judge. Exactly this practice appears to have been followed in the case of Kuldip Singh. I invite reference in this connection to Para 35 of the Supreme Court judgment. It is mentioned there that even after Mr Pitam Singh had passed an ineffective order, that still left the District Court free to act under Section 476-A Cr. P. C. when the matter came back to it again. This time, the Supreme Court observed further, the matter came by way of appeal from the order made by Mr Pitam Singh. It was incumbent on the District Judge, the Supreme Court emphasised, either to make an appropriate order himself under Section 476-A Cr P C, or to send the matter for disposal to the only other Court that had jurisdiction, namely, the original Court. But the District Judge, the Supreme Court pointed out, did not deal with it himself and instead the matter went to the Additional District Judge. Therefore, it is abundantly clear from the facts mentioned in the Supreme Court judgment that the appeal was filed by Kuldip Singh in the Court of the District Judge and it was the District Judge who assigned it to the Additional District Judge for disposal.

Hence, the distinction drawn by the High Courts of Calcutta and Jammu and Kashmir between the facts of the cases dealt with by them and those of the Supreme Court case simply does not exist. The true ratio of the decision of the Supreme Court was that the Punjab Courts Act does not contemplate the appointment of Additional Judges to the District Court and as such the Court of Ad-

ditional District Judge is not a Division Court of the Court of the District Judge but a separate and distinct Court of its own. This conclusion was founded on the specific provisions enacted in Section 18 of the Punjab Courts Act. The Supreme Court clarified the situation by making reference to Articles 214 and 216 of the Constitution. It is mentioned in Article 216 that every High Court shall consist of a Chief Justice and such other Judges as the President may from time to time deem it necessary to appoint. In para 37 of their judgment the Supreme Court pointed out that the Punjab Courts Act nowhere speaks of an Additional District Judge or of an Additional Judge to the District Court, and then observed that the Additional Judge is not a Judge of co-ordinate judicial authority with the District Judge. These distinctive features of the Punjab Courts Act are not to be found in the Manipur Act. As pointed out above, the definition of the expression "District Court" given in Section 2 (iii) of the Manipur Act read with Section 20 thereof leaves no room for doubt that the Additional District Judge is a part and parcel of the District Court in the same way as are the Judges of the various High Courts in India. Looked at from this standpoint, there is no scope for criticism against the judgment of the Punjab High Court in the case of Janak Dulari (supra)

9. Shri Ibotombi Singh was frank in conceding that on merits his client has no case. The Additional District Judge recorded the finding that Narendra Nath Kochar had failed to prove that his wife had deserted him for a period of more than two years and this finding was not challenged in this Court.

10. As a result, the appeal fails and is dismissed with costs Advocate's fee Rs 50/- GGM/D.V.C.

Appeal dismissed.

END

said thing delivering the said thing he must not intend to act gratuitously; and the third is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. When those conditions are satisfied S. 70 imposes upon the latter person the liability to make compensation to the former in respect of, or to restore, the thing so done or delivered. In appreciating the scope and effect of the provisions of this section it would be useful to illustrate how this section would operate. If a person delivered something to another it would be open to the latter person to refuse to accept the thing or to return it; in that case Section 70 would not come into operation. Similarly, if a person does something for another it would be open to the latter person not to accept what has been done by the former; in that case again Section 70 would not apply. In other words the person said to be made liable under Section 70 always has the option not to accept the thing or to return it. It is only when he voluntarily accepts the thing or enjoys the work done that the liability under S. 70 arises."

These observations clearly lay down that the person who gets the benefit must have the option to refuse to accept the benefit. It also implies that the benefit accepted must be voluntary. These tests have to be applied to the facts of this case and I shall examine this aspect a little later. In the latter part of the judgment, the Supreme Court observes as follows:—

".....It is of course true that between the person claiming compensation and person against whom it is claimed some lawful relationship must subsist, for that is the implication of the use of the word "lawfully" in S. 70; but the said lawful relationship arises not because the party claiming compensation has done something for the party against whom the compensation is claimed but because what has been done by the former has been accepted and enjoyed by the latter. It is only when the latter accepts and enjoys what is done by the former that a lawful relationship arises between the two and it is the existence of the said lawful relationship which gives rise to the claim for compensation"

From this observation it follows that the lawful relationship is not what is precedent to the act done by the plaintiff, but the lawful relationship that arises after the act is done. The Supreme Court further observes:

".... Therefore, in our opinion, all that the word "lawfully" in the context indicates is that after something is delivered or something is done by one per-

son for another and that thing is accepted and enjoyed by the latter, a lawful relationship is born between the two which under the provisions of Section 70 gives rise to a claim for compensation."

The object of Section 70 is also referred to in the judgment and it is stated that:

".... Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them. Section 70 deals with cases where a person does a thing for another not intending to act gratuitously and the other enjoys it. It is thus clear that when a thing is delivered or done by one person it must be open to the other person to reject it. Therefore, the acceptance and enjoyment of the thing delivered or done which is the basis for the claim for compensation under S. 70 must be voluntary. It would thus be noticed that this requirement affords sufficient and effective safeguard against spurious claims based on unauthorised acts. If the act done by the respondent was unauthorised and spurious the appellant could have easily refused to accept the said act and then the respondent would not have been able to make a claim for compensation."

They also refer to the observations of Chief Justice Jenkins which are as follows:

"The terms of S. 70", said Jenkins, C. J., "are unquestionably wide, but applied with discretion they enable the courts to do substantial justice in cases where it would be difficult to impute to the persons concerned relations actually created by contract. It is, however, especially incumbent on final Courts of fact to be guarded and circumspect in their conclusions and not to countenance acts or payments that are really officious."

The facts of this case indicate that the contract for construction was entered into by plaintiff not in his personal capacity, but as agent of the defendant. The liability, if any, under the contract was against the defendant. If the Contractor had any claim, it could be only against the defendant. It is undisputed that the power of attorney was cancelled on 24-3-1955. The payment is made on 20-9-1956. This payment was made without any knowledge of the defendant. He had no option either to accept or reject it. Shri Mohandas Hegde the learned counsel for the appellant invited my attention to Ex. P-11, a reply issued by the defendant to the Contractor. The defendant in it states that the entire expenses incurred in connection with the repairs has been paid to Devoraj and this reply was of 5th September 1955. This document instead of being of any

assistance to the plaintiff, supports the case of the defendant that there could have been no acceptance of any benefit by the defendant by the plaintiff's payment. The stand of the defendant is that the plaintiff has paid the contractor whatever was due to him from out of the defendant's monies and not that he had any benefit from the plaintiff's payment. Therefore, the payment alleged to have been made by the plaintiff to the Contractor would not be a lawful payment within the meaning of Section 70 of the Indian Contract Act. The payment under Section 70 should be by a person who has a lawful interest in making the payment at the time when the payment was made. In this connection, the respondent's counsel invites my attention to the decision of the Madras High Court in AIR 1950 Mad 817 where it is stated that.

"Where a person divests himself (of) all his interests in the property and has ceased to have any interest in the same by reason of a valid transfer he cannot be said to be within the relationship contemplated either by S 69 or S 70 Contract Act."

In this case the relationship of principal and agent had come to an end. The plaintiff was not interested in any of the transactions of the defendant. Therefore if the plaintiff in those circumstances made a payment, it would be voluntary and officious and cannot secure him the benefit of S 70 of the Contract Act. This decision also lays down the proposition that in order to claim the benefit of S 70, it must be shown that the defendants had the opportunity of accepting or rejecting the benefit of the payment made by the plaintiff. The words in the section "he enjoys such benefit" must be taken to mean that he does it as a result of his volition. As I have already stated, Exhibit P-11 indicates a denial of any benefit having been conferred on him by the payment. It is further contended by the respondent's counsel that the benefit contemplated in S 70 must be a direct benefit. In support of this contention reliance is placed on the observations at page 432 of Pollock and Mulla on The Indian Contract Act, where it is stated that the benefit must be direct and not indirect. Reliance is also placed on a decision of the Privy Council reported in AIR 1949 P C 39. In the instant case it cannot be said that the benefit is direct. As Sri Mohandas Hegde submitted the benefit accrues to the defendant by the improvements and addition or alterations effected by the contractor. The benefit accruing by the payment is only indirect, in view of the fact that the payment discharges the liability of the plaintiff (defendant?) which would arise on the basis of the benefit derived by him owing

to the improvements, alteration or repairs effected by the contractor. For this reason also the claim of the plaintiff is not covered by the provisions of S. 70 of the Contract Act. It is not in every case in which a man is benefited by the money paid by another that an obligation to repay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation express or implied to repay. It is well settled that there arises no obligation to the case of a voluntary payment by one person of another's debt. Applying this principle which has been enunciated in AIR 1945 PC 23, it appears to me that the present case is one where the plaintiff has discharged the obligation of the defendant. This by itself would not create a legal obligation against the defendant to repay the plaintiff. In this connection I may refer to page 572 of Anson's Law of Contract wherein an apt illustration is given — viz.,

"So, for example, if A pays the premiums of B on insurance policy in order to prevent the policy from lapsing, he cannot recover the money from B"

In this case, if the plaintiff has paid the money to the contractor to discharge the obligation of the defendant, that by itself would not create a liability on the defendant to pay the plaintiff. Further, even if the plaintiff had paid the contractor in order to avoid the possibility of a claim being made by the contractor against him, even then, it would not give rise to a claim against the defendant; in this particular case such a contingency does not arise. It is clear from the documents that I have referred to that the plaintiff had entered into a contract with the contractor for and on behalf of the principal, i. e. the defendant. Knowing this well, if the contractor had chosen to initiate any legal action against the plaintiff, he could not have sustained such action in view of the plaintiff's stand. Therefore, there is no basis for the apprehension referred to in the plaint. As mentioned already, the payment is made long after the cancellation of the power of attorney by which whatever interest the plaintiff had in the defendant's transactions, had come to an end. Therefore, Sri Mohandas Hegde, the learned counsel for the appellant, tries to sustain the case of the plaintiff on the basis of a decision in AIR 1943 Mad 85. This was a case where the tank in question was owned jointly by the Government and also the shrotriamdars. The tank being in need of repairs, the Collector caused an estimate to be prepared and also got the tank repaired. The

shrotriandars were asked to contribute their proportionate shares payable by them. The shrotriandars did not object to the estimate or to the work being carried out, but they objected to making any contribution to the cost of the repairs. The fact that they had the benefit of enjoying the result of the repairs got effected by the Government was undoubted and the Government and the shrotriandars being jointly interested it was held that the shrotriandars were liable to contribute to the cost of the work which the Government had carried out. The facts of the present case stand on a different footing. The case referred to in AIR 1943 Mad 85 and the other cases referred to therein are cases where there are joint interests between those that incur the expenses and the persons who are sought to be made liable. Such cases do not have any bearing on the plaintiff's case before me.

6. So, in view of the legal position discussed above, and the facts of this case I confirm the findings of the learned District Judge and the payment made by the plaintiff was voluntary and does not secure him the benefit of the provisions of Section 70 of the Indian Contract Act. The appeal is, therefore, dismissed and in the circumstances of the case I direct each party to bear his own costs.

CWM/D.V.C.

Appeal dismissed.

AIR 1969 MYSORE 355 (V 56 C 86)

A. NARAYANA PAI AND

M. SANTHOSH, JJ.

Chhotalal Morarji Dhami and others, Petitioners v. Regional Provident Fund Commissioner and others, Respondents.

Writ Petns. Nos. 326, 538, 539 & 540 of 1966, D/- 21-10-1968.

(A) Employees' Provident Funds Act (1952), Section 1(3)(a) and (b) — Composite factory engaged in manufacturing and other commercial activities — Test to determine whether it comes within purview of Act indicated.

Whether an establishment, which is engaged in more activities than one, some of which are manufacturing activities and some merely commercial or other activities, but employs on the whole 20 or more persons, can be brought within the scope of the Statute must be answered by examining which among the activities of the establishment is the dominant or primary activity and which the secondary or ancillary activity. If the dominant activity is manufacturing activity, the establishment will necessarily have to be classified or identified as a factory. If such a factory is engaged

in more industries than one, some of which are enumerated in I Schedule of the Act and some not, it will have to be seen if its dominant or principal activity is an industry mentioned in the Schedule. If it is, the factory will come within the purview of CL (a) of sub-sec. (3) of S. 1, and, if it is not, it will not come within the purview of the said clause. If, upon applying the test, it is found that the dominant activity is a non-manufacturing activity or an activity other than manufacturing activity, the establishment will go out of the purview of clause (a) of sub-section (3) of Section 1. In such a case if the establishment is within the description of an establishment given in any of the Notifications made by the Central Govt. pursuant to CL (b), the Act can be validly applied to it. AIR 1962 SC 1536 & AIR 1964 SC 314, Foll. (Para 15)

(B) Employees' Provident Funds Act (1952), S. 1(3)(b) — Notification No. GER 346 dated 7-3-1962 under — Is not ultra vires power of Central Government delegated under CL (b).

The Notification No. GER 346 dated 7-3-1962 issued by Central Government under CL (b) of S. 1(3) of the Act is not ultra vires the power of Central Government delegated to it under CL (b).

The Notification does not apply the Act to all types of trading and commercial establishments but only to trading and commercial establishments engaged in the purchase, sale or storage of any goods. Other establishments like Exporters, Importers, etc., which will not come within the strict limitation of the said description are specially brought within its scope, apparently because, the activities of Exporters, Importers, etc., are closely connected with the activity of the establishments first mentioned. There is also a clear statement of the principal characteristic which distinguishes the class selected for action and keeps out of it establishments not sought to be covered by it. The addition of other enumerated categories of establishments is also clearly understandable on the footing of intimate relationship that exists between them and the first named establishments. So, it cannot be said that the Government have exceeded the scope of the power delegated to them under the Act. AIR 1964 SC 980, Foll.

(Paras 21, 22 & 23)

Cases Referred: Chronological Paras

(1964) AIR 1964 SC 314 (V 51) = (1964) 2

SCR 905, Associated Industries

(P) Ltd. v. Regional Provident Fund Commr., Kerala

12, 13

(1964) AIR 1964 SC 980 (V 51) =

(1963) Supp 1 SCR 993, Mohamedalli v. Union of India

18, 23

(1962) AIR 1962 SC 1536 (V 49)=

65 Bom LR 274, Regional Provident Fund Commr., Bombay v. S K. M. Mfg Co., Bhandara 12

K. Jagannatha Shetty, for Petitioners (in all W. Ps); B S. Keshava Iyengar, Central Government Pleader, for Respondents 1 and 3

NARAYANA PAI, J.:— These petitions have been heard together because they raise a common question of law as to the applicability of the provisions of the Employees' Provident Funds Act, 1952, and the propriety of the action taken by the authorities functioning under the said Statute to apply the same, to the Establishments run by the petitioners in these four cases.

2. We shall deal in detail with the facts and of points of law raised in the first of the petitions W. P. No 326/1966 because a decision thereon will govern the other three cases also

3. The petitioner describes himself as the proprietor of a Cardamom Factory. According to his case, his establishment is only a factory within the definition of the term contained in clause (g) of Section 2 of the Act. But, because the industry in which it is engaged is not one of the industries enumerated in Schedule I of the Act, it is not possible to apply the provisions of the Act. The stand taken up by the 1st respondent, the Regional Provident Fund Commissioner, Bangalore, is that the petitioner's Establishment comes within the description of a trading and commercial establishment falling within the category to which the Statute has been made applicable by a Notification of the Government issued pursuant to clause (b) of sub-section (3) of Section 1 of the Act. The answer to this contention of the respondent on behalf of the petitioners is that the Notification itself is ultra vires of the powers of the Government or is liable to be struck down as one made in excess of the power conferred by the Statute.

4. Although there is some dispute between the parties regarding such matters as the exact number of employees working in the establishment, there is not any dispute on or in respect of the following facts—

5. The petitioner purchases cardamom, subjects it to a certain process coming within the meaning of manufacture as defined in clause (i-a) of Section 2 of the Act to make it marketable and then either sells locally or exports the processed cardamom. He engages manual labourers for the said manufacturing process. He also has a clerical staff attending to details of the working of his establishment other than manufacturing. He therefore, purchases goods, stores them for some time and then sells them.

6. On the assumption for the purposes of this discussion that the total staff engaged by him numbers 20 or more, the establishment may be regarded as either a factory or an establishment engaged in buying, storing and selling goods.

7. If it is to be regarded merely as a factory or to the extent it may be regarded as a factory, the processing of cardamom is admittedly not one of the industries enumerated in the I Schedule of the Statute. This position is also not disputed by the 1st respondent.

8. Before proceeding to formulate the exact controversy between the parties it is necessary to set out sub-section (3) of Section 1 of the Act. That reads as follows:

"1. (1) xx xx xx

(2) xx xx xx

(3) Subject to the provisions contained in Section 16 it applies,—

(a) to every establishment which is a factory engaged in any industry specified in Schedule I and in which twenty or more persons are employed; and

(b) to any other establishment employing twenty or more persons or class of such establishments which the Central Government may, by notification in the Official Gazette, specify in this behalf." There is a proviso appended to this with which, however, we are not concerned in this case.

9. Under or pursuant to clause (b), the Central Government issued various Notifications from time to time. The Notification which is of relevance to the present case is No. GER 346 dated 7-3-1962, brought into effect from 30th April 1962. By the said Notification, the Act was applied or was made applicable to:

"Every trading and commercial establishment engaged in the purchase, sale or storage of any goods including establishments of exporters, importers, advertisers, commission agents, and brokers, and commodity and stock exchanges, but not including banks or warehouses established under any Central or State Act."

10. The contention on behalf of the 1st respondent is that whereas, as a cardamom factory, the establishment of the petitioner cannot be brought within the purview of clause (a) of sub-s (3) of Section 1, it is an establishment which answers the description of trading and commercial establishment given in the said Notification, and is therefore within clause (b) of the said sub-section

11. Once it is conceded that on the I Schedule as it now stands, cardamom industry is not enumerated therein and that, therefore, the establishment of the petitioner to the extent it may be regarded as a factory is not within the purview of clause (a), but it is, in some respects, also an establishment which is not a factory,

the question does arise as to how an establishment which is a factory as well as an establishment other than a factory, can be brought within the purview of either clause (a) or clause (b). In other words, the question does arise as to how an establishment which when viewed from one point of view answers the description contained in clause (a) and from another point of view answers the description of clause (b) can be clearly placed within one or the other clause and what the tests for the determination should be.

12. The answer, according to Mr. B. S. Keshava Iyengar, learned counsel for the 1st respondent, is contained in the principles stated by the Supreme Court of India in two rulings reported in Regional Provident Fund Commissioner Bombay v. S. K. M. Mfg. Co., AIR 1962 SC 1536 and Associated Industries (P) Ltd. v. Regional Provident Fund Commissioner, Kerala, AIR 1964 SC 314. Both the cases dealt with establishments which were clearly factories but which were engaged in more industries than one. Some of which were among the industries enumerated in the I Schedule and some not. The question was whether and in what manner the factories may be classified so as to determine whether the Statute could or could not be applied. The more detailed discussion of principles is contained in the first of the cases. Among other propositions, the most important propositions laid down were:—

“the Statute, in terms, applies to establishments of two categories, viz., establishments which are factories and establishments which are not factories;

(ii) an establishment for the purpose of the Statute need not necessarily be engaged in a single activity or located in a single place, especially after the introduction of Section 3-A by the Amending Act 46 of 1960 making it clear that an establishment may consist of different branches whether situate in the same place or in different places;

(iii) it is not the intention of the Statute that factories should be exclusively engaged in any one of the industries specified in the I Schedule before they can be brought within the purview of the Statute; and

(iv) in determining whether a particular factory engaged in several industries, some of which are those enumerated in the I Schedule and some not, comes within the purview of clause (a) of sub-section (3) of Section 1, the test to apply is which is the primary or dominant activity of the establishment; if the dominant activity is an industry enumerated in the I Schedule, then the factory will come within the purview of clause (a) notwithstanding the fact that it engages itself in other industries or activities as well.”

13. The same principles were reiterated in the subsequent decision reported in AIR 1964 SC 314.

14. In both the cases, the further question was also discussed, viz., whether the necessary minimum strength of staff to attract the provisions of necessary minimum strength of the Statute should be the staff working in respect of the industry enumerated in the I Schedule, or staff working in respect of the entire establishment. The answer was latter.

15. From the principles so laid down by the Supreme Court, it follows that just as the Statute does not require that for a factory to come within the purview of clause (a) it should engage itself exclusively in one or more of the industries enumerated in the I Schedule, so also there is nothing in the Statute to indicate that before an establishment can be brought within its purview, it should be either exclusively an establishment which is a factory or exclusively an establishment which is not a factory. In actual practical working also, it may not be possible to have such clearly distinguishable establishment engaged purely or exclusively in one activity alone. Modern economic and commercial life necessarily involves the combination of more activities than one for the purpose of profitable working of any establishment or venture. When, therefore, one is met with an establishment which for the stated reasons may be regarded as a composite establishment, that is, an establishment engaged in more activities than one, some of which are manufacturing activities and some merely commercial or other activities, but employs on the whole 20 or more persons, the question whether such an establishment can be brought within the scope of the Statute must be answered by applying the test laid down by their Lordships of the Supreme Court in the above cases. That is to say, one has to examine which among the activities of the establishment is the dominant or primary activity and which the secondary or ancillary activity. If the dominant activity is manufacturing activity, the establishment will necessarily have to be classified or identified as a factory. If in such a situation, the factory is engaged in more industries than one, some of which are enumerated in I Schedule of the Act and some not, the further question will have to be examined as to whether the dominant or principal activity is an industry mentioned in the Schedule or not. If the answer is the former, the factory will come within the purview of clause (a) of sub-section (3) of Section 1. If the answer is latter, it will not come within the purview of the said clause. If upon applying the test it is found that the dominant activity is a non-manufacturing activity or an activity other than manufacturing activity, the

establishment will go out of the purview of clause (a) of sub-section (3) of Sec 1. The next question in that situation would be, is it an activity which would bring the establishment within the description of an establishment given in any one of the Notifications made by the Central Government pursuant to cl (b) If it answers any one of those descriptions the Statute can be validly applied, if it does not, the Statute cannot be validly applied.

16. The contention of the 1st respondent, as already stated, is that the establishment of the petitioner in this case is an establishment which comes within the description of trading and commercial establishment engaged in purchase, sale or storage of goods.

17. Whether that contention is right or wrong or supportable on the material placed before Court will not arise if Mr Jagannatha Shetty, the learned counsel for the petitioner is right in saying that the Notification itself is ultra vires of the powers of the State Government.

18. He relies strongly on the observations of the Supreme Court in the case of Mohamedali v Union of India, AIR 1964 SC 980. In that case it was argued that the power given to the Central Government under clause (b) of sub-s (3) of Section 1 of the Act was an unguided uncanalised power and that therefore the Statute itself was bad as amounting to excessive delegation of legislative powers beyond constitutional limits. In repelling that contention and upholding the validity of the Statute, their Lordships made the following observations in paragraph 6 of the judgment at page 983 of the report.

"It cannot be asserted that the power entrusted to the Central Government to bring within the purview of the Act such establishments or class of establishments as the Government may by notification in the Official Gazette specify is uncontrolled and uncanalised. The whole Act is directed to institute provident funds for the benefit of employees in factories and other establishments, as the preamble indicates. The institution of provident fund for employees is too well established to admit of any doubt about its utility as a measure of social justice. The underlying idea behind the provisions of the Act is to bring all kinds of employees within its fold as and when the Central Government might think fit, after reviewing the circumstances of each class of establishments . . .

So far as establishments which do not come within the descriptions of factories engaged in industries the Central Government has been vested with the power of specifying such establishments or class of establishments, as it might determine, to be brought within the purview of the Act. The Act has given sufficient indication of the policy underlying its provisions, namely, that it shall apply to all factories

engaged in any kind of industry and to all other establishments employing 20 or more persons. This Court has repeatedly laid it down that where the discretion to apply the provisions of a particular statute is left with Government, it will be presumed that the discretion so vested in such a high authority will not be abused. The Government is in a position to have all the relevant and necessary information in relation to each kind of establishment enabling it to determine which of such establishments can bear the additional burden of making contribution by way of provident fund for the benefit of its employees x x xx"

19. Mr Jagannatha Shetty's argument is that in upholding the constitutionality of the Statute, the Supreme Court has proceeded upon the footing that the control or guidance given to the Government by the Statute in the matter of exercising the delegated power consists in this, viz, that it should examine the position and the desirability of applying the Statute with reference to each kind of establishment or each category of establishments. If, therefore, the Government goes beyond these directions or principles of guidance and purports to bring within the fold of the Statute an heterogeneous body of establishments, the obvious inference could be that the Government have not applied their mind to the desirability or otherwise of applying the Statute to the different kinds of establishments and that therefore the exercise of the power itself must be struck down as either in excess of the power or in contravention or opposition of the policy of the Statute.

20. Now the Notification depended upon the 1st respondent, which we have already copied operates to apply the Statute in every trading and Commercial establishment engaged in purchase sale or storage of any goods. The characteristic of the establishment or class of establishments selected which distinguishes it from the class of establishments kept outside the scope of the classification is said to be its trading and commercial activity. This description according to Mr Shetty, is too wide, and the subsequent portions make it clear that it is too wide. The subsequent portions include certain specially described establishments within the scope of the description 'trading and commercial establishments' and exclude certain others therefrom.

21. Even in regard to the class selected it appears to us that it may not be quite right to say that it applies to all types of trading and commercial establishments. It is limited in its application to trading and commercial establishments engaged in the purchase, sale or storage of any goods. There may be several activities which may be brought within the scope of either trade or commerce. Indeed, the latter word is

wider in its connotation than the former. By restricting the category to establishments engaged in purchase, sale or storage of any goods, the commercial activity of such establishments is sought to be brought nearer an activity which can be clearly described as trade, because, primarily trade consists in buying and selling of goods, whereas the commercial activity is wider than mere buying and selling of goods. It is on account of this clear intention to limit the class in the manner indicated, that it becomes necessary to include within the definition certain categories of establishments which would not otherwise have fallen within the limited category so described. These are the establishments of Exporters, Importers, Advertisers, Commission Agents, Brokers, Commodity Exchanges and Stock Exchanges, all or any of whom may or may not, under all circumstances, purchase goods or store goods or sell goods. But, they do engage themselves in commerce under all circumstances. This slight widening of the definition apparently would bring within its scope banks and warehouses in certain circumstances. Obviously, with a view to make the position clear, the notification expressly excludes banks and warehouses from its scope. In the last analysis, therefore, establishments to which the notification primarily applies the Statute are trading and commercial establishments engaged in the purchase, sale or storage of any goods. Other establishments like Exporters, Importers, etc., which will not come within the strict limitation of the said description are specially brought within its scope, apparently because, the activities of Exporters, Importers, etc., are so closely connected with the activity of the establishments first mentioned that it was considered desirable to name them along with the first mentioned category of establishments.

22. So understood, we find it difficult to accept the criticism of Mr. Shetty that the Notification purports to deal with different varieties of establishments as belonging to one class. There is a clear statement of the principal characteristic which distinguishes the class selected for action and keeps out of it establishments not sought to be covered by it. The addition of other enumerated categories of establishments is also clearly understandable on the footing of intimate relationship that exists between them and the first named establishments.

23. In that view, we are unable to agree that the position is such that if examined in the light of the principles stated by their Lordships of the Supreme Court in case of Mohamedalli, AIR 1964 SC 980 it could be regarded as one in which the Government have exceeded the scope of the power delegated to them under the Statute.

24. What remains now is that application of the principles to the facts of this

case. As already discussed, the one or the primary question of fact for investigation is which of the two activities of the petitioner is a dominant activity of his establishment. Is it manufacturing activity or is it the commercial activity? Although an assertion has been made in the affidavit of an Inspector of Provident Funds working under the 1st respondent that the dominant activity is clearly commercial activity, it does not appear that the position was clearly examined from the point of view of principles now discussed. The correspondence or the contents of the notices issued on behalf of the 1st respondent and replies on behalf of the petitioner disclose that the parties were at issue on various other matters which may or may not be of relevance to the main issue. Neither the petitioner nor the 1st respondent or any officer working under the 1st respondent had clearly applied his mind to the main question about the relative importance of the different activities engaged in by the petitioner's establishment. As we have already pointed out, if the dominant activity can be regarded as the manufacturing activity, then the petitioner's establishment is clearly outside the scope of the Statute. It is only if, upon fact, it can be held that the dominant activity is the commercial activity, then the 1st respondent can sustain his case that the petitioner's establishment comes within the scope of the Notification mentioned.

25. As facts and circumstances of the case have not been examined from the point of view of, and in the light of the principles stated above there is no alternative but to quash the demands for deposits impugned in these various petitions. At the same time, the liberty should be reserved to the 1st respondent to examine the position in the light of the principles stated above, and then decide whether the Statute can or cannot be validly applied to the establishment of the petitioner.

26. In each of these writ petitions, therefore, we make an order quashing the demands impugned and declare that the said quashing will not preclude the 1st respondent from examining the facts and circumstances, either himself or through his authorised subordinate, in the light of the principles stated in this order and then take a decision as to whether or not the Statute can be validly made to apply to the establishment of the petitioner.

27. In each of these cases, the parties will bear their own costs.

BNP/D.V.C.

Order accordingly.

AIR 1969 MYSORE 160 (V 56 C 87)

A NARAYANA PAI AND M.
SANTHOSH, JJ.

Doddahalli Shivanegowda, Petitioner v.
District Registrar of Registration, Banga-
lore Dist. and others, Respondents.

Writ Petn. No 575 of 1966 D/- 22-1-
1969

Registration Act (1908), Ss. 72, 75 (1),
(2), 58 (1), (c) and (2), 59 and 60 —
Powers of District Registrar under S. 72
— Powers same as that of original autho-
rity — He cannot impose payment of
consideration as a condition precedent for
registration.

The District Registrar while disposing
of an appeal under S. 72 of the Registra-
tion Act has no power or jurisdiction to
direct payment of any sum of money as
a condition precedent for getting the docu-
ment registered (Para 9)

Under the provisions of Section 58, the
registering officers under the Act have no
power to enforce payment of any consi-
deration as a condition precedent for the
registration of the document. Where
money is paid in the presence of the regis-
tering officer, he is required to endorse
the fact on the document at the time of
registration. The question whether a state-
ment contained in the document regarding
payment of consideration is or is not true,
is also not a matter for the registering
officer to examine and decide. The appel-
late authority has no wider powers than
the original authority in the matter of
examining and deciding facts or questions
of fact. The appellate authority can him-
self register the document or direct regis-
tration by the original authority

(Paras 6 to 8)

Balogopalan for Doddakalegowda, for
Petitioner, Ramdas for Advocate General,
for Respondents Nos 1 and 4, B S Soma-
sundara, for Respondents Nos. 2 and 3

ORDER :— Respondents 2 and 3 Guru-
kar Veerabhadrapa and S. V. Shiva-
kumaraswamy executed on 22nd April
1963 a deed of sale in respect of survey
Nos 491, 492 and 493 of Morale Village,
Kanakapura taluk, in favour of the peti-
tioner Doddahalli Shivanegowda. When
the petitioner presented the same for regis-
tration before the 4th respondent the Sub-
Registrar of Kanakapura, he refused to
register the same for the reason that the
executants did not present themselves be-
fore him. The petitioner thereupon pre-
sented an appeal under Section 72 of the
Registration Act to the District Registrar,
Bangalore District, the 1st respondent. It
was disposed of by him on 2nd March
1966. On an examination of the material
placed before him he came to the definite
conclusion that there was overwhelming
evidence that the sale deed had been duly

executed. While observing that the legal
position was that he should confine him-
self to an examination of the question
whether or not there had been execution
of the deed, he adverted also to certain
other circumstances relating to a dispute
or difference of opinion between the par-
ties as to payment of consideration or
delivery of possession and also whether
one of them had any effect upon the
other, and ultimately made the following
order:

"In the result, I uphold the contention
of the petitioner, and I order that the
Sub-Registrar may register the document
provided he (the petitioner) pays the
balance of Rs. 15,000/- to the respon-
dents"

2. The petitioner having taken back
the deed filed before the District Registrar
in connection with the appeal on 11th
March 1966, presented it to the Sub-Regis-
trar, Kanakapura, on 21st March 1966.
As the exact date on which the petitioner
had so presented the deed to the Sub-
Registrar after the disposal of the appeal,
was not capable of being gathered on the
affidavits and materials placed before us,
we directed the Government Pleader on
the last occasion to obtain a report from
the Sub-Registrar on the matter. The said
report, now received, is taken on file of
this writ petition. It is from the said re-
port that we get the information that the
deed was re-presented to him on 21st
March 1966 for registration pursuant to
orders of the District Registrar.

3. This Writ petition was filed by the
petitioner on 13th April, 1966 with a
prayer that the direction contained in the
appellate order of the District Registrar
that the deed should be registered only
upon the petitioner paying Rs. 15,000/-
may be quashed as illegal and beyond the
powers of the District Registrar.

4. The only point for consideration is
whether a District Registrar disposing of
an appeal under Section 72 of the Regis-
tration Act, has the power to impose such
a condition. The relevant section is Sec-
tion 75 of which sub-ss (1) and (2) have
a direct bearing on the question now be-
fore us. (Those sub-sections read

"75 (1) If the Registrar finds that the
document has been executed and that the
said requirements have been complied
with, he shall order, the document to be
registered

(2) If the document is duly presented
for registration within thirty days after
the making of such order, the registering
officer shall obey the same and thereupon
shall, so far as may be practicable, follow
the procedure prescribed in Sections 58,
59 and 60."

5. Of the three sections enumerated
above, it is sufficient to refer to Section 58.
The said section requires the Registrar to
endorse on the document certain parti-

culars among which are those stated in Clause (c) of sub-section (1), viz.,

"Any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution."

Then follows—Sub-section (2) which reads: "If any person admitting the execution of a document refuses to endorse the same, the registering officer shall nevertheless register it, but shall at the same time endorse a note of such refusal."

6. These provisions of Section 58 make it abundantly clear that the registering officers under the Act have no power to enforce payment of any consideration as a condition precedent for the registration of the document. Where money is paid in the presence of the registering officer, he is required to endorse the fact on the document at the time of registration. The question whether a statement contained in the document regarding payment of consideration is or is not true, is also not a matter for the registering officer to examine and decide.

7. The appellate authority cannot, of course, in the ordinary circumstances, and in the absence of special provision in the relevant statute, have wider powers than the original authority in the matter of examining and deciding facts or questions of fact. Normally the appellate authority can either do itself or direct the original authority to do what under the law the original authority ought to have or should have done.

8. In the case of the Registration Act, the sections extracted above make it perfectly clear that the appellate authority, upon being satisfied as to the execution and the requirements of law referred to in Section 74 (b), is bound to order registration. Once that order is passed, it is for the original authority, the Sub-Registrar, to follow the procedure prescribed in Sections 58, 59 and 60 to the extent applicable in the changed circumstances.

9. We, therefore, accept the argument that the District Registrar, while disposing of the appeal under Section 72, had no power or jurisdiction to direct payment of any sum of money as a condition precedent for getting the document registered. That direction, therefore, alone is hereby quashed.

10. As it appears from the report of the Sub-Registrar now received that the document has been re-presented before him within one month of the date of the appellate order of the District Registrar, the Sub-Registrar will now proceed to register the document in accordance with law.

11. The parties will bear their own costs.

TVN/D.V.C.

Order accordingly.

AIR 1969 MYSORE 361 (V 56 C 88)

A. R. SOMNATH IYER, J.

Tata Keshavaiah Setty, Petitioner v. M. Ramayya Setty and others, Respondents.

Civil Revn. Petn. No. 1044 of 1968, D/- 18-2-1969.

Limitation Act (1963), Art. 119(a) — Production of award in Court by Arbitrator — Art. 119(a) does not apply — (Arbitration Act (1940), S. 14(2)).

Article 119(a), Limitation Act, governs only an application by a person who seeks the direction of the Court under S. 14(2) Arbitration Act that the arbitrator or the umpire, as the case may be, should produce the award in court. The production of the award by the arbitrator or the umpire, as the case may be, is not within Art. 119(a) and there is no period of limitation prescribed by the Act for such production. AIR 1968 Pat 82, Foll. (Para 6)

The fact that the umpire produced the award at the instance of the parties, does not make any difference so long as the production was by the umpire and there was no application by the parties that he should be called upon to produce the award in court. (Para 8)

Cases Referred: Chronological Paras (1968) AIR 1968 Pat 82 (V 55) =

ILR 46 Pat 832, Mohd. Hasan v. Mohd. Anwar

7

C. Lakshminarayana Rao, for Petitioner; G. Vedavyasachar, for Respondent No. 9.

ORDER: In respect of a controversy between the members of a Hindu Joint Family who submitted their disputes to the arbitrators appointed by them so that they might make an award, an award was made on April 18, 1964, and respondent 9 in this revision petition instituted a suit in the court of the Civil Judge, Tumkur in Original Suit No. 40 of 1964 for the enforcement of the award. But, he withdrew from that suit which was not maintainable, and, before he withdrew from that suit, the umpire produced the copy of the award before the Civil Judge on June 15, 1966 under Section 14 (2) of the Arbitration Act. The copy was produced since the original award had already been produced in Original Suit No. 40 of 1964 when a summons had been issued by the court for the production of the original award at the instance of respondent 9 in this revision petition.

2. In the proceedings which commenced with the production of the copy of the award by the umpire a contention was raised by the petitioner in this revision petition that the production of the copy of the award by the umpire as late as on June 15,

GM/HM/D459/69/M

1966, was affected by Article 119(a) of the Indian Limitation Act, 1963 which prescribes a period of thirty days for "application for the filing in court of an award" under the Arbitration Act of 1940

3. The view taken by the Civil Judge who overrules the plea of limitation was that that Article of the Limitation Act was applicable only to an application by a person for a direction that the arbitrators should produce the award in court and that it did not control the production of the award by the arbitrators themselves

4. In this revision petition Mr Lakshminarayana Rao appearing for the petitioner contends that that view taken by the Civil Judge does not fit into the language of Article 119(a) of the Limitation Act, 1963. It was maintained by him that even an arbit-

trator who wishes to produce his award in court under Section 14(2) of the Arbitration Act must do so within the period of thirty days prescribed by Article 119(a) and that the production of the copy by the umpire after the expiry of that period of thirty days was not permissible.

5. I do not agree

6. Article 119(a) governs only an application by a person who seeks the direction of the court under Section 14(2) that the arbitrators or the umpire as the case may be should produce the award in court that is so is clear from the words "Application in specified cases" appearing on the top of Part I of the Third Division of the Schedule to the Indian Limitation Act, 1963 which have to be read with Article 119(a) which reads

THIRD DIVISION — APPLICATION

Description of Application	Period of Limitation.	Time from which period begins to run.
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PART I. APPLICATION IN SPECIFIED CASES.

**	**	**	**
119. Under the Arbitration Act 1940 (10 of 1940) (a) for the filing in Court of an award.	Thirty days.	The date of service of the notice of the making of the award.	
**	**	**	**

The language of this part of Art 119 makes it clear that the period of limitation which it prescribes does not govern the production of an award by the arbitrator or the umpire as the case may be but governs only an application made to the court by a person other than the arbitrator or the umpire for a direction that the arbitrator or the umpire should produce the award. But, the production of the award by the arbitrator or the umpire as the case may be is not within that Article of the Limitation Act and there is no period of limitation prescribed by the Act for such production.

7. The view that I take receives support from the decision of the High Court of Patna in Mohd Hasan v. Mohd Anwar,

AIR 1968 Pat 82 with the enunciation made in which I respectfully agree

8. But Mr Lakshminarayana Rao maintained that the provisions of Article 119 became applicable by reason of the fact that, as stated by the umpire, he produced the award at the instance of the parties. The fact that he did so does not in my opinion make any difference so long as the production was by the umpire and there was no application by the parties to the submission that he should be called upon to produce the award in court

9. I dismiss this revision petition. The costs of this revision petition will be costs in the cause and will abide the eventual result

NNH/DV C.

Petition dismissed

AIR 1969 MYSORE 362 (V 56 C 89)

A. R. SOMNATH IYER AND AHMED ALI KHAN, JJ.

G. B. Mudambadithaya and others, Petitioners v. The Union of India and another, Respondents.

Writ Petns. Nos. 2141, 1954, 2229, 1830 1896 1928, 2085 2007 to 2009, 2171, 2003 2004, 1975 1952, 2221, 2017 to 2022, 2052 to 2055 1991, 2469, 1871, 2259 1993 to 2000 and 2185 of 1966 and 8 of 1967 D/- 12-6-1969.

States Reorganisation Act (1956), S. 115 — Preparation of Inter-State seniority list — Criteria for equation of posts laid down in conference of Chief Secretaries of States, HM/HM/D61/69/B

1956 — Court can consider whether those criteria have been followed while preparing final Inter-State Seniority list — Held criteria not followed — Seniority list set aside. AIR 1969 Punj 34, held not good law in view of AIR 1968 SC 850 — Constitution of India, Art. 226.

Court has power to investigate the question whether the equation and determination of Inter-State Seniority list under Section 115, States Reorganisation Act has been made by the application of the relevant criteria laid down in the conference of the Chief Secretaries of States, 1956 or no, and if it transpires that the equation does not rest upon a proper application for the four principles on which that equation should

have rested, the Court can disturb the equation on which the impugned seniority lists depended. (Para 21)

Section 115 (5) of the States Reorganisation Act directs an integration which ensures fair and equitable treatment to all persons affected by the provisions of that section, and it is to afford such fair and equitable treatment that the conference of the Chief Secretaries deduced the four principles by the application of which alone the equation had to be made. So it cannot be contended that those four principles which were formulated solely and exclusively for the guidance of the Central Government, can have no relevance when the equation is assailed on the ground that it does not rest upon the principles so formulated. AIR 1968 SC 850, (1969) 17 Law Rep 591 (Mys). Relied on; AIR 1969 Punj 34, held not good law in view of AIR 1968 SC 850. (Para 23)

Two of the four criteria by the application of which an equation has to be made are: (1) the nature and duties of post and (2) the responsibilities and powers exercised by the officers holding a post. (Para 27)

Held that the equation of the post of an Assistant District Co-operative Officer of Bombay to the post of an Inspector in the new State of Mysore made on the basis of that discussion by the Advisory Committee could not be sustained. (Para 30)

Equation of a post of District Co-operative Officer of Bombay to the post of an Inspector of the new State of Mysore and the equation of the initial cadre posts with promotional posts of Bombay, did not rest upon the application of any of the four principles by which it stood regulated. Moreover the equation so made introduced an element of incongruity. (Para 32)

Equation with respect to the other posts also could not be defended. (Para 37)

(Fresh determination of final list ordered.) (Para 37)

Cases Referred: Chronological Paras
(1969) AIR 1969 Punj 34 (V 56)=

ILR (1968) 1 Punj 204, K. C. Gupta v. Union of India 25

(1969) 17 Law Rep 591 (Mys).

Venkatachalachar v. Union of India 24

(1968) AIR 1968 SC 850 (V 55)= 1968-2

SCR 186, Union of India v. P. K.

Roy 19, 25

G. S. Ullal, In No. 2141/66; H. B. Datar

in Nos. 1954, 2229, 1830, 1896, 1928, 2005,

2007 to 2009, 2171, 2003, 2004, 1975, 1952,

2221 and 2185 of 1966; S. G. Bhat, for V. S

Malimath, in Nos. 2017 to 2022 and 2052 to

2055/66; S. K. Venkataranga Ivengar, in No.

1991/66; K. Murlidhar Rao, in No. 8/67,

C. B. Motiah, in No. 2469/66; Smt R. Lalith

amma, in Nos. 1871, 2259, 1993 to 2006/66,

for Petitioners; B. S. Keshava Ivengar, Central

Govt. Pleader, for Respondent No. 1; in

Nos. 2141, 1954, 2229, 1830, 1896, 1928,

2005, 2007 to 2009, 2171, 2003, 2004, 1975,

1952, 2017 to 2022, 2052 to 2055, 2469, 1991,

1871, 2259, 1993 to 2000, 2185 of 1966 and 8/1967, for Respondent; E. S. Venkataramah, High Court Spl. Govt. Pleader, for Respondent No. 2, in Nos. 2141, 1954, 2229, 1830, 1896, 1928, 2005, 2007 to 2009, 2171, 2003, 2004, 1975, 1952, 2221, 1991, 1871, 2259, 1993 to 2000, 2185 & 8 of 1967, for Respondents Nos. 2 & 3, in Nos. 2017 to 2022 & 2052 to 2055/66, for Respondent No. 9, in Nos. 2469/66; M. Rama Jois, for Respondents Nos 3 to 6, in Nos. 1975/66 and for Respondents Nos. 4 to 8 in No. 2221/66, for Respondents Nos. 4 to 7 in Nos. 2017 to 2022/66 and 2052 to 2055/66.

SOMNATH IYER J.: In these 40 Writ Petitions in which we heard arguments with respect to each of the writ petitions on the basis of its own facts and pleadings, we find it possible to pronounce a common order and we accordingly do so.

2. These 40 writ petitions concern two final inter-State seniority lists made by the Central Government under the provisions of Section 115 of the States Reorganisation Act in respect of the post of an Inspector and a junior Inspector of Co-operative Societies in the new State of Mysore which came into being on November 1, 1956. These inter-State seniority lists related to the Department of Co-operation in which there was a concourse of civil services from five different areas of which the new State was composed. These lists rested principally upon equations made by the Central Government on the advice tendered by the Advisory Committee of which Section 115 (5) of the States Reorganisation Act speaks.

3. The list pertaining to the post of an Inspector integrated twentyone species of posts. Sixteen of them were of the then State of Bombay, the holders of which were allotted to the new State of Mysore one, of the then State of Hyderabad, two, of the State of Madras, one, of the State of Coorg and one more, of the former State of Mysore. These posts were considered to be equivalent posts.

4. The other final list as already stated appertained to the post of a junior inspector of Co-operative Societies in the new State of Mysore. This integration appertained to eight different kinds of posts which were held in five different areas which became part of the new State of Mysore to which we have referred. One of them was in the former State of Mysore, two were in the State of Bombay, three in the State of Hyderabad, one in the State of Coorg and one in the State of Madras. The Central Government thought that these posts were also equivalent posts and the equated post was that of a junior inspector.

5. We have before us in these Writ petitions more than one kind of challenge to the two final inter-State seniority lists prepared by the Central Government in that way.

6. But the main criticism made of these two lists is that they depended upon an equivalence of posts deduced without the application of the relevant criteria, and incidentally it is also contended that even the process by which there was a determination of seniority and the ranks to be assigned was not made in accordance with law.

7. It appears to us for reasons to be presently stated that the complaint with respect to the assignment of ranks based upon the determination of seniority is one which really concerns the complaint against equation, except in some cases in which the complaint that a proper rank has not been assigned has no association with the complaint against the equation.

8. We are therefore, asked in these writ petitions to quash the two final inter-State seniority lists.

9. Those of the petitioners who challenge the list appertaining to the cadre of Inspectors fall into more than one category. Some of them contend that their posts should have been equated to a post higher than that of an Inspector in the new State of Mysore. The others impeach the inclusion of some of the posts in the different areas. Some of them make the impeachment that inferior posts have been equated to the post of an Inspector in the new State.

10. Some of them, as for example in W. P. 1991 of 1966 and W. P. 2416 of 1966, make a complaint that in the determination of the length of continuous officiation in the equated post, some part of the service rendered by them in, what according to them was an equivalent post, has been illegitimately excluded from consideration, and that had there been no such exclusion they would have been entitled to the assignment of higher ranks.

11. With respect to the impugned list appertaining to the cadre of Junior Inspectors in the new State of Mysore, the most outstanding complaint is that they should have been included in the Inspectors' list and not in the Junior Inspectors' list, and that their exclusion from the Inspectors' list is attributable to an unsupportable equivalence of posts.

12. We shall first address ourselves to the criticism of the equations on which the impugned lists rest. But before we do so it should be observed that the challenge to the equation in the writ petitions before us does not extend to all the twentyone posts to which the Inspectors' list refers, nor does it extend to all the eight posts to which the Junior Inspectors' list appertains. We have been taken through the pleadings in all the writ petitions before us, and it is undisputed that with respect to the post of a Senior Inspector in the erstwhile State of Hyderabad, the post of a Co-operative Sub-Registrar in the State of Madras and the post of Inspectors in the former State of Mysore, the equation made by the Central

Government is not the subject matter of challenge.

13. We do not accede to Mr Motiah's submission that there is any challenge in W. P. 2469 of 1966 in which the restricted claim made by the petitioner is that he should be made available the benefit of the service which he had rendered as Junior Inspector in the State of Coorg in the same way in which, according to him, the determination of the aggregate length of officiation was made in the case of the employees of the former State of Mysore.

14. Mr. Datt, on behalf of one of the petitioners, maintained that in some of the representations made to the Central Government under Section 115(5) of the States Reorganisation Act, there was a contention that the equation concerning the old Mysore Post made by the State Government on the basis of which they prepared the provisional inter-State seniority list was not correct, but that matter was not pursued after the Central Government prepared their final inter-State seniority list, and so, the position is that in the petitions before us today, the equation made by the Central Government with respect to the post of a Senior Inspector of the erstwhile State of Hyderabad, the post of a Co-operative Sub-Registrar of the State of Madras and the post of Inspectors of Co-operative Societies in the former State of Mysore, remains unchallenged.

15. So, what we should do in these writ petitions is to investigate into the criticism of the equation in so far as it relates to the remaining posts. Sixteen of them relating to the Inspectors' list, were in the State of Bombay, one is the post of a Senior Inspector of Co-operative Societies in the State of Madras and the remaining was the post of a Senior Inspector in the State of Coorg.

16. Some of the petitioners who were the holders of those sixteen posts in the State of Bombay namely, the post of a District Co-operative Officer of grade I in the pay scale of Rs. 200-300 and the post of an Auditor, grade I in the pay scale of Rs. 200-300 made the claim that their posts were superior to the equated post of an Inspector in the new State of Mysore, and that the equivalence deduced between that post and the posts held by them was an unsupportable equivalence.

17. The petitioner in W. P. 8 of 1967 who was a Senior Inspector of the State of Hyderabad has put forward a grievance that the rank assigned to him was lower than the rank to which he was entitled and that the assignment of the lower rank is attributable to the equation which was made by the Central Government between some of the inferior posts in the State of Bombay and the equated post. Similarly that is also the complaint made with respect to the equation of the Senior Inspector's post in the State of Madras and the Senior Inspector's post in the State of Coorg with the equated post. According to him those in-

ferior posts in the State of Bombay and the two posts in Madras and Coorg were not equivalent to the equated post and should have been included in the Junior Inspectors' list.

18. The petitioner in W. P. 2141 of 1966 also makes a similar complaint with respect to the equation concerning some of the posts in Bombay.

19. Now, the equivalence between the various posts should have rested on four principles which were evolved during the conference of the Chief Secretaries of various States convened in the year 1956, and, with respect to that matter the Supreme Court said this in Union of India v. P. K. Roy, AIR 1968 SC 850 at p. 852:

"With regard to the principle for determining the equation of posts and relative seniority the following conclusions were reached at the conference of the Chief Secretaries:

It was agreed that in determining the equation of posts, the following factors should be borne in mind:—

- (i) the nature and duties of a post;
- (ii) the responsibilities and powers exercised by the officers holding a post; the extent of territorial or other charge held or responsibilities discharged;
- (iii) the minimum qualifications, if any, prescribed for recruitment to the post;
- (iv) the salary of the post.

It was agreed that in determining relative seniority as between two persons holding posts declared equivalent to each other, and drawn from different States, the following points should be taken into account:—

- (i) length of continuous service, whether temporary or permanent, in a particular grade; this should exclude periods for which an appointment is held in a purely stop-gap or fortuitous arrangement;
- (ii) age of the person; other factors being equal, for instance, seniority may be determined on the basis of age.

20. It was said on behalf of the petitioners that the impugned equations did not rest upon the four criteria evolved during the Chief Secretaries' Conference, and that therefore, there should now be a fresh determination of the equation and the determination of seniority which would ordinarily be a corollary of the former.

21. But Mr. Rama Jois appearing on behalf of the allottees from the former State of Mysore advanced the contention that this court has no power to investigate the question whether the equation has been made by the application of the relevant criteria or no, and that even if it transpires that the equation does not rest upon a proper application for the four principles on which that equation should have rested, we could not disturb the equation on which the impugned seniority lists depended.

22. We are of opinion that Mr. Central Government Pleader is right in not subscribing to the postulate so placed before us by Mr. Rama Jois. This court has expressed the view more than once and in more than one case that an equation which it made except on a proper application of those four principles, cannot be maintained.

23. It should be observed that Section 115 (5) of the States Reorganisation Act directs an integration which ensures fair and equitable treatment to all persons affected by the provisions of that section and it is to afford such fair and equitable treatment that the conference of the Chief Secretaries deduced the four principles by the application of which alone the equation had to be made. So it is far too unreasonable for Mr. Rama Jois to contend, as he did contend, that those four principles which, according to him, were formulated solely and exclusively for the guidance of the Central Government, could have no relevance when the equation is assailed on the ground that it does not rest upon the principles so formulated.

24. In Venkatachalachar v. Union of India, (1969) 17 Law Rep 591 (Mys) this court set aside the equation on the ground that it was not preceded by a proper application or consideration of those four principles, and, we see no reason to take a different view in the cases before us.

25. But Mr. Rama Jois asked us to say that the decision of the Punjab High Court in K. C. Gupta v. Union of India, AIR 1969 Punj 34 which takes a contrary view should commend itself to us. But it is not however possible for him to ask us to do so since the view expressed by the Punjab High Court on which Mr. Rama Jois depends can no longer be sustained after the clear enunciation made by the Supreme Court in AIR 1968 SC 850 which emphasises the importance of the four principles evolved during the Chief Secretaries' Conference and their application in obedience to the rules of natural justice.

26. We therefore now proceed to consider the ratiocination on which the impugned equation rests. From the proceedings of the Advisory Committee made available to us by Mr. Central Government Pleader, it becomes clear that in the context of the discussions appertaining to the impugned equations, the Advisory Committee proceeded to discuss the question whether a dichotomy with respect to the post of an Inspector in the form of two lists, one relating to the cadre of Inspectors and the other relating to the cadre of Junior Inspectors was appropriate and reached the conclusion that it was. Then the discussion related to sixteen different posts of Bombay and the two posts of Madras. The Advisory Committee thought that it was not clear "whether the duties of each of the posts from Bombay differed materially and substantially from

those of the other and if so, to what extent." So they proceeded to discuss the process of recruitment to those posts and the prescribed qualifications. This discussion was in the main restricted to the question whether the post of an Assistant District Co-operative Officer which is the 9th post in annexure II to the provisional inter-State seniority list which was prepared on April 8, 1965, of the State of Bombay, was inferior to the post of an Inspector in the new State of Mysore, and the conclusion reached was that it was not.

There was next the discussion of the post of an Assistant District Co-operative Officer of Bombay and whether that post was equivalent to the post of a senior Inspector of Co-operative Societies of Mysore and other integrated areas, and the view expressed by the Advisory Committee with respect to that matter is of some importance supporting as it does the complaint made by the petitioners before us with respect to the equation. This is what the Advisory Committee said

"Having regard to the nature of duties performed by the incumbents of the post of District Co-operative Officer and the Assistant District Co-operative Officer and their jurisdiction, it was felt that it would be reasonable to equate the post of Assistant District Co-operative Officer from Bombay with the Senior Inspector of Co-operative Societies from Mysore and other integrating areas. The post of District Co-operative Officer from Bombay might have involved the assumption of somewhat higher duties and responsibilities, but the position of the incumbents of those posts would be safeguarded by the principle of maintaining inter se seniority and by the fact that those of them who had been promoted to that post would be allowed to count all the service rendered by them as Assistant District Co-operative Officer towards seniority in the integrated list".

27. It will be remembered that two of the four criteria by the application of which an equation has to be made are: (1) the nature and duties of post and (2) the responsibilities and powers exercised by the officers holding a post. The investigation which was made by the Advisory Committee with respect to the matter to which we have referred was whether the post of an Assistant District Co-operative Officer of Bombay was equivalent to the post of a senior Inspector in the other integrated areas or the equated post of an Inspector in the new State of Mysore. The question did present some importance by reason of the fact that the post of a District Co-operative Officer of grade I and the post of a District Co-operative Officer of grade II in the State of Bombay were both, according to the Advisory Committee equivalent to the post of an Inspector in the new State of Mysore. The pay scale of the former post was Rs 200-300 and that of the latter Rs 150-200

The representation made to the Advisory Committee was that an Assistant District Co-operative Officer of Bombay whose pay scale was Rs 100-150 could not be equated with the Inspector of the new State of Mysore since that post was inferior to the post of a District Co-operative Officer, grade I and grade II.

28. In the context of that representation it was the duty of the Advisory Committee to examine the nature and duties of the three posts and the responsibilities and powers exercised by the officers holding them. And, when they made their investigation they had no doubt in their minds that the post of a District Co-operative Officer involved the assumption of somewhat higher duties and responsibilities than those of the post of an Assistant District Co-operative Officer, and, unless they found it possible to say that the other criteria, when applied, would yield a different conclusion they could not have deduced any equivalence between the two posts on the one hand and the third on the other.

29. That, *prima facie* the position, and the disparity between the duties and responsibilities of the two posts on the one hand and those of the other, would not get obliterated by mere maintenance of the inter se seniority of the persons holding those posts, which has no relevance whatsoever in the determination of the equation which has to be made in accordance with the prescribed four criteria, and, that is not one of them. It is difficult to understand how the maintenance of inter se seniority between the holders of two unequal posts, if they are unequal — and on that question it is not for us to express any final opinion in these cases — can make them equal. So, the equation so deduced invites the criticism that it was made by the application of the relevant criteria, since there is no other discussion on that question, save what we have said about it.

30. What we have said so far is the discussion of the Advisory Committee with respect to the equivalence between the post of an Assistant District Co-operative Officer of Bombay which is the 9th post in the second annexure to the provisional seniority list and the equated post of an Inspector in the new State of Mysore. And it is plain that the equation made on the basis of that discussion cannot be sustained.

31. With respect to the remaining thirteen posts among the sixteen posts of Bombay the Advisory Committee did not embark upon any adequate discussion. In that context the committee said this —

"There are some other posts from Bombay which carried the scale of Rs 100-140 and Rs 150-200. These were only an intermediate category of posts to which officers were promoted before they came to hold the post of District Co-operative Officers. The incumbents of those posts also should be included in the seniority list of

the equated cadre and should count towards seniority all the service rendered by them in posts on Rs. 100-140 and above”.

32. The statement so made by the Advisory Committee suggests that the post of a District Co-operative Officer was a promotional post while the other posts were posts relating to the initial recruitment cadre. But the post of a District Co-operative Officer of Bombay was equated to the post of an Inspector of the new State of Mysore, and the equation of the initial cadre posts with the promotional posts of Bombay appears to introduce an element of incongruity. Moreover the equation so made did not rest upon the application of any of the four principles by which it stood regulated.

33. The concluding part of the discussion of the Advisory Committee related to the post of a Co-operative Sub-Registrar of Madras. But, as we have already observed, there is no challenge to the equation made with respect to that post, and so, it becomes unnecessary for us to investigate its correctness.

34. After the discussion concluded in that way the Committee proceeded to make its comments on individual representations. But before doing so, there was no discussion of the attributes of the post of a Senior Inspector of Madras or of a Senior Inspector of Coorg.

35. It is thus clear that with respect to the Bombay posts, the post of a Senior Inspector of Madras and the post of a Senior Inspector of Coorg, the equation was not made by the application of the relevant criteria, and so, cannot be sustained.

36. It would be recalled that the equation made with respect to the post of a Senior Inspector of Hyderabad, the post of a Co-operative Sub-Registrar of Madras and the post of an Inspector of the former State of Mysore is not the subject matters of any challenge in these writ petitions, and since according to Mr. Central Government Pleader not even a representation with respect to those matters was made to the Central Government under Section 115 (5) of the States Reorganisation Act, it becomes unnecessary for us to embark upon a discussion of its validity.

37. If the equation with respect to the other posts cannot be defended, and so must be set aside, except in the cases in which the complaint with respect to the determination of seniority rests upon some other ground, the assignment of ranks on the basis of the equation which now falls to the ground must also stand set aside. That determination has to be made in manner prescribed by the conference of the Chief Secretaries, and so, we set aside the final inter-State seniority list relating to the post of an Inspector, in so far as it relates to the sixteen posts of Bombay, the post of a Senior Inspector of Madras and the post of

a Senior Inspector of Coorg. We make a direction that the equation with respect to those posts should now be made afresh and in accordance with law. But we, however, make it clear that the determination of seniority with respect to everyone of the persons included in the final inter-State seniority list relating to the cadre of Inspectors, including those who were allottees from the former State of Mysore and the State of Hyderabad and those from Madras who held the post of a co-operative sub-registrar in the State of Madras should be made afresh and on the basis of the new equation to be evolved in accordance with the direction made by us.

38. With respect to the equation evolved for the preparation of the inter-State seniority list in respect of the cadre of Junior Inspector of Co-operative Societies in the new State of Mysore, it appears from the proceedings of the Advisory Committee made available to us by Mr. Central Government Pleader that there was again in this context no application of the four criteria by the application of which alone that equation should be made. All that the Advisory Committee stated with respect to that matter was to allude to the argument advanced on behalf of the representationists that the duties and responsibilities of the Senior Inspectors of the State of Coorg and the Junior Inspectors of that State were identical and that they should not be put into two different classifications. The Advisory Committee did not say that duties and responsibilities and the jurisdictions appertaining to the one post were not identical with those of the other, but proceeded to observe that since the erstwhile State of Coorg had maintained two different classes of posts on two different scales of pay and recruitments to those posts were made by two different methods, the two distinct classifications must remain.

39. It is obvious that the perpetuation of those two distinct classifications could not be made to rest on any such ground. So, the complaint made by the petitioners in W. P. 2469 of 1966 and W. P. 1991 of 1966 against the exclusion of the service rendered by them in the cadre of Junior Inspectors of the State of Coorg has to be sustained on the ground that, into the validity of such exclusion, there has been no proper investigation.

40. With respect to the exclusion of the Junior Inspectors of the State of Madras from the list of Inspectors it appears from the Advisory Committee's proceedings that there is little or no discussion supporting the equation. It appears from those proceedings that here again there was no application of the relevant principles formulated in that regard.

41. So we set aside the final inter-State seniority list concerning the cadre of the Junior Inspectors in so far as it relates to

the posts of Junior Inspectors of the then State of Coorg and the posts of Junior Inspectors of the State of Madras. As to equation made with respect to the post of a Junior Inspector of the former State of Mysore which existed only in the area of the Bellary District which became part of the former State of Mysore in the year 1953 but was in the State of Madras until then, and with respect to the other posts of the Hyderabad and Bombay areas which were equated with the post of a Junior Inspector of the new State of Mysore, the final inter-State seniority list will remain undisturbed, but subject to the re-assignment of ranks on a proper determination of seniority on the basis of the equation which may now be evolved or deduced by the Central Government as directed by this order.

42. In W P 1952 and W P 2008 of 1966, the controversy surrounds the question whether the petitioners are entitled to higher ranks than those assigned to them in the impugned final inter-State seniority list relating to Inspectors, and that claim to no extent rests upon any complaint about equation. Their contention is that even on the basis of the equation deduced by the Central Government the ranks which should properly be assigned to them are higher than those which they have now secured. With respect to that matter it is admitted that they have made representations to the Central Government, and now that the entire equation with respect to the post concerning those two petitioners has to be made afresh in accordance with the directions issued in this order, even the determination of the seniority of these two petitioners and of the ranks to be assigned to them has to be made once again in accordance with law.

43. Mr. Central Government Pleader raised a contention that the Central Government is normally not the repository of the power to decide controversies concerning inter se seniority. On that question we do not express any opinion in these writ petitions. It will be open to the petitioners to contend before the Central Government that that power resides in the Central Government and the Central Government, when it determines seniority, will do so in accord-

ance with law by the exercise of all the powers which reside in them. If these two petitioners are aggrieved by any adverse decision either with respect to competence or in respect of the determination of seniority to be so made by the Central Government, they would of course be at liberty to seek appropriate redress at the appropriate stage.

44. Now, the other incidental directions that we issue are these: The Central Government will not call for representations with respect to the matters to be decided by them. The petitioners in all these writ petitions and others who wish to do so shall make their representations to the Central Government with respect to the matters to be decided now by the Central Government in accordance with this order within six weeks from this date. Those representations which have to be transmitted to the Central Government will be forwarded by the State Government to the Central Government within two months thereafter. The Central Government will proceed to prepare the final inter-State seniority list within four months next following.

45. The petitioners before us and the others who can make representations in manner directed, can raise in those representations every contention available to them.

46. Mr. Central Government Pleader says that in the context of an undertaking given by the Central Government to the Supreme Court when a writ petition presented by persons who held the posts of District Co-operative Officers Grade I, of the Bombay State was disposed of, the Central Government is now making an equation with respect to those posts, and that the Central Government should therefore be at liberty to make a consolidated equation of all the posts in respect of which such equation has now to be made. We grant them liberty to do so.

47. Let the usual copies of this order be supplied to Mr. Government Advocate and Mr. Central Government Pleader, and to such others who make applications within a week from this date.

48. No costs.

R.G.D.

Order accordingly.

END

It has already been stated that the deceased was in very angry mood. He filthily scolded the accused. He also raised the axe M. O. I to kill the accused. All these facts were sufficient to give grave and sudden provocation to the accused to the extent of his being deprived of the power of self-control. If in such circumstance the accused caused the death of the deceased, Exception 1 to Section 300, I. P. C. in terms applies. We accordingly hold that the offence committed by the accused comes within the mischief of Section 304, I. P. C.

8. For the reasons given above, we set aside the order of acquittal and convict the respondent (accused) under Section 304, I. P. C. and sentence him to undergo R. I. for five years. Appeal is allowed.

9. **ACHARYA, J.:**— I agree.
AKJ/D.V.C. Appeal allowed.

AIR 1969 ORISSA 289 (V 56 C 105)

G. K. MISRA AND S. K. RAY, JJ.

Bisipati Padhan, Appellant v. State, Respondent.

Criminal Appeal No. 13 of 1969 and Death Ref. No. 1 of 1969, D/- 21-2-1969, from order of S. J. Gunjam Boudh, Berhampur, D/- 16-1-1969.

(A) Criminal P. C. (1898), S. 288 — Depositions before committing Court brought on record of Sessions Court are substantive evidence — Such statements conflicting with those made before Sessions Court — Duty of Court, pointed out.

The deposition before the committing Court brought into the record of the Sessions Court under S. 288 Cri. P. C. constitutes substantive evidence before the Sessions Court. If the witness is produced and examined, the evidence can be treated as evidence in the case for all purposes subject to the provisions of the Evidence Act.

Further, when a person has made two conflicting statements on oath, it is not possible to safely rely on a particular version. The statement before the committing Court being substantive evidence, as a matter of law no corroboration is necessary for acceptance of the same. But in order to decide as to which version out of the two is true, as a matter of prudence some corroboration is necessary through extrinsic evidence, in arriving at a conclusion whether one version is to be preferred to the other. However there may be some cases in which even without corroboration one version may be preferred to the other from the

intrinsic circumstances themselves, if the Court of fact keeps in its mind the position that the matter is to be carefully sifted in view of the two conflicting versions. AIR 1964 SC 1357, Foll.

(Para 6)

(B) Criminal P. C. (1898), Section 164 — Evidence Act (1872), Sections 145 and 157 — Statement of witness under Section 164 — Can be used for purposes of corroboration or contradiction of the witness.

A statement of a witness under Section 164, Criminal P. C. is not substantive evidence, but is a former statement made before an authority legally competent to investigate the fact. Such a statement can be used either for corroboration of the testimony of a witness under Section 157 or for contradiction thereof under Section 145 of the Evidence Act. AIR 1954 Orissa 163, Rel. on.

(Para 7)

(C) Criminal P. C. (1898), Section 288 — Statements before committing Court — Allegation that they were made under police pressure — Onus is on the accused to prove it — Evidence Act (1872), Sections 101-104. AIR 1952 SC 214, Foll.

(Para 7)

(D) Penal Code (1860), Section 302 — Sentence — Accused an aborigine — Aborigines are more or less of animal instinct — Accused having volatile temperament — Accused using gun and killing deceased on his being chastised for doing no work in the fields — Held, that the ends of justice would be met if the extreme penalty of death was not imposed but imprisonment for life only was imposed.

(Para 11)

(E) Criminal P. C. (1898), Sections 162 and 164 — Judicial confession — Admissible without examining Magistrate before whom it was made.

The confessional statement can be admitted into evidence and made an exhibit without examining the Magistrate in Court. If the confessional statement is not in conformity with law examination of the Magistrate would not cure it. AIR 1952 SC 159, Foll.

(Para 13)

(F) Evidence Act (1872), Section 45 — Medical evidence — Injury report is an admissible piece of evidence in proof or disproof of the theory of accident.

(Para 14)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1357 (V 51) =

1964(2) Cri LJ 359, Sharnappa v. State of Maharashtra 6

(1954) AIR 1954 Orissa 163 (V 41) =
1954 Cri LJ 980, State of Orissa v. Banshi Nayak 7

(1952) AIR 1952 SC 159 (V 39) =
1952 Cri LJ 839, Kashmira Singh v. State of Madhya Pradesh 13

(1952) AIR 1952 SC 214 (V 39)=

1952 Cri LJ 1131, Bhagwan Singh

v. State of Punjab

7

(1936) AIR 1936 PC 253 (2) (V 23)=

37 Cri LJ 897, Nazir Ahmed v

King Emperor

13

H G Panda for Appellant, Govt Advocate, for Respondent

G. K. MISRA, J. — The appellant has been convicted under Section 302 I P C and sentenced to death. A reference has been made under Section 374 Cr P. C to the High Court for confirmation of the sentence of death.

2. The prosecution case may be stated in short. One Badal (dead) had four sons Krushna (dead), Kalisingi (P W. 2), Suma (dead) and Arjun (the deceased). Out of them, only Krushna had 2 sons Tunde (P W 1) and Bisipati (the accused). Others had no issues. The four sons of Badal were having joint cultivation of their lands. They had however separate messings. On 28-2-68 at about 4 P M the deceased Arjun, P W 2 and the accused were sitting in the Bari of the accused. The deceased asked the accused as to why he was loitering with the gun and was not doing work in the fields. The accused went inside his house, brought out his gun (M O I) and shot the deceased. The deceased instantaneously fell down dead. The accused threw away the gun in the Bari and entered into his house. P. W 1 had gone out to the jungle to bring fuel. P W 2 went out and called P. W 1. Both P. Ws 1 and 2 tied the accused with a rope to a pole on the verandah of the accused. The dead body was carried to the house of the accused. P. Ws 4 and 5, the ward members of the village Panchayat, were informed. Before them the accused made an extra-judicial confession that he killed the deceased as the latter asked him as to why he was not doing work in the fields. F I. R was lodged on that very day at about 8 P M before a head-constable. The formal F I. R (Ext 2) was drawn up at 3 P. M next day. The defence of the accused before the sessions court was that he came out of his house with the gun (M O I). He stumbled in his own Bari where the deceased and P W 2 were sitting. The gun accidentally went off and the deceased was killed. On an analysis of the materials on record, the learned Sessions Judge held that the death of the deceased was homicidal and that the accused killed the deceased.

3. The finding that the death was homicidal is not assailed before us. In fact it is the very defence case that as a result of an accident the deceased died of the shot from the gun (M O I).

4. The only question for consideration is whether the accused killed the deceased with the gun (M O I) or the deceased

died as a result of accidental gun-shot. The only eye-witness is P W. 2. In the committing court P. W. 2 fully supported the prosecution story. There is also no divergence between his statement in the committing court and that before the Sessions Judge, except to the limited extent that he speaks of accidental firing of the gun in the sessions court though he clearly stated in the committing court that the accused killed the deceased deliberately. The essential part of his statement in the committing Court runs thus —

"The deceased Arjuna told the accused Bisipati as to why he was loitering with the gun without doing work in the fields. The accused Bisipati went inside his house and brought out his gun and shot the deceased Arjuna with that gun in the Bari of the accused Bisipati at village-Rasinaju."

In cross-examination in the committing court, a suggestion regarding accidental gun-firing was made. P W 2 however stoutly denied it. The statement runs thus —

"It is not a fact that the accused did not shoot the deceased Arjuna. It is not a fact that the accused was holding the gun and that by accident his hand fell on the trigger and that accidentally there was firing."

It would thus be seen that the suggestion of accidental firing was repelled by P. W. 2. One more significant feature to be noted at this stage is that the story of stumbling and falling down of the accused on the ground with the gun (M O I), taken up in the Sessions Court, was not advanced in the committing court. On the contrary, a different story regarding accidental firing was taken. It was to the effect that by accident the hand of the accused fell on the trigger and there was firing. Before the learned Sessions Judge P. W. 2 deposed thus —

"The deceased Arjuna told the accused as to why he (the accused) was simply moving about with a gun instead of doing cultivation, when he (the deceased) had grown old and was incapable of doing cultivation. Then, the accused had not the gun with him. At this, the accused did not reply, but went inside his house and came out with his gun. This is the gun (M O I). The accused then gave out that he was going to the forest for hunting. When the accused was going out with his gun, he suddenly fell down on the ground by the left side, hardly at a distance of about six cubits from me and the deceased. When the accused fell down on the ground as above with the gun in his hand, its muzzle towards us, the gun fired one shot at us, hitting directly the belly of the deceased Arjuna. At this, Arjuna died and fell down on the ground Then my-

self and the P. W. 1 tied the accused by means of a rope."

In cross-examination P. W. 2 however admitted that his statement in the committing court to the effect "The accused Bisipati went inside his house and brought out his gun and shot the deceased Arjuna with that gun" is a truth. He admits that in his statements under Section 164 and Section 162 Cr. P. C. he did not say about accidental firing out of fear for the police. He further says that he deposed about the accused killing the deceased intentionally, as tutored by the police.

5. As has already been stated, P. W. 2 is consistent in his narration of the story regarding other matters both in the committing court and the sessions court. The divergence in his statements is confined only to the question whether the accused killed the deceased intentionally and deliberately, or whether the deceased died as a result of accidental firing of the gun in the hand of the accused. When there are conflicting versions, the question for consideration is as to which version is true. It is to be noted that the deposition before the committing court brought into the record of the Sessions Court under Section 288 Cr. P. C. constitutes substantive evidence before the Sessions Judge. The section lays down that the evidence of a witness duly recorded in the presence of the accused under Chapter XVII may, in the discretion of the Presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act. The learned Sessions Judge resorted to the legal formalities in bringing the statement before the committing court to the records of the Sessions Court in accordance with the provision of this section. Thus, there are two substantive pieces of evidence before the Sessions Judge — One supporting the prosecution version and the other the defence theory.

6. When a person has made two conflicting statements on oath, it is not possible to safely rely on a particular version. The statement before the committing court being substantive evidence, as a matter of law no corroboration is necessary for acceptance of the same. But in order to decide as to which version out of the two is true, as a matter of prudence some corroboration is necessary through extrinsic evidence, in arriving at a conclusion whether one version is to be preferred to the other. It is however to be noted that there may be some cases in which even without corroboration one version may be preferred to the other from the intrinsic circumstances themselves, if the court of fact keeps to its mind the position that the matter is to

be carefully sifted in view of the two conflicting versions. A masterly exposition of the law is to be found in AIR 1964 SC 1357, *Sharnappa v. State of Maharashtra*, (see para 10).

7. In the light of the principles laid down, it is now necessary to examine whether the statement of P. W. 2 in the committing court is to be preferred to his statement in the Sessions Court that there was accidental firing. One of the most important circumstances in this case is that in his earliest version before a Magistrate under Section 164 Cr. P. C. P. W. 2 fully supported his version in the committing court that the accused killed the deceased intentionally and deliberately. The statement before the committing court is substantive evidence. Under Section 157 of the Evidence Act a former statement made by such witness, relating to the same fact, at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved. A statement of a witness under Sec. 164 Cr. P. C. is not substantive evidence, but is a former statement made before an authority legally competent to investigate the fact. Such a statement can be used either for corroboration of the testimony of a witness under Section 157 or for contradiction thereof under Section 145 of the Evidence Act. The statement of P. W. 2 made on 28-2-68 before a Magistrate, first class, under section 164 Cr. P. C. corroborates the statement in the committing court and contradicts the evidence before the Sessions Court. On this basis the statement before the committing court can be preferred to the evidence before the Sessions Court (see AIR 1954 Orissa 163 — *State of Orissa v. Banshi Nayak*).

The second circumstance which probabilises P. W. 2's statement in the committing court as reliable is the admitted fact by P. W. 2 even before the Sessions Judge that after the deceased was shot down, both P. Ws. 1 and 2 tied down the accused with a rope. If the story of accidental firing was true, P. W. 2 would have immediately stated that the accused had no fault and the deceased died as a result of accidental firing, and there was no justification for tying down the accused when he lacked guilty animus. The tying down of the accused, in which P. W. 2 played a significant role, indubitably points to the conclusion that because the accused deliberately murdered the deceased, he was tied down.

The third circumstance is that P. W. 2 has no issues. He was also having joint cultivation with P. W. 1 and the accused along with the deceased. The deceased cannot now be brought back to life. P. W. 1 and the accused being the only

issues in the family, P. W 2 is interested in saving the life of the accused. They are aborigines. At the initial stage P W 2 came out with the truth, but with the lapse of time the desire to save the accused has impelled him to resile from his earlier statement.

The fourth circumstance is that in his statement under Section 342 Cr P C before the committing court the accused did not advance the story of accidental firing. He resorted to a plea of complete denial of his knowledge as to how the deceased was killed. Under Section 257 Cr P C the examination of the accused recorded by or before the committing Magistrate shall be tendered by the prosecutor and read as evidence. The committing court statement was put to the accused in his statement under Section 342 Cr P C in the Sessions Court and he admits to have made such a statement. The fact that in the committing court the accused made a denial of the occurrence runs counter to his present story that he fell down by stumbling with the gun in hand which resulted in accidental firing and death of the deceased. Clearly the present plea is an after-thought. That apart, in cross-examination of P W 2 before the committing Court the plea of accidental firing was suggested in a different manner. The story of stumbling and falling down was not at all presented. On the other hand, it was suggested to P W 2 that accidentally the hand of the accused fell on the trigger which resulted in accidental firing and death of the deceased. The divergence between the nature of accident affects the truth of the statement of P W 2 in the Sessions Court that he fell down as a result of stumbling.

The next circumstance is that the plea of the accused that the earlier statement before the committing court was made under Police pressure has not been established. The onus is on the accused to establish it (see AIR 1952 SC 214, *Bhagwan Singh v State of Punjab*).

8. In his statement under Section 162 Cr P C before the police, P W 2 had stated that the accused deliberately killed the deceased. Such a statement is not substantive evidence and cannot be used for any purpose other than contradicting P W 2. The statement of P W 2 before the Sessions Judge thus stands contradicted by his statement under Section 162 Cr P C which proves the falsity of the statement before the Sessions Judge.

9. For the aforesaid reasons, there can hardly be any doubt that the version of P W 2 before the committing court that the accused killed the deceased is true, and his plea before the Sessions Judge that there was an accidental firing as a result of which the deceased died is false. The conviction is well founded on the

statement of P. W 2 before the committing court.

10. The learned Sessions Judge also placed reliance on the extra-judicial confession of the accused before P Ws 4 and 5. Both these witnesses resile from their statements in the committing court, before the Sessions Judge. We do not place much reliance on the extra-judicial confession and it is not necessary to discuss the reasons at length.

11. On our conclusion that the statement of P W 2 before the committing court is true, the conviction must be affirmed. As to the question of sentence, we agree with the learned Sessions Judge that the accused deliberately killed the deceased and the murder was cold-blooded. We however take note of the fact which the learned Sessions Judge ignored that the accused is an aborigine and appears to be of volatile temperament. He purchased the gun M O I and was whiling away his time in hunting without doing manual work in the field which was being jointly cultivated. At the time of occurrence the deceased chastised the accused as to why he was not doing work in the fields, this appeared to have aroused his anger and passion suddenly. The aborigines are more or less of animal instinct. For no reason they use their bow and arrows, and it makes no difference if in this particular case a gun was used. Accordingly we are of opinion that ends of justice would be met if the extreme penalty of death is not imposed upon the accused. We accordingly reduce the sentence to one of imprisonment for life.

12. In the result, the Death Reference is discharged and the Criminal Appeal is dismissed subject to the modification in the sentence.

13. We however cannot part with this case without observing that the learned Sessions Judge ought not to have hurriedly disposed of this case by ignoring certain provisions of law. The accused made a judicial confession before Shri K. V. Patra, Magistrate, First Class, on 9-3-68. This confessional statement has not been marked as an exhibit and has not been brought into record. No opportunity was also given to the accused in his statement under Section 342 Cr P C to say whether the confession was voluntary and true. We therefore express no opinion on the confession itself. From the order dated 9-1-1969 recorded by the learned Sessions Judge it appears that Shri K. V. Patra did not attend the court in obedience to the summons though he received a copy of the summons on 27-12-68. The learned Judge observed "In the above circumstances, we cannot wait for his evidence and the Associate P. P. gives him up." If the

learned Judge had cared to look into law, the confessional statement could have been admitted into evidence and made an exhibit without the Magistrate being examined in court. In AIR 1952 SC 159 *Kashmira Singh v. State of Madhya Pradesh*, their Lordships observed thus:—

"The prosecution were criticised for not calling the Magistrate who recorded the confession as a witness. We wish to endorse the remarks of their Lordships of the Privy Council in *Nazir Ahmed v. King Emperor*, AIR 1936 PC 253 (2) at p. 258, regarding the undesirability of such a practice. In our opinion, the Magistrate was rightly not called and it would have been improper and undesirable for the prosecution to have acted otherwise."

If the confessional statement as recorded is not in conformity with law, the examination of the Magistrate would not have cured it. The learned Sessions Judge and the Associate P. P. should not have ignored this elementary proposition of law.

14. Similarly the learned Judge and the Associate P. P. and the Advocate for the accused did not care to bring into record the injury report of Dr. R. C. Misra with regard to the injuries on the accused. The injury report was an admissible piece of evidence in proof or disproof of the theory of accident. We have however looked into the injury report. The location and nature of the injuries do not in any way militate against the theory of deliberate gun-shot.

15. RAY, J. :— I agree.

MVJ/D.V.C.

Order accordingly.

AIR 1969 ORISSA 293 (V 56 C 106)

S. BARMAN, C. J. AND S. ACHARYA, J.

Miss Eva Rout, Petitioner v. State of Orissa and others, Opposite Parties.

O. J. C. No. 288 of 1965, D/- 2-9-1968.

Education — Orissa Education Code, Art. 336 — Procedure — Managing Committee of school resolving to recommend termination of services of headmistress — Appeal of headmistress against that resolution rejected — No personal hearing given to her despite her prayer for such opportunity: Held that an opportunity should have been given to her to meet the charges against her — Procedure adopted by authorities not regular and was against principle of natural justice and that rejection of appeal was unsustainable. (Paras 3 and 4)

R. N. Misra and D. P. Mohanty, for Petitioner, Govt. Advocate L. K. Dasgupta

DM/FM/B459/69/D

and G. N. Sengupta, for Opposite Parties.

BARMAN, C. J. :— In this writ petition the petitioner—an ex-Head Mistress of the Urdu Girls School, Oriya Bazar, Cuttack—challenges the order of the District Inspectress of Schools, Central Circle, Cuttack, dated January 5, 1965 rejecting an appeal by way of representation filed by the petitioner against the resolution dated October 24, 1964 of the Managing Committee of the School by which the Managing Committee recommended that the services of the petitioner be terminated.

2. On September 9, 1964 the petitioner was called upon to show cause against certain charges including the charges that the petitioner remained absent from the school, without any application, from August 7, 1964 to August 9, 1964 and then from August 11, 1964 to August 18, 1964 causing dislocation of normal school work and further that she failed to intimate the President of the school about the holding of the public meeting on August 7, 1964 within the school premises. On September 29, 1964 the petitioner submitted an explanation purported to meet the charges against her; she also requested in her explanation for an independent enquiry or causing an enquiry to be made with proper notice to her before the concerned authorities proceeded to take any action against her interests.

On October 24, 1964 the Managing Committee passed a resolution giving findings on matters not included in the charges, namely, that she instigated the School Mistresses to go on strike and she was also found guilty of subsequent insubordinate behaviour with the President, as recorded in the resolution purported to give findings on the charges. As against the decision of the Managing Committee the petitioner appealed to the District Inspectress of Schools under Article 336 of the Orissa Education Code. The District Inspectress of Schools rejected the said appeal by way of representation. It is against this decision of the District Inspectress of Schools that the petitioner has filed this writ petition.

3. The main ground on which the petitioner challenges the impugned order is that no opportunity was given to her for a personal hearing although she prayed for the same in her explanation to the charges. We are satisfied that she should have been given such opportunity to meet the charges as prayed for by her. The procedure adopted by the concerned authorities was not regular and against the principle of natural justice.

4. In this view of the matter, the order of the District Inspectress of Schools dated January 5, 1965—in appeal

by way of representation—is quashed It is however open to the District Inspector of Schools to deal with the said representation after giving the petitioner a personal hearing and dispose of the case according to law The writ petition is accordingly allowed in terms aforesaid There will be no order as to costs

5. ACHARYA, J.— I agree
JRM/D V C Petition allowed

AIR 1969 ORISSA 294 (V 56 C 107)

G K MISRA, J

Gita Debi Saragi, Petitioner v Madan Mohan Masanta and others, Opposite Parties

Civil Revn No 238 of 1968, D/- 29-4-1969, from order of Sub J, Balasore, D/- 4-4-1968

(A) Partition Act (1893), S. 4 — Partition between two brothers A and B — Dwelling house not partitioned by metes and bounds — Death of A — Sale of undivided half share by widow of A—Suit for partition by transferee of share — Wife, sons and daughter of B cannot claim any right under S. 4—Though they were members of undivided family of defendant, qua the dwelling house they were not co-sharers of A or his widow as A died in a separated status — Further, they having no locus standi to exercise right of pre-emption under S. 4, time to repurchase cannot be extended at their instance when B to whom opportunity was given to repurchase did not ask for any extension — They are not necessary parties to proceedings under Section 4. (Civil P. C (1908) Order 1 Rule 10)

(Paras 4, 5)

(B) Civil P. C (1908), Order 23 R. 3 — Partition Act (1893) S. 4 — Partition between two brothers A and B — Dwelling house not partitioned — Partition suit by transferee of undivided share of A — B claiming to repurchase — Fixation of value by Commissioner — Plaintiff demanding high price — Compromise to repurchase at some high price — B failing to deposit money and repurchase the property within stipulated period — Held it could not be said that B acted against interest of family in agreeing to pay high price when there was contest between plaintiff and defendant regarding valuation. (Para 3)

N Mukherji, for Petitioner, R N Sinha, for Opposite Parties

ORDER — Deceased Kissors Mohan and defendant No 1 were brothers They were separate in status, but their dwelling house was not partitioned by metes and bounds Subasini (defendant no 2), widow of Kishori Mohan, transferred un-

divided 8 annas interest in the disputed house and homestead by a registered sale deed to Gita Debi (plaintiff) on 27-4-62 for Rs 2000/- Gita Debi filed T S No 23 of 1963 in the Court of the Subordinate Judge, Balasore, for partition. Defendant no 1 claimed to repurchase the property sold to the plaintiff under Section 4 of the Partition Act As to the value of the house, there was contest Ultimately a compromise petition was filed on 17-1-67 whereby the plaintiff and defendant no 1 agreed that the value of the homestead would be Rs 550/- per decimal It was stated therein that defendant no 1 would repurchase the disputed homestead within two months of the compromise, failing which the plaintiff would be entitled to partition This compromise was accepted by the court on 18-1-67 Within the stipulated period defendant no 1 did not pay the money and did not repurchase the property from the plaintiff On 4-4-68 Gangamani (wife), Chintamani and Chandramohan (sons) and Sebamani (daughter) of defendant no 1 filed an application under Order 1, Rule 10 C P C that they should be permitted to intervene and were prepared to repurchase the disputed homestead on payment of proper consideration This application was accepted by the learned subordinate Judge who allowed them to be impleaded in the partition suit Against this order the Civil Revision has been filed by the plaintiff

2 The learned Subordinate Judge held that defendant no 1 did not act in the interest of the family and that the compromise to purchase the disputed homestead at the rate of Rs 550/- per decimal which is higher than the rate fixed by the Commissioner which was Rs 400/- per decimal, establishes the fact that defendant no 1 did not act in the interest of the family He further held that even though the wife, the sons and the daughter of defendant no 1 were not co-sharers of Kishori Mohan in respect of the disputed homestead, they were entitled to exercise the right of repurchase under Section 4 of the Partition Act by virtue of their right of residence in the house of defendant no 1

3. Mr Sinha was unable to support the judgment of the learned Subordinate Judge on the grounds advanced therein There are no materials that defendant no 1 acted against the interest of the family There was contest between the plaintiff and defendant no 1 regarding valuation A commissioner was deputed who fixed the value at Rs 400/- per decimal The plaintiff challenged the value and claimed at a much higher rate In such a circumstance, if a compromise was entered into fixing the value of the land at Rs 550/- per decimal, it cannot

be said without some other evidence that defendant no. 1 acted against the interest of the family. The finding of the learned Subordinate Judge is speculative and cannot be accepted without more solid evidence.

4. The view of the learned Subordinate Judge that the wife, the sons and the daughter of defendant no. 1 can exercise the right of repurchase under Section 4 of the Partition Act, because they reside with defendant no. 1 in a portion of the house occupied by him, is also not correct in law. Section 4(1) of the Partition Act runs thus:—

"Where a share of a dwelling house belonging to an undivided family has been transferred to a person who is not a member of such family, and such transferee sues for partition, the court shall, if any member of the family being a shareholder shall undertake to buy the share of such transferee, make a valuation of such share in such manner as he thinks fit and direct the sale of such share to such shareholder and may give all necessary and proper directions in that behalf."

It is to be noted that in order to exercise this right of pre-emption the claimant must be a member of the undivided family qua the dwelling house. The wife, the sons and the daughter of defendant no. 1 are undoubtedly members of the undivided family qua the dwelling house. But the further condition to be fulfilled is that, they must also be shareholders. Admittedly those persons are not cosharers of Kishori Mohan or his widow. Kishori Mohan died in a separated status. In respect of the undivided dwelling house his only cosharer is Madan Mohan. The wife, the sons and the daughter of defendant no. 1 cannot therefore claim any right under Section 4 of the Partition Act.

5. Mr. Sinha last contended that time is not the essence of the contract, and though the period of two months stipulated in the compromise expired the court has got power to extend time. It is not necessary to examine the law relevant on the point as defendant no. 1 to whom opportunity was given to repurchase the property did not ask for any extension of time. Even in this court defendant no. 1 does not appear to ask for extension of time. Time cannot be extended at the instance of persons who have no locus standi to exercise the right of pre-emption under Section 4 of the Partition Act.

6. All the contentions urged by Mr. Sinha fail. The impugned order is set aside and the prayer of the wife, the sons and the daughter of defendant no. 1 P. C. is rejected. The Civil Revision is to be impleaded under O. 1, Rule 10 C.

allowed. In the circumstances parties to bear their own costs throughout.

LGC/D.V.C.

Revision allowed.

AIR 1969 ORISSA 295 (V 56 C 108)

G. K. MISRA, J.

Ram Saraf, Petitioner v. Mani Dei and another, Opposite Parties.

Civil Revn. No. 360 of 1968, D/- 4-4-1969, from order of Munsif, Bhadrak, D/- 19-9-1968.

Civil P. C. (1908), S. 115, O. 14, R. 2 — Issues as to maintainability of suit on ground of limitation and O. 2, R. 2 Civil P. C. — Nothing wrong in not deciding the issues as preliminary issues — Suit must be tried as a whole and not piecemeal unless it involves question of jurisdiction — It cannot be said that lower court exercised its jurisdiction either illegally or with material irregularity.

(Para 4)

R. Mohanty, R. K. Kar and S. N. Kar, for Petitioner; B. K. Pal, B. Pal and A. Mohanty, for Opposite Party No. 1.

G. K. MISRA, J.:— There were 8 issues in the suit. An application was filed by defendant no. 1 that issues 7 and 8 should be tried as preliminary issues. Those issues are:—

"(7) Is the suit maintainable in view of Article 113 of the Limitation Act?

(8) Is the suit barred under Order 2, Rule 2 C. P. C.?"

The learned Munsif rejected this prayer. Against the order this Civil Revision has been filed.

2. The other important issues are issues nos. 3 to 5. They are:—

"(3) Is the suit barred by principle of constructive res judicata?

(4) Has the plaintiff acquired right of easement either by grant or necessity?

(5) Is the deed of agreement dated 19-3-57 a fraudulent document?"

3. Mr. Mohanty contended that on the face of the averments in the plaint the suit is barred by limitation under Article 113 of the Limitation Act, and on the face of the judgment in certain previous suits the present suit is barred by Order 2, Rule 2 C. P. C.

4. It is well known that the suit must be tried as a whole and not piecemeal unless it involves the question of jurisdiction. For instance, if the valuation of the suit be such that it will oust the jurisdiction of the court before whom it was instituted, then in such cases ordinarily this issue should be tried as a preliminary issue to prevent unnecessary harassment to the litigants. But in all other matters it is always desirable that the cases should be tried as a whole, so

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that it would not be remanded times without number from the appellate court to re-examine other matters left undecided. The learned Munsif took the correct view in not deciding issues 7 and 8 as preliminary issues. At any rate, it cannot be said that he exercised his jurisdiction either illegally or with material irregularity.

5 In the result, the Civil Revision is dismissed with costs. Hearing fee Rs 32/- The learned Munsif is directed to dispose of the suit within three months from today with intimation to this Court. LGC/DVC Revision dismissed

AIR 1969 ORISSA 296 (V 56 C 109)

G K MISRA, C J AND B K PATRA, J
Jagannath Misra and others, Petitioners v State of Orissa, Opposite Party

Criminal Misc Cases Nos 62, 76, 77, 81, 82, 83, 84 and 95 of 1969, D/- 14-7-1969

(A) Criminal P. C. (1898), Ss. 167 and 344 — Distinction between — Order of remand under S. 344 by a Magistrate having no jurisdiction to try case is illegal — Detention under such order is illegal — Accused subsequently produced by police before Magistrate having jurisdiction to try case and remanded to jail custody under S. 344 — Subsequent detention is legal — (Constitution of India, Art. 226 — Habeas Corpus)

A Magistrate passing an order of remand under S. 167 Cr P C need not always be the Magistrate who has jurisdiction to try the case. But if any detention beyond the period of 15 days from the date of arrest is sought, that can be ordered only by the Magistrate having jurisdiction to try the case and this power can be exercised by the Magistrate not under Section 167 Cr P C, but under Section 344 Cr P C. (Para 4)

It is not always necessary that to enable a Magistrate to pass an order of remand under Section 344 Cr P C, the accused persons concerned must have been arrested by the Police. There may be cases where a person accused for a cognizable offence may surrender himself in Court and it cannot be said, that in such a case, the Magistrate cannot commit him to jail custody. (Para 5)

Where the accused petitioners were remanded under S. 344 to jail custody from 8-3-69 to 17-4-69 by a Magistrate who had no jurisdiction to try their case and were ultimately produced by the Police before the Magistrate having jurisdiction to try the case to be dealt with under S. 344 Cr P C and were again remanded to jail custody by that Magistrate on 17-4-69

Held, that the orders of remand passed by the Magistrate who had no jurisdiction to try the case were illegal and therefore the detention of the accused from 8-3-69 to 17-4-69 was illegal. The preceding illegal detention could not affect the powers of the Magistrate having jurisdiction to take action under S. 344 Cr. P. C. and as such the detention of the accused subsequent to 17-4-69 was perfectly legal. AIR 1948 Mad 100 & AIR 1952 Assam 167, Ref. (Para 5)

(B) Criminal P. C. (1898), S. 491 — Application under — Relevant date for considering legality of detention of applicant is not the date when application is filed but the date on which the court passes final order or at least the date on which State shows cause in answer to the rule issued — Accused cannot be released under S. 491 merely because of the antecedent illegality of detention when detention is legal at the relevant date. AIR 1952 SC 106 & AIR 1953 SC 277 & AIR 1945 FC 18 Ref. to (Constitution of India, Art. 226 — Habeas Corpus).

(Para 6)

Cases Referred: Chronological Paras

(1953) AIR 1953 SC 277 (V 40) =
1953 Cri LJ 1113, Ram Narayan Singh v State of Delhi 6

(1952) AIR 1952 SC 106 (V 39) =
1952 Cri LJ 656, Naranjan Singh v State of Punjab (1) 6

(1952) AIR 1952 Assam 167 (V 39) =
1952 Cri LJ 1659, Prabhat Malla v D C Kamrup 4

(1948) AIR 1948 Mad 100 (V 35) =
49 Cri LJ 41 In re, M. R. Venkatraman 4

(1945) AIR 1945 FC 18 (V 32) =
46 Cri LJ 559, Basanta Chandra v Emperor 6

P. Palit and R. C. Ram, for Petitioners.
Advocate General, for Opposite Party

PATRA, J. — These eight applications (Crl Misc 62/69 and 95/69 being by the same person) have been filed praying that this Court should issue directions in the nature of habeas corpus under Section 491 Cr P. C. to produce the petitioners before this Court and set them at liberty.

2. All the petitioners excepting the one in Cr Misc 77 of 69 were arrested by the police of Gunupur Police Station of Gunupur Sub division in Koraput district on charges under Sections 120B/399 I P C on different dates between 30-1-1969 and 2-2-1969, and were duly produced before the Sub Divisional Magistrate at Gunupur, who remanded them to custody till 14-2-69. A proceeding under Section 109 Cr P C having been initiated against the petitioner in Crl Misc. 77/69, he was arrested by the Gunupur Police on 2-3-69 and was duly produced before the Magistrate at Gunupur, who remanded him to custody pending further

investigation. It appears from the record that besides these petitioners a large number of other persons, about 52 in all, were also arrested on charges under Sections 120B/399, I. P. C. As there was insufficient accommodation in Gunupur Sub-jail, these petitioners were transferred to be lodged in Koraput District Jail on 6-2-1969. They were produced before the Sub Divisional Magistrate at Koraput on the 14th February, 1969. On that very day, the other accused persons involved in this case who had been kept at Gunupur Jail were produced before the S. D. M., Gunupur. On the same day, the Investigating Officer filed an application in Gunupur court praying for further remand as investigation was not complete. The Court directed that charge sheet should be filed by 27-2-1969 and also directed that the remands in respect of not only the accused persons actually produced before him, but also the accused persons who were transferred to Koraput jail should be extended till 27-2-1969. On 19-2-69, the charge sheet was filed before the S. D. M. at Gunupur. Meanwhile, on 14-2-69, the petitioners were produced before the Sub Divisional Magistrate at Koraput who remanded them to custody till 20-2-69. On 28-2-69, the petitioners were produced before the S. D. M. at Koraput who remanded them to custody till 8-3-69. The order sheet shows that this was done in pursuance of a wireless message received from the S. D. M., Gunupur. On 8-3-69, in the absence of any further instructions from the S. D. M., Gunupur, the Magistrate at Koraput extended the remand till 22-3-69. Thereafter, no further instruction appears to have been received by the Magistrate at Koraput, from the Magistrate at Gunupur, and in the absence thereof, he went on remanding the petitioners from time to time to 22-3-1969, 5-4-69, 16-4-69 and 17-4-69. On the last mentioned date, the petitioners were forwarded in custody to Gunupur. It is not disputed, that after being taken to Gunupur, the petitioners were produced before the S. D. M. at Gunupur who obviously under Section 344 Cr. P. C. has remanded them to jail custody.

3. These, in short, are the facts of the case. The present applications were submitted by the petitioners while they were still in Koraput Jail complaining that they were being illegally detained there. The three short points that arise for consideration in these cases are —

(1) Whether the detention of the petitioners in Koraput Jail under orders of the Magistrate at Koraput is illegal.

(2) if the aforesaid detentions are illegal whether in view of the fact that they were subsequently produced before the Gunupur Magistrate, who has jurisdiction to try them and under whose orders

they are at present remanded to Jail custody, their present detention can still be illegal; and

(3) assuming that their present detention is legal, whether the petitioners are entitled to be released merely by reason of the fact that at the time they made these applications they were held in illegal custody.

4. Section 167 Cr. P. C. provides that whenever any person is arrested and detained in custody of the Police and it appears that the investigation cannot be completed within the period of twenty-four hours and there are grounds for believing that the accusation or information is well founded, he must be produced within 24 hours of the arrest before a Magistrate who from time to time may authorise the detention of the accused person in such custody, for a term not exceeding fifteen days in the whole. Such a Magistrate need not always be the Magistrate who has jurisdiction to try the case. But if any detention beyond the period of 15 days from the date of arrest is sought, that can be ordered only by the Magistrate having jurisdiction to try the case and this power can be exercised by the Magistrate not under Section 167 Cr. P. C., but under Section 344 Cr. P. C. What has happened in these cases is that the original production of the accused persons was before a Magistrate who has jurisdiction to try the case, namely, the Magistrate of Gunupur. Thereafter, the petitioners were transferred to the Koraput Jail and were produced before the Magistrate who admittedly had no jurisdiction to try the case and it is under his orders that the petitioners were being ordered to be detained from time to time. They were ultimately produced before the Magistrate, Gunupur sometime about the 24th of April, 1969. The learned Advocate General appearing for the State sought to justify such detention in Koraput Jail on the ground that although the accused persons were being produced before the Magistrate at Koraput, the latter in extending the remands was acting on instructions from the Magistrate at Gunupur. Whether actual production of the accused before the Magistrate entitled to pass an order of remand is necessary or not is a question which is not free from doubt. A Division Bench of the Madras High Court in AIR 1948 Mad 100 In Re: M. R. Venkatraman, had taken the view that a Magistrate commits illegality in issuing an order of remand without having the prisoner produced before him. Thadani C. J. in AIR 1952 Assam 167, Prabhat Malla v. D. C. Kamrup had taken the view that neither Article 22 of the Constitution of India nor Section 167 Cr. P. C. requires the production of an

accused person before the Magistrate on the occasion of a subsequent remand. For the disposal of the present applications it is unnecessary to decide these questions, because, on facts we find, as revealed from the order sheet of the Court of the Magistrate at Koraput, that although he purported to act under instructions from the S D M at Gunupur in extending the remand of the petitioners till 8-3-69, he had no such instructions thereafter till the petitioners were sent back to Gunupur sometime after 17-4-1969. The detention of the petitioners during this period was clearly illegal and it was during this period that the petitioners have filed the present applications for their release. It is, however, not disputed that after their retransfer to Gunupur Jail the petitioners were produced before the Magistrate at Gunupur who acting under Section 344 Cr P C has remanded them to Jail custody.

5. Mr Palit, appearing amicus curiae for the petitioners contended that since the detention of the petitioners during the period preceding their production before the Magistrate at Gunupur on the 24th of April, 1969 was illegal, the order of remand passed by the Gunupur Magistrate in the absence of fresh arrests of the petitioners is not legal. We are unable to accept this contention. It is not always necessary that to enable a Magistrate to pass an order of remand under Section 344 Cr P C, the accused person concerned must have been arrested by the Police. There may be cases where a person accused for a cognizable offence may surrender himself in Court and it cannot be said, that in such a case, the Magistrate cannot commit him to Jail custody. If a person is illegally detained, he is entitled to make an application to the High Court under Section 491 Cr P C as has been done in these cases, and one of the powers the High Court would exercise in such a case is to direct that person concerned may be brought before the Court to be dealt with according to law. In these cases the Police themselves produced the petitioner before the Magistrate at Gunupur to be dealt with according to S 344, Cr P C. The preceding illegal detention of the petitioners cannot affect the powers of the Magistrate to take action under Sec 344 Cr P C. Mr Palit has not been able to produce before us any decision where a contrary view has been taken. We, therefore, hold that the detention of the petitioners at the present moment is legal.

6. The question then arises, whether by reason of the fact that the detention of the petitioners was illegal at the time they made these applications, they are entitled to be set at liberty, notwithstanding the fact that they are held in

legal custody from 24th April 1969 onwards. There is nothing in Section 491 Cr P C to persuade us to hold the view that notwithstanding the legal detention of the petitioners at the present moment, they are to be released merely because of the antecedent illegality in their detention. We are fortified in this conclusion by a decision of the Federal Court in AIR 1945 FC 18, Basanta Chandra v Emperor. The appellant in that case was arrested on 27th March 1942 under an order dated 19th March, 1942 made by the Governor of Bihar in exercise of his power under Rule 26 of the Defence of India Rules. The application under Section 491 Cr P C was filed on 28th April 1943. Before the matter was heard in the High Court, an Ordinance had been promulgated on the 15th January, 1944 and thereafter the application was dismissed by the High Court. On appeal, the Federal Court held that the new Ordinance did not take away the power of the High Court to deal with the matter and accordingly on 23rd May, 1944 remitted the case back to the High Court for disposal. On the 3rd July, 1944 the Governor of Bihar passed two orders. By the first, he cancelled the order of detention dated 19th March 1942 and by the second, he directed the detention of the appellant on the ground that it was necessary so to do "with a view to preventing him from acting in a manner prejudicial to the maintenance of public order and the efficient prosecution of the war". When the application again came on for hearing before the High Court, reliance was placed on behalf of the State on the order dated 3rd July, 1944, and it was contended that it was unnecessary in the circumstances to enquire into the validity of the order of the 19th March, 1942. The High Court dismissed the application. On appeal before the Federal Court, it was contended that it was not open to the High Court to base its decision on the subsequent order of 3rd July, 1942 (which the Federal Court considered to be legal order), and that the legality of the detention of the appellant should be decided on the basis of the detention order dated 19th March, 1942. Repelling these contentions, their Lordships observed —

"The analogy of civil proceedings in which the rights of parties have ordinarily to be ascertained as on the date of the institution of the proceedings cannot be invoked here. If at any time before the Court directs the release of the detainee, a valid order directing his detention is produced, the Court cannot direct his release merely on the ground that at some prior stage there was no valid cause for detention. The question is not whether the later order validates the earlier detention but whether in the face of the

later valid order the Court can direct the release of the petitioner."

In later decisions of the Supreme Court AIR 1952 SC 106, Naranjan Singh v. State of Punjab 1, AIR 1953 SC 277, Ram Narayan Singh v. State of Delhi, Their Lordships held that in habeas corpus proceedings, the Court is to have regard to the legality or otherwise of the detention at the time of the return, namely, the date on which the State shows cause in answer to the rule issued and not with reference to the institution of the proceedings. It is, therefore, clear that the legality of the detention of the petitioners cannot be determined with reference to the dates on which they have made these applications. Whether the relevant date is the date on which the State shows cause in answer to the rule as indicated by the Supreme Court or the date on which this Court passes the final order as indicated by the Federal Court, it is immaterial so far as the present proceedings are concerned, because, even by the time the State showed cause in these proceedings, the petitioners are being held in lawful custody by virtue of orders under Section 344 Cr. P. C. passed by the Magistrate at Gunupur.

7. In the result, the applications are dismissed.

8. G. K. MISRA, C. J. :— I agree.
KSB Applications dismissed.

AIR 1969 ORISSA 299 (V 56 C 110)

G. K. MISRA, C. J. AND B. K. PATRA, J.
Jagabandhu Sahu, Petitioner v. State of Orissa represented by Commr. of Sales Tax, Respondent.

Spl. Jurisdiction Case No. 33 of 1964,
D/- 26-6-1969.

(A) Sales Tax — Orissa Sales Tax Act (14 of 1947), S. 6 — Ginger is vegetable — Sales tax not leviable — 'Vegetable', what is. ILR (1961) Cuttack 175, held no good law. (Words and Phrases — 'Vegetable').

Ginger is a vegetable, though it is not used for the primary purpose of food, but is used to give flavour or taste to the food. It satisfies the tests that it is grown in kitchen garden and is used for the table. This being so in Orissa, it is not taxable under the Orissa Sales-tax Act. Whether in common parlance a particular vegetable would be vegetable or not would depend on the particular area or locality. What may be a vegetable in Kerala may not be a vegetable in Orissa on the application of the aforesaid restricted definition of the expression 'vegetable'. AIR 1961 SC 1325 & AIR 1962 SC 660 & 1962-13 STC 838

(Ker) (FB); (1967) 20 STC 254 (Cal) Foll. ILR (1961) Cut 175 Held no good law by reason of Supreme Court's decisions.

(Paras 3 and 5)

(B) Civil P. C. (1908), Preamble — Precedents — First Division Bench Decision — No overruling by subsequent Division Bench on palpable errors in the former — Matter must be referred to larger Bench — Decision, however, need not be followed if it ceased to be good law by reason of Supreme Court decision. (Constitution of India, Art. 141). (Para 3)

Cases Referred: Chronological Paras

(1967) 1967-20 STC 254 (Cal), Wazi Ahmed v. State of West Bengal 4

(1962) AIR 1962 SC 660 (V 49) =

1962 Supp (1) SCR 498, Motipur Zamindari Co. (Private) Ltd. v.

State of Bihar 3

(1962) 1962-13 STC 838 = ILR (1962)

2 Ker 161 (FB), Krishna Iyer v. State of Kerala 4

(1961) AIR 1961 SC 1325 (V 48) =

(1961) 12 STC 286, Ramavatar v. Asst. Sales Tax Officer, Akola 3

(1961) ILR (1961) Cut 175, Dhadi Sahu v. Commr. of Sales Tax, Orissa 2

N. N. Bhattacharya, for Appellant;

Govt. Advocate, for Respondent.

G. K. MISRA, C. J. :— The Sales Tax Tribunal has referred the following question under Section 24(1) of the Orissa Sales Tax Act for the opinion of the High Court:

"Whether in the facts and circumstances of the case, ginger is not a vegetable according to the test as finally settled by the Supreme Court."

"Vegetables" are not taxable under the Orissa Sales Tax Act. If ginger is vegetable, it is not taxable. This is how the question gathers importance.

2. The Tribunal has found that ginger is not vegetable. Its view is based on ILR (1961) Cut 175, Dhadi Sahu v. Commissioner of Sales Tax, Orissa. In paragraph 8 their Lordships laid down the following test:

"On the basis of those decisions one can safely find that 'vegetables' would cover only such plants which are grown in the kitchen garden and cultivated for the purpose of food. In other words vegetables shall include such plants, roots, etc. which are primarily used for the purpose of food. The description of the word 'vegetable' as appears from the authorities stated above, only means that if a particular plant or vegetable is used for the primary purpose of being served as a food, then it will be treated as a vegetable. As is well known, while giving a meaning to the word 'vegetable' we have to look to the meaning of the law as is intended by the Legislature, the people for whom it is intended, and the area or place for which it is intended to

apply The test therefore would be whether green pepper are treated as a principal item of food in Orissa as vegetables like brinjals, tomatoes, potatoes etc., or it is applied to other vegetable or non-vegetable preparations for the purpose of adding taste or flavour."

Mr Government Advocate also relies on this Division Bench decision. If the aforesaid passage represents the correct law, the conclusion of the Tribunal is unassailable. Ginger is never used in Orissa for the primary purpose of being served as food. It is definitely used in this part of the country for the purpose of adding taste or flavour to the main item of food whether vegetarian or non-vegetarian.

3 It is to be noticed that this is the only decision in India which lays down the test that, in order to come within the meaning of 'vegetable' the particular vegetable must be used for the primary purpose of food. Mr Bhattacharya contends that the aforesaid decision is directly contrary to the view expressed by the Supreme Court and can no longer be held to be good law. The view of the Division Bench was based on a passage appearing in *Corpus Juris Secundum* (91 C J S 804) which is as follows—

"It has been held that in the common language of the people, whether sellers or consumers of provisions, all these are vegetables which are grown in kitchen gardens, and which, whether eaten cooked or raw, are like potatoes, carrots, parsnips, turnips, beets, cauliflower, cabbage, celery and lettuce, usually served at dinner in, with or after the soup, fish or meats which constitute the principal part of the repast, and not, like fruits generally, as dessert."

The meaning given to this passage by the Division Bench is quite different from the meaning it conveys. In the passage the principal items consist of soup, fish or meats. Other items like potatoes, carrots etc. are served at the dinner as subsidiary items. Though so served as subsidiary items still they were construed as vegetables. Unfortunately, the Division Bench by mistake was of the impression that in order to be vegetables they must be used for the primary purpose of being served as food. The passage quoted above does not support the conclusion of the Division Bench. We are aware of the position that a subsequent Division Bench cannot overrule an earlier Bench decision by pointing out certain palpable errors. If this were the only ground on which we were to take a different view, the question would have been referred to a larger Bench but the necessity for referring to a larger Bench does not arise on account of the consistent view taken by the Supreme Court laying down the meaning of the expres-

sion 'vegetable'. It is to be remembered that in a wide sense all things belonging to the vegetable world are vegetables, but in the taxing statutes they have been construed to be used in a restricted sense.

In AIR 1961 SC 1325, *Ramavatar v Assistant Sales Tax Officer, Akola*, the question for consideration was whether betel-leaves were vegetables. After reviewing the entire law on the question their Lordships laid down the following tests:

"The word 'vegetables' in taxing statutes is to be understood as in common parlance, i.e. denoting class of vegetables which are grown in a kitchen garden or in a farm and are used for the table."

This decision was followed in AIR 1962 SC 660, *Motipur Zamindari Co (Private) Ltd v State of Bihar* and applying that test sugarcane was held not to be a vegetable. Though sugarcane and betel-leaves might be grown either in a kitchen garden or in a farm they are not used for the table. It is to be noticed that the test laid down by the Supreme Court does not refer to the use of vegetable as primary or subsidiary for the purpose of food. Take for instance Podina (mint) or Dhania (coriander). They are used for the purpose of preparation of chutney, but are not used for the primary purpose of food and are used to give flavour or taste to the food. In common parlance in Orissa they are vegetables, are grown in the kitchen garden and are used for the table.

Judged by the Supreme Court decisions indicated above, the view taken by the Division Bench of this Court is no longer good law. As there is direct authority of the Supreme Court on the point which is the law for the country, there is no necessity to refer the question to a larger Bench. The Orissa decision however remains good law so far as the second test is concerned, namely whether in common parlance a particular vegetable would be vegetable or not would depend on the particular area or locality. What may be a vegetable in Kerala may not be a vegetable in Orissa on the application of the aforesaid restricted definition of the expression 'vegetable'.

On the aforesaid analysis ginger is a vegetable. Doubtless it is not used for the primary purpose of food but is used to give flavour or taste to the food but it is grown in the kitchen garden and is used for the table.

4 The same view has been taken in 1962-13 STC 838 (Ker) (FB) *Krishna Iyer v State of Kerala* and (1967) 20 STC 254 (Cal) *Wazi Ahmed v. State of West Bengal* and no contrary view has been brought to our notice.

5. In the result we hold that the Tribunal took a wrong view. We would answer the question by saying that ginger is a vegetable. In the circumstances parties to bear their own costs. The petitioner is however entitled to refund of the money deposited under Section 24(1) of the Orissa Sales Tax Act.

6. **B. K. PATRA, J. :-** I agree.
TVN/D.V.C. Reference answered accordingly.

AIR 1969 ORISSA 301 (V 56 C 111)

G. K. MISRA, C. J.

M/s. Rao & Sons and others, Petitioners v. Bijayalaxmi Das and another, Opposite Parties.

Civil Revn. No. 3 of 1968, D/- 13-5-1969 from order of Addl. Sub. J., Cum A. D. M. (Judicial), Cuttack, D/- 13-9-1967.

(A) Contract Act (1872), S. 25 sub-s. (3) — Promise to pay barred debt — Barred debt is valid consideration — Promisor need not be conscious that the debt was barred. (1910) 20 Mad LJ 656 & AIR 1963 Andh Pra 337 Diss. from; (1913) 18 Cal LJ 269 & (1913) 18 Cal LJ 329 & AIR 1915 Mad 242 & AIR 1951 Mad 903. Rel. on. (Para 9)

(B) Contract Act (1872), S. 2(b) — Acceptance of proposal — Can be inferred from facts and circumstances of case. AIR 1952 Cal 443, Ref. to. (Para 10)

Cases Referred: Chronological Paras

(1963) AIR 1963 Andh Pra 337 (V 50)
= (1963) 1 Andh LT 501, Sam-bayya v. Shemsherkhan 9
(1952) AIR 1952 Cal 443 (V 39) =
86 Cal LJ 308, Sriram Arjundas v. Governor General in Council 10
(1951) AIR 1951 Mad 903 (V 38) =
1951-1 Mad LJ 573, Murthayee Achi v. Sabbiah Chettiar 9

(1)	2-1-41	Kasinath Das borrowed Rs. 660/- from late M. S. Rao	Ext. 1.
(2)	6-3-42	Rs. 500/- paid	Ext. 1/a
(3)	27-2-45	Rs. 25/- paid	Ext. 1/b
(4)	22-2-48	Rs. 25/- paid	Ext. 1/c
(5)	19-2-51	Rs. 25/- paid	Ext. 1/d
(6)	14-2-54	Rs. 25/- paid	Ext. 1/e
(7)	14-2-57	Rs. 30/- paid	Ext. 2
(8)	13-2-60	Acknowledgment by letter	Ext. 3

The learned trial court held that Rs. 660/- was borrowed by late Kasinath Das under Ext. 1 on 2-1-41, and not on 2-1-40 and that the payment of Rs. 30/- on 14-2-57 did not relate to the suit handnote, but related to the handnote

GM/HM/C793/69/D

(1947) AIR 1947 Cal 267 (V 34) =
50 Cal WN 796, Suresh Chandra v. Benoy Kumar 7
(1915) AIR 1915 Mad 242 (V 2) =
25 Ind Cas 361, Mrs. C. Simon v. Arogiasami Pillai 9
(1913) 18 Cal LJ 269 = 20 Ind Cas
809, Mati Sheikh v. Bai Kantha Nath 9
(1913) 18 Cal LJ 329 = 21 Ind Cas 254,
Bhowani Misser v. Peari Jha 9
(1910) 20 Mad LJ 656 = 7 Ind Cas
901, Ramaswami Pillai v. Kuppuswami Pillai 9

R. N. Misra and A. K. Rao, for Petitioners; B. Rath, for Opposite Parties.

ORDER:— The plaintiff's suit was for recovery of Rs. 690/- on the basis of a promissory note Ext. 1 executed by late Kasinath Das, an advocate, on 2-1-41 for Rs. 660/-. He paid Rs. 630/- in six instalments, the last payment being Rs. 30 on 14-2-57. On 13-2-60 the executant wrote the letter Ext. 3 acknowledging the loan payable under Ext. 1. The defendants are the heirs of late Kasinath Das. Their defence is that the handnote Ext. 1 was executed on 2-1-40, and not on 2-1-41. The payment made on 14-2-57 towards the suit handnote is challenged and it is asserted that this payment was made towards the dues of a loan incurred by late Gopinath Das in which Kasinath Das was his surety. Ext. 3 is said to be not genuine. It is alleged that late Kasinath Das was appearing as a junior with late M. S. Rao in many cases. He used to send blank papers with signatures authorising late M. S. Rao to appear on his behalf. One such paper containing the signature of late Kasinath Das has been used for fabrication of Ext. 3. There was no acknowledgment and the suit was barred by limitation.

2. To have a clear picture, it would be profitable to note the various payments with dates.

under which Gopinath Das incurred the loan. He further held that the letter Ext. 3 dated 13-2-60 sent by Kasinath Das acknowledging the loan was genuine. Having held that the suit handnote was barred by limitation as the payment on 14-2-57 did not relate to it, he dismissed

the suit. He also held that Ext. 3 did not constitute a fresh agreement within the scope of Section 25(3) of the Contract Act.

The learned lower appellate court recorded the following findings—

(i) The handnote Ext 1 was executed on 2-1-40 and not on 2-1-41

(ii) The payment made on 14-2-57 did not relate to the suit handnote

(iii) The letter Ext 3 is not genuine

(iv) Ext 3 even if genuine is not an agreement within the meaning of section 25(3) of the Contract Act

The appeal was accordingly dismissed. Against the confirming judgment dismissing the plaintiff's suit, this Civil Revision has been filed.

3. The following questions arise for consideration on the basis of arguments advanced by the learned counsel for the parties—

(1) Was Ext 1 executed on 2-1-40 or on 2-1-41?

(2) Does the payment of Rs 30/- on 14-2-57 under Ext 2 relate to the suit handnote?

(3) Is Ext 3 genuine?

(4) If it is genuine, does it furnish a fresh cause of action under Section 25(3) of the Indian Contract Act?

4. The first question whether the suit handnote was executed on 2-1-40 or 2-1-41 is wholly academic. There is no dispute that the payments made under Exts 1/a to 1/e relate to the suit handnote Rs 500/- was paid under Ext 1/a on 6-3-42. Even if the handnote was executed on 2-1-40, it was not barred by limitation by 6-2-42. The payments are definitely endorsed on Ext. 1. Judged from this aspect it is immaterial whether the handnote was executed on 2-1-40 or 2-1-41 as its execution and passing of consideration thereunder are not disputed.

Going into the merits of the case, the learned trial court reached the correct conclusion in holding that the handnote was executed on 2-1-41. Obviously by mistake late Kasinath Das had given the date "2-1-40". The year 1940 had come to an end, but the habit of noting the past year does not sometimes cease. This is evidenced by the fact that there is a clear endorsement in the handwriting of late M S Rao made on 2-1-41 itself. Some of the subsequent endorsements are in the handwriting of Kasinath Das himself. The learned lower appellate court indulged in surmises and speculation without any materials that Kasinath Das made the endorsement, without seeing the noting of late M S Rao that Rs 660/- was advanced on 2-1-41. Late Kasinath Das was an advocate of eminence. The learned trial court reached the correct conclusion in holding that the date of the handnote is 2-1-41 and not 2-1-40.

5. It is conceded by Mr. R N. Misra for the plaintiff that the payment of Rs 30/- on 14-2-57 does not relate to the suit handnote. On this concession, the handnote would be barred by limitation unless the letter Ext 3 sent on 13-2-60 furnishes a fresh cause of action under Section 25(3) of the Contract Act. Even if this letter constitutes an acknowledgment under Section 19 of the Limitation Act, it will not save limitation, as by then the handnote was not saved by any payment.

6. The further question for consideration therefore is whether Ext 3 is genuine, and if so, whether it comes within the scope of Section 25(3) of the Contract Act. Ext 3 bears the signature of late Kasinath Das and it comes from the custody of the plaintiff. It is written on a paper containing the letter-head of Kasinath Das. It runs thus—

"With reference to handnote for Rs 660/- dated 2-1-41, as yet I have not been able to repay your dues in full. Please allow me time till the end of March 1960 for repaying in full.

Yours faithfully,

K. N. Das,
Advocate."

Admittedly the body of the letter is not in the handwriting of Kasinath Das. Mr. Kartik Rao (Advocate, Plaintiff and P W 1) states on oath that a relation of Kasinath Das, whom he cannot subsequently trace out, wrote the letter to the dictation of late Kasinath Das and the latter signed the same. The counter evidence is given by the widow of late Kasinath Das that P W. 1 never came to the office of Kasinath Das and no such letter was dictated by Kasinath Das. The evidence of the widow, though she is a respectable lady, cannot be given much importance. She is not likely to come to the office of her husband and was not in a position to know any transaction in between Kasinath Das and P W 1. Her denial therefore does not carry any value. P W. 1 is an advocate of some standing and is a respectable person. It is not the case of either party that Kasinath Das was unconscious while the signature was given on the letter. He was an advocate of eminence and it is a matter of common sense that he could not have put his signature to such a letter without going through it.

The case of the defendants that late Kasinath Das used to send blank papers for use in court does not carry much conviction. P W. 1 denies the fact of any such blank paper being handed over to late M S Rao by late Kasinath Das. Mr. M S Rao was a top ranking senior advocate of this Bar. In the absence of very strong evidence it is difficult to ac-

cept the defence story that a blank paper was used by Mr. M. S. Rao or Mr. Kartik Rao to fabricate Ext. 3. Doubtless the onus of proving the genuineness of Ext. 3 is on the plaintiff. Even if the scribe is not examined and the scribe is not known to the plaintiff, the execution can be proved on the basis of the evidence that a relation of Mr. Kasinath Das scribed the letter to the dictation of Mr. Kasinath Das, after which the latter signed it. Such cases are somewhat unusual. But the evidence given by P. W. 1 in the aforesaid strain cannot be rejected as not being admissible in evidence. I am satisfied that P. W. 1 is a witness of truth and the letter Ext. 3 is genuine and was written to the dictation of late Kasinath Das.

Even if Ext. 3 is genuine and constitutes an acknowledgment under Section 19 of the Limitation Act, the suit cannot be decreed on its basis as by then any suit on the basis of the handnote would be barred by limitation, there being no payment in between 14-2-54 and 13-2-60. It is therefore necessary to examine if Ext. 3 can be a valid agreement within the meaning of Section 25(3) of the Contract Act.

7. Section 25, sub-section (3) of the Contract Act runs thus:—

"25. An agreement made without consideration is void, unless —

(3) it is a promise, made in writing and signed by the person to be charged therewith, or by his agent generally or specially authorised in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits."

In any of these cases, such an agreement is a contract."

The juristic theory behind this sub-section is that the right of a lender to receive payment and the obligation of the borrower to repay never dies by lapse of time. The sub-section merely resuscitates the remedy to enforce payment by suit (See AIR 1947 Cal 267, *Suresh Chandra v. Benoy Kumar*). The letter Ext. 3 prima facie satisfies all the elements required under this section. There is a clear reference to the handnote under which the loan had been incurred. Late Kasinath Das made a clear admission that the dues had not been repaid in full. In express terms he asked for time to make payment in full by March 1960. There was thus a promise made in writing signed by Kasinath Das to pay the dues under the handnote which had been barred by limitation.

8. Mr. Rath however contends that the section has no application as Ext. 3 does not indicate that Kasinath Das was

conscious that the debt had been barred by limitation. The letter Ext. 3 does not indicate his awareness that the debt had been barred by limitation and his preparedness to repay the debt, even though it had been barred by limitation. He further contends that Ext. 3 is not a promise within the meaning of Section 2(b) of the Contract Act. Both these contentions require careful examination.

9. In support of his contention that the debtor must be conscious of the debt being barred by limitation before a promise is made, reliance is placed by Mr. Rath on (1910) 20 Mad LJ 656, *Ramaswami Pillai v. Kuppuswami Pillai* and AIR 1963 Andh Pra 337, *Sambayya v. Shemsherkhan*. Both these cases are single Judge decisions and support the contention of Mr. Rath. In (1910) 20 Mad LJ 656 his Lordship observed that there was nothing to show that the debtor recognised that the debt was irrecoverable and still promised to pay it, and the promise to which Section 25 refers seems to be a promise to pay despite the consciousness that the debt is barred. This case came up for consideration in (1913) 18 Cal LJ 269, *Mati Sheikh v. Baikantha Nath* and was dissented from. It was held not to have laid down good law. Their Lordships observed that the legislature did not insist on the consciousness of the debtor about the debt being barred by limitation before promise was made. Such words cannot be imported into the section which are not to be found there. The identical view was taken also in (1913) 18 Cal LJ 329, *Bhowani Misser v. Peari Jha*. Sir Asutosh Mookerjee was a party to both these Division Bench decisions. In AIR 1915 Mad 242, *Mrs C. Simon v. Arogiasami Pillai* and AIR 1951 Mad 903, *Muthayee Achi v. Sabbiah Chettiar* similar views were taken by two Division Benches of the Madras High Court. (1910) 20 Mad LJ 656 thus stands overruled even in Madras. AIR 1963 Andh Pra 337 did not make reference to any of these Calcutta and Madras decisions and does not lay down good law.

I am clearly of opinion that a barred debt is a valid consideration for a promise to pay under Section 25(3) even if the promisor did not know it to be barred on the date of the promise. The first contention of Mr. Rath is accordingly rejected.

10. The next contention of Mr. Rath is that Ext. 3 is merely a proposal given by late Kasinath Das, and there is no material to show that the plaintiff accepted the proposal. There is therefore no promise within the meaning of Section 2(b). Reliance is placed on AIR 1952 Cal 443, *Sriram Arjundas v. Governor General in Council* wherein his Lordship observed thus:—

"It seems to me that Section 25 requires that before the writing is made and signed there must be an agreement by the acceptance of a proposal and that agreement is to be recorded in writing and signed in accordance with the requirements of the section"

Mr Rath contends that there are no materials on record to show that Ext 3 was accepted by the plaintiff before it was put into writing. The law laid down in the Calcutta case cannot be construed to mean that acceptance cannot be inferred from the facts and circumstances of a case. Section 2(b) of the Contract Act runs thus —

"2 In this Act the following words and expressions are used in the following senses unless a contrary intention appears from the context

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted A

proposal, when accepted becomes a promise"

In this case the evidence of P W 1 is that the letter was signed by Kasinath Das after going through the contents and was given to the plaintiff. Obviously the plaintiff accepted it, kept it with him and has used it. The circumstances are clear that the plaintiff accepted the proposal made by late Kasinath Das, as a result of which the promise given in Ext 3 came into existence. That the proposal was accepted ultimately culminating in the promise embodied in Ext 3 can be reasonably inferred from the facts and circumstances of this case. The second contention has accordingly no force.

11. In the result, the plaintiff's suit must succeed. The judgments of the courts below are set aside and the Civil Revision is allowed. In the circumstances, parties to bear their own costs throughout.

GDR/D V C.

Revision allowed.

E N D

connection that in a large number of cases industrial disputes are raised by or on behalf of the entire body of workmen working in a particular industry, which industry by and large compared to the Shops and Establishments' employers or employees governed by the Bihar Shops and Establishments Act is much bigger and substantial. In Shops and Establishments of the kind which are governed by the Act, the employer and the employee daily work in close contact and company. Both must work for the harmonious running of the establishment in mutual trust and confidence. It will be almost impossible for them to work if one has lost confidence of the other. The Supreme Court has in the case of Punjab National Bank, AIR 1960 SC 160 quoted with approval the principle laid down by the Full Bench of the Labour Appellate Tribunal in Buckingham & Carnatic Mills Ltd. v. Their Workmen, (1951) 2 Lab LJ 314 (LATI-Cal) (FB) in paragraph 36 of the judgment of the Supreme Court. The Full Bench has said:

"..... in so ordering the tribunal is expected to be inspired by a sense of fair-play towards the employee on the one hand and considerations of discipline in the concern on the other. The past record of the employee, the nature of his alleged present lapse and the ground on which the order of the management is set aside are also relevant factors for consideration."

The principle to be applied for ordering reinstatement under Section 26(5) of the Act can never be more lenient, if not stricter, than the one initiated by the Full Bench of the Labour Appellate Tribunal. Even on applying all those principles which the Labour Court in this particular case has failed to notice or apply, it would be manifest that Barman is not an employee, in whose case, for the various reasons already stated by me in my judgment above, an order of reinstatement could be or should have been made. Since the Labour Court has completely failed to direct itself in this regard, it must be held that the order giving the relief of reinstatement suffers from an infirmity of the kind which obviously can be called an error of jurisdiction warranting interference by this Court in exercise of its revisional power or power of superintendence.

26. In C. W. J. C. 509 of 1967, Mr. Ghose contended that once an order of reinstatement is made the Labour Court has no power to give by way of compensation only six months' pay and not the entire wages for the idle period. In the view I have taken on the question of reinstatement, the point becomes academic and does not arise. I, therefore, express no opinion on it.

27. In the result, Civil Revision 371 of 1965 fails and is dismissed and Civil Revision 320 of 1967 is partly allowed. The order of the Labour Court is modified, in that the relief of reinstatement given to the employee is set aside; it is held that his services will be deemed to have been dispensed with not from 8-9-1964 but from 14-9-1964, on and from which date, in view of the finding of the Labour Court, that the services were dispensed with without reasonable cause, the employee will get by way of compensation six months' pay at the undisputed rate of Rs. 189 per month which he was drawing at that time. The order of the Court below granting Rs. 200 by way of cost to the employee is also maintained. C. W. J. C. 509 of 1967, in view of the order of modification passed in Civil Revision 320 of 1967, fails and is dismissed. I shall make no order as to costs in any of the three applications in this Court.

28. WASIUDDIN, J.:— I agree.
TVN/D.V.C. Orders accordingly.

AIR 1969 PATNA 385 (V 56 C 100)

N. L. UNTWALIA AND
S. WASIUDDIN, JJ.

M/s. Luxmi Narayan Arjundas and others, Appellants v. State Bank of India, Respondent.

A. F. O. D. No. 324 of 1963 dated 5-11-1968, from decision of 3rd Addl. Sub. J. Purnea dated 7-2-1963.

(A) Evidence Act (1872), Ss. 18, 21, 115 — Admission in the pleading of a previous suit — Admission binds the party making it in a subsequent suit — Admission can be used against him in the subsequent suit — Admission by agent without instigation of or without benefit to principal is not binding on principal. AIR 1967 SC 341, Foll. (Para 20)

(B) Evidence Act (1872), S. 35(2) — Commissioner dying after filing his report — His report is admissible in evidence under the provision. (Para 22)

(C) Contract Act (1872), Ss. 176, 211, 214 and 215 — Right of pawnee to sell the goods pledged — Nature of right — Pawnee's duty when the purchaser raises a dispute regarding quality of goods — First sale being good and not annulled, the pawnee cannot resell under S. 176.

Although by virtue of the special property which passes to the pawnee, he gets a right to sell the thing pledged, as expressly engrafted in Section 176 of the Contract Act, he still does so not as a full owner of the thing, but by virtue of an implied authority from the pawner to do so. The sale must be held for the bene-

fit of both the parties. The sale proceeds are the property of the pawner. The pawnee has a right to appropriate the sale proceeds or any portion thereof for satisfaction of his dues from the pawner. The surplus has got to be accounted for and refunded to the pawner. At no point of time the entire property in the goods in the sense of ownership passes from the pawner to the pawnee. Before the sale, the property is of the pawner in the custody of the pawnee, and after the sale, if it is a completed sale, in the sense of the passing of the property, it is of the purchaser. In a case where there had been a completed sale and the property in the goods had passed, the purchaser raises a dispute regarding the quality of the goods then, the pawnee cannot proceed in the matter without referring to the pawner. He must inform the pawner, treating himself as his agent, and cannot proceed in the matter without instructions of the principal, namely, the pawner. In such a situation, the provisions contained in Sections 211, 214 and 215 of the Contract Act will be attracted and it becomes the duty of the pawnee to use all reasonable diligence in communicating to the pawner seeking his instructions.

(Paras 27 and 28)

In a case, a bank who held some jute bales under pledge for moneys due to it from their owner, sold them by public auction and realised the price. Later on the purchaser refused to take some of the bales alleging that they contained gudri which the purchaser said was non-jute substance. The purchaser sued the bank for refund of the part of the sale consideration. The bank not only contested the matter all by itself without reference whatsoever to the pawner but also entered into a compromise with the purchaser by which it had agreed to and in fact refunded the amount claimed by the purchaser. The bank later on resold the remaining bales at a lower rate and sued the pawner for reimbursement. The evidence also disclosed that the bank had not conducted the matter with due diligence.

Held, that, under the circumstances the bank was not entitled to get reimbursement from the pawner whom it had not consulted in the matter, and itself having been negligent.

(Paras 28, 30 & 32)

Held further, that the first sale being good and not having been set aside the bank had no right to resell the goods under Section 176 of the Contract Act.

(Para 31)

Cases Referred: Chronological Paras (1967) AIR 1967 SC 341 (V 54)=

(1957) 1 SCR 1, Basant Singh v Janki Singh 20

J C. Sinha, H L Agarwal, Girijapati Sanyal and Kedar Nath Tulsyan for Ap-

pellants, Syed Akbar Hussain and P. C. Mukharji, for Respondent.

UNTWALIA, J.:— This is an appeal by the defendants from the judgment and decree of the Court of the 3rd Additional Subordinate Judge at Purnea in Title Mortgage Suit 29 of 1957, whereby the suit of the plaintiff respondent for realisation of Rs 65,555/3/9 has been decreed in full, and a preliminary mortgage decree has been passed.

2 The defendants were members of a joint Hindu Mitakshara family, of which the karta was Luxmi Narayan Changotia (defendant 2). The managing members of the business were also Ram Chandra Changotia (defendant 5) and Sheodayal Changotia (defendant 14). Defendant 2 died during the pendency of the appeal here, and his heirs have been substituted. They all carried on their business under the name and style of M/s Luxmi Narayan Arjundas (defendant 1) in village Banmankhi in the district of Purnea. They opened a cash credit account in the year 1948 with the Imperial Bank of India, which undertaking has been taken by the State Bank of India under the State Bank of India Act, 1955 (Act 23 of 1955) with all its assets, liabilities, etc. As the relevant transactions and facts took place and occurred when the bank was known as the Imperial Bank of India, for the sake of brevity, hereinafter in this judgment, the reference to the plaintiff will be by the word 'Bank' only, which term, unless otherwise indicated in the context, will ordinarily and generally mean Imperial Bank and may mean the State Bank, as the suit has been instituted by the latter Bank. Since the argument in the appeal has been confined to two points only to be stated hereafter, I shall state the relevant facts of this case only so far as they are necessary for the decision of the two points aforesaid.

3. After the opening of the cash credit account, there were several transactions between the defendants and the Bank in pursuance of eight written agreements executed by and on behalf of the defendants from the year 1948 to January, 1952, as detailed in paragraph 4 of the plaint. The Bank advanced money to the defendants against pledge of jute which was stored in the godown of the defendants situated near their residential house. There was a fall in the jute market in the year 1952 and the value of the pledged security became considerably low. Considerable amount was outstanding due from the defendants to the Bank, and when called upon by the Bank to cover the margin of the fall, the defendants failed to do so. They failed either to pay up the dues of the Bank or to cover the short fall in the value of the security. Hence, according to the case of the Bank,

on or about the 14th January, 1953, the defendants created an equitable mortgage by delivering to the Bank in the town of Calcutta the documents of title of their immovable properties comprising their gaddi, residential houses and godown in Banmankhi Bazar and cultivable lands in Banmankhi and Rupouli which are fully described at the foot of the plaint.

It may be made clear here that there are five lots of the property described at the foot of the plaint, out of which lots 1 and 2 are situated in village Banamankhi, lot 3 is described as situated in village Rashar and the properties described in lots 4 and 5 are situated in village Rupouli. It seems that village Rashar is either a suburb of Banmankhi Bazar or very near it, and that is the reason why all throughout properties of lots 1 to 3 have been described as Banmankhi properties and will be described as such hereinafter in my judgment, and the properties of lots 4 and 5 will be called Rupouli properties.

4. The properties given in equitable mortgage were made further security for the Bank's dues against the defendants for advancements to be made. The defendants, however, could not redeem the mortgage and pay the Bank's dues in spite of several notices. Finally, in the last quarter of the year 1953 a sum of Rs. 1,48,399/9/6 remained due to the Bank from the defendants. After requisite notices and information to the defendants, the pledged jute, the weight of which was 6479 maunds as per Bank's records, was sold by public auction on 21-1-1954 to the highest bidder, Messrs. Rai Bahadur Hurdutrai Motilal Jute Mills Ltd. (for the sake of brevity hereinafter to be referred to as R. B. H. M. Jute Mills) at Rs. 17/10/- per maund. The said Mills agreed to take delivery on full payment after actual weighment of the goods.

5. The plaintiffs' case further is that the entire stock of pledged jute was in packed bales, some in 3½ maunds and some in 1½ maunds per bale. R. B. H. M. Jute Mills after their purchase paid to the Bank Rs. 1,14,192/6/- subject to adjustment by actual weighment. They were to start taking delivery of the goods from 24-1-54. A portion of the goods was delivered to the purchaser after actual weighment after keeping its record. 448 bales of jute weighing 1506 maunds 28 seers were taken delivery of by R. B. H. M. Jute Mills but they refused to take further delivery on the ground that many of the bales contained non-jute, that is, worthless materials described by them as gudri.

So the purchaser wanted to pick out good bales for delivery, but the Bank refused to allow the purchaser to pick and choose, as the entire stock was sold and purchased by the purchaser irrespective

of quality as also because, as the case of the plaintiff in paragraph 14 of the plaint is; the Bank officers were under the impression that the bales contained jute and not worthless materials which were not jute, as stated by the purchaser. R. B. H. M. Jute Mills therefore filed Money Suit 75 of 1954 in the Court of the Subordinate Judge, Purnea, for refund of the part of the purchase money and also for damages for failure of the Bank to deliver the balance of the goods according to the contract. The total claim in the suit was to the tune of Rs. 1,00,106/10/6.

6. The plaintiffs' case further is that the Bank which was defendant in Money Suit 75 of 1954 applied to the Court for the sale of the balance of the stock. The prayer was allowed and the remaining goods were sold through Sri Ajab Lal Mandal, pleader commissioner, on 21-12-1954 to the highest bidder by public auction at Rs. 18/8/- per maund. This purchaser deposited Rs. 75,267/11/3 with the plaintiff Bank. The pleader commissioner weighed each bale and kept proper records and submitted a report to the Court. The plaintiffs' case further is that the pleader commissioner's report would show that there were altogether 1595 bales, out of which 1368 bales were normal and contained jute. They weighed 3821 maunds 4 seers and the remaining 227 bales contained gudri and weighed 247 maunds 17 seers. The pleader commissioner had opened one such bale, and it was found that it weighed 1 maund 11 seers, out of which the jute contents were 12 seers only and the rest 39 seers were gudri.

The case of the Bank is that 227 bales were tied, bound and packed and made in such a way that they looked like normal bales, and it was impossible to know that they contained gudri. The Bank had accepted them in good faith as good bales containing jute upon representation by the defendants that the bales did contain jute. The fact that a large quantity of gudri was packed in 227 bales was an act of fraud on the part of the defendants practised by them upon the Bank which was detected at the time when the purchasers of the first sale, R. B. H. M. Jute Mills, were taking delivery. The main cause of the filing of the suit by the said Mills against the Bank was the fraud practised by the defendants, as a result of which the Bank had to spend and incur costs and expenses to the tune of Rs. 3,948/9/- in the said suit. The Bank is entitled to be indemnified against the said loss. In the 19th paragraph of the plaint the case made out is that the entire stock of the jute weighing 6479 maunds was sold on 24-1-1954, but owing to the fraud practised by the defendant, the purchasers refused to take delivery, instituted the money suit, and so the remaining stock

left after the part delivery to the first purchaser remained lying in the godowns at Banmankhi which had earthen floor and tatti wall for full one year and the entire stock got deteriorated and became short in weight thereby by 903 maunds 31 seers. The Bank states that the loss on account of the shortage was also to fall on the shoulders of the defendants. As per accounts given in Schedule A appended to the plaint, the total claim of the plaintiff of the amount of Rs 65,555/3/9 consists of the principal Rs 46,516/4/9, insurance charges Rs 4515/10/-, interest Rs. 10,574/12/- and cost of the money suit Rs 3,948/9/-.

7. Several pleas were taken up in the written statement to defeat the entire suit of the plaintiff Bank. Both the sales, one held in January, 1954 and the other in December, 1954 were attacked on several grounds. The transaction of equitable mortgage was denied. It was asserted that the title deeds were not deposited by defendant 2 at the Calcutta head office of the Bank on 14-1-1953 or on any other date. As a matter of fact, the Bank's officers took away the sale-deeds from the custody of the defendants on one pretext or the other. The suit was barred by limitation. The allegations of the plaintiff that certain number of bales of jute contained gudri, that fraud was practised by the defendants, that the filing of the money suit was a result of the alleged fraud were all denied.

It was asserted that the Bank had taken entirely a different stand in its written-statement filed in the money suit and it cannot be allowed to change its stand in this suit. The defendants asserted further that they had no knowledge of the suit and they were not bound by the sale held during its pendency. R. B. H. M. Jute Mills wrongly refused to take delivery of the entire stock of jute, and in collusion with the plaintiff Bank and for their mutual benefit they made up their matters causing loss to the defendants. Thus, the defendants' liability to the various amounts claimed by the Bank in the suit was refuted.

8. The learned Additional Subordinate Judge has held that the auction-sales held on 21-1-1954 and 21-12-1954 are valid and binding on the defendants; they had knowledge of both the sales; they are liable to pay to the Bank not only the amounts of principal and interest claimed by the plaintiff but also the amounts on account of the shortage of the goods, insurance charges and costs of the money suit. He has further held that equitable mortgage was created on 14-1-1953 by delivery of all the title-deeds relating both to Banmankhi and Rupouli properties by defendant 2 at the Bank's Calcutta head office. Hence, the suit is not barred by limitation. In that

view of the matter, the suit has been decreed for the full amount with interest pendente lite and future at the rate of 6 per cent per annum. The defendants have come up in appeal.

9. Mr. J. C. Sinha, learned counsel for the defendants, to put broadly, attacked the judgment and decree of the Court below on two grounds only, (1) that no equitable mortgage was created in respect of any property, and that being so, the suit filed on 20-9-1957 on the basis of the transaction which admittedly had closed in the year 1953 must be held to be barred by limitation under Article 57 of the Limitation Act, 1908, and (2) that in any view of the matter, the defendants are not liable to reimburse the Bank on account of any loss said to have been sustained by it for the failure of R. B. H. M. Jute Mills to take delivery of the entire stock of jute purchased by them on 21-1-54, either on account of the shortage in weight, insurance charges or costs of the suit nor are the defendants liable to pay any interest on the excess of the amount said to have remained due after the first sale as a result of the deficit caused by the second sale.

10. At the outset, I may make it clear that learned counsel for the appellants conceded, and in my opinion rightly, that if an equitable mortgage in respect of the properties or any portion of them is held to have been created on 14-1-1953, the suit will not be barred by limitation. The first question, therefore, which falls for our decision is whether an equitable mortgage was created on 14-1-1953 if so, in respect of what properties?

(In paragraphs 11 to 14 the judgment discusses the oral and documentary evidence in the case regarding the creation of an equitable mortgage in respect of all the 5 sets of properties and comes to the following conclusion. The judgment then proceeds.)

I, therefore, hold that an equitable mortgage was in fact and validly in law created by and on behalf of the defendants on 14-1-1953 in so far as the Banmankhi properties described in lots 1 to 3 in Schedule B of the plaint are concerned. In view of my finding in regard to the Rupouli properties, it is manifest that the preliminary mortgage decree which is going to be upheld by me for a part of the amount will be operative on the Banmankhi properties only; that is to say, the Banmankhi properties will be liable to be sold in execution of the mortgage decree in accordance with law, and a personal decree will have to be passed if and when it is found that the sale proceeds from the Banmankhi properties are not sufficient to satisfy the entire decretal dues.

15. Coming to the second ground of attack on the judgment and decree of the Court below, I would like to state first

that it is not necessary to refer to the various letters written or notices given by the Bank to the defendants in the year 1953 or in January, 1954, before exercising its right under Section 176 of the Contract Act to sell the pledged property, the sale of which took place on 21-1-54. Exhibit 24 is a copy of the relevant entries in the ledger relating to cash credit accounts of the defendants. This would show that after debiting of various sums on account of insurance charges and other expenses which were liable to be made by the pawner, and after debiting interest up to 21-10-1953, the balance shown due on October 22, 1953 is Rs. 1,48,339/9/6. Exhibit A(5) is a letter dated 21-11-1953 from the Agent of the Purnea branch of the Bank to the Secretary and Treasurer of the Bank in Calcutta. The contents of this letter show that various qualities of jute, including as the evidence shows, the highest quality known as Tossa and the lowest quality of cross bottom were pledged with the Bank. The total number of bales pledged was 2042, out of which 334 bales only were weighing one and half maunds and the rest were weighing 3 and half maunds each. Thus, the total bales of jute pledged weighed 6479 maunds, on checking and verification of which a shortage in weight to the extent of 180 maunds was detected. But it appears from the evidence of P. W. 9, an Assistant of the Bank, as also from the evidence of P. W. 16, A. N. Gangoli, the Agent of the Bank, that this shortage was made good. This will also find support from the pleader commissioner's report (Ext. 6), reference to which will be made later on.

16. Exhibit I dated 12-1-1954 is a public notice notifying that baled jute weighing 6479 maunds will be sold by auction at the premises of Luxmi Narayan Arjundas, Banmankhi, at 12 noon on 21-1-1954. It was further notified that the stocks were held at the above place and could be inspected at any time before the auction. Exhibit 19 is the proceeding at the auction sale held on 21-1-1954. This, in short, contains the broad terms which were agreed upon between the Bank and R. B. H. M. Jute Mills, the purchaser at the said auction. It clearly recites that 2042 bales (1708 bales of 3 and half maunds each and 334 bales of 1 and half maunds each, total being 6479 maunds) pledged by Luxmi Narayan Arjundas, were sold to the highest bidder, R. B. H. M. Jute Mills at the highest bid rate of Rs. 17/10/- per maund. It was further stated that the weight given was as per the Bank's books, and the final amount of money will be calculated and adjusted after the actual weighment of the stock. The purchaser agreed and deposited a sum of Rs. 25,000 by cheque on the Central Bank of India

Lid., Katihar and undertook to pay the difference on 27-1-1954. It may be stated here that no other term in regard to the quality of the goods in express language was inserted in Ext. 19, which seems to have been signed also by the purchaser's representative at the auction.

17. Before I refer to Ext. 15, the plaint filed on 25-6-1954 by R. B. H. M. Jute Mills against the Bank in Money Suit 75 of 1954 I would refer in this connection to the evidence of some of the plaintiff's witnesses as to what happened at the time of delivery of the jute bales to R. B. H. M. Jute Mills in or about the last week of January, 1954. P. W. 10, S. C. Dutta, was a godown-keeper at Banmankhi under the employment of the Bank at the relevant time. He says that R. B. H. M. Jute Mills took delivery of the other bales saying that the jute was of bad quality as it contained gudri. They wanted to pick and choose among the bales in the godown; the Bank refused them to pick and choose. He further stated even in examination-in-chief that the jute pledged by the parties is not taken by the Bank on quality basis; they take it as jute only. In cross-examination, when he was asked as to whether he knew as to what was gudri, he answered the gudri means non-jute consisting of sticks, and then said jute sticks. P. W. 15, C. K. Puri, is a person who was giving delivery to R. B. H. M. Jute Mills on behalf of the Bank. He speaks about the dispute which cropped up after part-delivery, as the purchaser contended that it was not jute but was gudri. In cross-examination, P. W. 15 stated that although he was not an expert, he did know that Tossa is a good quality and cross bottom is an inferior quality of jute. He further stated that the auction purchaser wanted to pick and choose from the various qualities of jute, to which he did not agree.

18. Admittedly, as is clear from the evidence also, R. B. H. M. Jute Mills had paid the entire price of the jute amounting to Rs. 1,14,192/6/- within a few days of the auction sale. It is also undisputed that they had taken delivery of jute weighing 1506 maunds and odd, which was worth Rs. 26,555/9/6. The balance which remained with Bank out of the price paid was Rs. 87,636/12/6 on account of refusal of the representatives of R. B. H. M. Jute Mills to take delivery after they had taken delivery of a part of the goods. In Ext. 15, the plaint in Money Suit 75 of 1954, R. B. H. M. Jute Mills made out a case that there were transactions between the plaintiff and the defendant Bank from a long time and it was known to the defendants that the plaintiff required jute which was of merchantable quality and fit for manufacturing jute products. Hence, they stated that in the

circumstances there was an implied condition and warranty that the jute should be in terms of the details given out by the Bank's Agent at the time of auction.

Their further case was that after delivery of 1506 maunds of jute, the goods which were offered for delivery were only gudri which did not come within the category of jute. In spite of repeated demands, the Bank which was defendant No 1 or its Agent, A. N. Gangoli (who is P W 16 in the case and defendant 2 in the money suit) did not deliver the balance of the goods. Hence, they claimed a decree for refund of the sum of Rs 87,636/12/6 as also for decree for damages and interest, the total claim being to the tune of Rs 1,00,106/10/6. In the said money suit, two written statements were filed on identical lines—one filed on 16-9-1954 Ext. H (1) was on behalf of the Bank and the other, Ext. H was filed on 24-9-1954 on behalf of defendant 2. I shall here refer to the written statement filed on behalf of the Bank which also was verified by A. N. Gangoli, Agent of the Bank, who is P W 16 in the suit and was defendant 2 in the money suit. In this written statement, he stated that, even in December, 1953 R. B. H. M. Jute Mills had made an offer to purchase the entire stock at a flat rate of Rs. 17/8/- per maund and their representative Girdhari Mull had inspected the stock of jute at Banmankhi on 19-12-1953. It was further stated in the sixth paragraph.

"The allegation that only Gudris which did not come within the category of jute were sought to be delivered to the plaintiffs' agent is deliberately false. The plaintiffs had purchased the entire stock of the two godowns in one lot after thorough inspection of the same consisting of 6479 maunds as per Bank's Book. The plaintiffs had made inspections of godowns twice, once in December 1953 and again on the date of sale and having purchased with their eyes open cannot no make any objection regarding the quality of jute".

The case of R. B. H. M. Jute Mills as made up in the plaint that there was an implied condition or warranty was denied in the written statement filed on behalf of the Bank.

19. P W 16 stated in his evidence (vide page 102 of the paper-book) that the written statement filed by him, in Money Suit 75 of 1954 contained a true statement of his and the Bank's written statement filed in that money suit also contained true statement and that written statement was also signed by him.

20 The learned Additional Subordinate Judge has taken the view that an admission in the pleading of a previous suit is not binding on the party making that admission or (nor?) is to be used

against it in a subsequent suit. In view of the decision of the Supreme Court in *Basant Singh v Janki Singh*, AIR 1967 SC 341, the opinion of the Court below is erroneous Gangoli (P. W. 16), instead of explaining the admission in the previous written statement admitted it to be correct. At this stage, I may only point out that the case made out by the Bank in the written statement, Ext H (1), is inconsistent with the case made out in the plaint of the present suit. It is not the case of the Bank that the previous written statement was filed at the instigation or persuasion of the defendants of this suit and for their benefit. In that situation, it is difficult to follow the contradictory case made out by the Bank in the 17th paragraph of the plaint of this suit that the non-delivered bales of jute contained gudri and the fraud practised by the defendant firm on the Bank was detected at the time when the purchaser of the first sale R B H M Jute Mills, was taking delivery. If that was so, how is it that such a case was not made out in Money Suit 75 of 1954? Apart from the other reasons which I shall be giving hereinafter in my judgment, I have no difficulty in rejecting the case of fraud set up in the plaint of the present suit on this ground alone.

21. The entire stock of jute lying in the godown of the defendants which was kept in charge of the Bank had been sold to R. B. H. M. Jute Mills on 21-1-1954. They had paid the full price also. In such a situation, there is no difficulty in coming to the conclusion that the property in the goods under the Sale of Goods Act, 1930, had passed to the purchaser viz. R. B. H. M. Jute Mills. This finds further support from the pleadings in Money Suit 75 of 1954, as in the plaint there was no case made out by the purchaser that the property had not passed and from the written statement it would appear, according to the case of the Bank that property had passed. Ext 7 is the petition filed by the Bank on 5-11-1954 in Money Suit 75 of 1954, praying to the Court for arranging for the sale of the balance of the goods by appointment of a pleader commissioner. In this petition it was stated by the Bank.

"That the balance of the undelivered stock of jute lying in this defendant's godowns at Banmankhi is the property of the plaintiff company by virtue of purchase in public auction on 21-1-1954 and is lying at the godown at the risk and responsibility of the buyer."

To the same effect is the evidence of Gangoli (P W 16) when he said in cross-examination that the Bank had been holding the stock as a custodian on behalf of the purchasers who refused to take delivery of the goods from 21-1-54 to the end of December, 1954.

22. In pursuance of the order of the Court dated 4-12-1954 the Commissioner proceeded to sell the remaining quantity of jute during the pendency of the money suit. By the said order which is Ext. 33, the commissioner was also directed to ascertain if any gudri, which was called non-jute by the plaintiff, was mixed up with the stock of jute in the godown of the defendant. If so, he was directed to ascertain further the quantity of such gudri. Sri Ajab Lal Mandal was dead, as deposed to by certain witnesses, when the trial of this suit commenced in the Court below. His report, however, was admitted in evidence and marked Ext. 6. This is dated 3-2-1955. The statements in the report obviously are admissible in evidence under Section 32(2) of the Evidence Act.

(In the rest of paragraph 22 the judgment deals with the report of the Commissioner and oral evidence in the case regarding the content of Gudri in the jute bales and comes to the conclusion that gudri is not foreign matter unconnected with jute, that gudri is bound to be present especially in the cross bottom quality jute and that the auction-purchasers were not justified in refusing delivery of about 1600 bales of jute on the ground that all of them contained gudri. The judgment then proceeds:)

23. I think, it is neither necessary nor possible or permissible to give a decision upon the merits of the dispute between R. B. H. M. Jute Mills and the Bank in Money Suit 75 of 1954. On the pleadings of the parties and the facts as they emerge from the evidence in this suit, it is definitely clear that the Bank had a very good case for trial by way of defence against R. B. H. M. Jute Mills. At no point of time they gave any information to the defendants about the refusal of the delivery of the jute by R. B. H. M. Jute Mills or institution of their suit. At no point of time they sought any instruction from the defendants what the Bank was to do in the case of the dispute raised by the purchaser of the goods at the auction held on 21-1-1954. They did not ask the defendants as to what steps were to be taken in respect of the undelivered quantity of jute. All what was done in the money suit on behalf of the Bank was on its own. It may well be, as found by the learned Additional Subordinate Judge, that the defendants had knowledge of the facts. In all probability, they must have knowledge. When the delivery was not accepted by R. B. H. M. Jute Mills, the defendants must have known about the dispute raised by them. Nonetheless, the fact to be emphasised is that at no point of time the Bank thought it obligatory or proper to consult the defendants in regard to the dispute raised by R. B. H. M. Jute Mills.

The funniest thing which happened thereafter is that the Bank entered into a compromise with R. B. H. M. Jute Mills and filed a compromise petition on 10-2-1956 in Money Suit 75 of 1954. This is Ext. 7. In this compromise petition, it is stated that the defendants had deposited Rs. 87,636/12/6 in cash on 28-9-55 in favour of the plaintiff which had been withdrawn by the plaintiff. As against the balance of the amount paid by them, jute worth Rs. 26,555/9/6 had been delivered. Then, it is said in the third paragraph:

"That in order to restore good feelings between the parties the plaintiff will not press his further claim against the defendant and as such nothing remains due to the plaintiff from defendant in respect of the claim of this suit and neither party has got any claim against the other nor will lay any claim against the other in respect of the subject-matter of the suit or relating to the transaction of jute in question."

It is remarkable that without reference to the defendants, on whom, the Bank thought, will fall the ultimate loss brought about as a result of the money suit, the Bank entered into this compromise. Not only that, actually the money was refunded about five months earlier than the filing of the compromise petition. The statement contained in paragraph 3 of the compromise petition, which I have extracted above, read in the light of the case of R. B. H. M. Jute Mills in their plaint that they had transactions with the Bank since long would clearly go to show that the compromise was effected to restore good feeling between the parties to the money suit and not for the benefit of or in the interest of the defendants who obviously were not parties to the money suit.

(In paragraphs 24 and 25 the judgment works out the details of amounts which the plaintiff can claim by way of deficit, insurance charges and interest. The judgment then proceeds:)

26. The question now arises as to whether the defendants are liable to reimburse and pay to the Bank the sums of Rs. 12,369/1/3. Rs. 4515/10/. Rs. 3948-9-0 and Rs. 1440.00 on account of the various items discussed above which are, as a result of the dispute raised by R. B. H. M. Jute Mills after their purchase at the auction in January, 1954. The answer to this question created some difficulty during the course of the argument at the bar. No direct case on the point of any Court, either in India or in England, could be cited before us, nor could we find any. The point fell for our decision on appreciation of the well-established principles which should govern the rights and liabilities of pawner and pawnee.

27. Section 176 of the Contract Act reads as follows—

"If the pawnor makes default in payment of the debt, or performance, at the stipulated time of the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security, or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater than the amount so due, the pawnee shall pay over the surplus to the pawnor."

In Volume II of Chitty on Contracts, 22nd Edition, at page 107 in paragraph 218, 'pledge' is defined thus

"A pledge or pawn is 'a bailment of goods by a debtor to his creditor to be kept by him till the debt be discharged', the bailment is intended to be a security for some debt or engagement. The general property in the goods pledged remains in the pledgor, but a special property in them passes to the pledgee in order that he may be able to sell the goods if his right to sell arises. This 'special property' is strictly only a right to possession of the goods, together with a power of sale upon default....."

At page 111 in paragraph 225 in the same volume, it is stated

"If the pledgor makes default in payment at the stipulated time, the pledgee may sell the pledge, even although there is no express agreement to that effect, or he may sue the pledgor for his debt, retaining the pledge as a security.... He sells by virtue of an implied authority from the pledgor and for the benefit of both parties, hence, he must, after deducting his debt, account to the pledgor for any surplus of the proceeds of the sale...."

To the same effect is the law enunciated in Volume 29 of Halsbury's Laws of England, 3rd Edition, at pages 218 and 221 in Articles 415 and 421. I would only quote a few words from the latter passage which are to the effect:

"If the pawnee sells he does so by virtue and to the extent of the pawner's ownership, and not with a new title of his own. The right of sale is exercisable by virtue of an implied authority from the pawner and for the benefit of both parties....."

It would thus be seen that although by virtue of the special property which passes to the pawnee he gets a right to sell the thing pledged, as expressly engrafted in Section 176 of the Contract

Act, he still does so not as a full owner of the thing, but by virtue of an implied authority from the pawner to do so. The sale must be held for the benefit of both the parties. The sale proceeds are the property of the pawner. The pawnee has a right to appropriate the sale proceeds or any portion thereof for satisfaction of his dues from the pawner. The surplus has got to be accounted for and refunded to the pawner. In such a situation, what is the legal position after the pawnee has exercised the right of selling the goods under Section 176 of the Contract Act when a dispute is raised by the purchaser of the goods? Can it be said that the pawnee then becomes entitled to deal with the dispute and bring it to an end, as he likes or as he thinks best, without referring the matter to the pawner? It is to be remembered that at no point of time the entire property in the goods in the sense of ownership passes from the pawner to the pawnee. Before the sale, the property is of the pawner in the custody of the pawnee, and after the sale, if it is a completed sale, in the sense of the passing of the property it is of the purchaser. The right to sell may and must include a right to enter into an agreement to sell which will be a completed sale on the passing of the property to the purchaser. In that situation, let us take an instance to explain the view point. If the pawnee agrees to sell the goods to a person who agrees to purchase them, but the property does not pass, the ownership in the goods remains with the pawner. If the goods are destroyed by fire or otherwise for no fault of the pawner, the pawnee or the person who has agreed to purchase, it is manifest, the loss will fall on the head of the pawner. If, however, the goods are so destroyed after the property in them had passed to the person who had agreed to purchase them, it goes without saying on the well-established principles of law, that the loss will have to be borne by the purchaser. In that case, the pawner will not be liable for the loss. If in such a situation a dispute is raised by the purchaser asserting that since the property in the goods had not passed the loss was not his and he must get back the price which he had paid for the goods from the pawnee, while, on the other hand, the pawnee asserts that the property had passed and, therefore, he was not liable to refund the price, can it be said that in such a dispute the pawnee can proceed as he likes without any reference to the pawner? The answer, to my mind, obviously must be against the pawnee. The pawnee has no special property or right left, after he has exercised his right of sale under Section 176 of the Contract Act. Incidental to the sale, he may have the right of effecting delivery or the

like. But on the raising of the dispute by the purchaser, he cannot proceed in the matter without referring to the pawner. He must inform the pawner, treating himself as his agent, that such and such disputes have been raised by the purchaser. In my opinion, on the raising of such a dispute, the pawnee becomes a mere agent of the pawner and cannot proceed in the matter without instructions of the principal, namely, the pawner.

28. That being so, the provisions of law contained in Sections 211, 214 and 215 of the Contract Act are attracted. It was the Bank's duty to deal with the dispute raised by R. B. H. M. Jute Mills and conduct the money suit according to the directions given by the pawners, the defendants of this suit. A difficulty and of a great magnitude was created by the purchaser, R. B. H. M. Jute Mills, by stating that they were not bound to take delivery of the balance of the goods. In terms of Section 214, therefore, it was the duty of the Bank to use all reasonable diligence in communicating to the defendants and in seeking their instructions. *The Bank did nothing of the kind.* It may well be that on seeking such instructions, if the money suit would have been decided against the Bank, the loss resulting from the decision in the suit would have fallen on the defendants of this suit. They would have been bound to reimburse the bank for all kinds of losses resulting from the decision in the suit.

29. On the facts and in the circumstances of the case, I am constrained to hold that the Bank dealt on its own with the dispute which was raised by R. B. H. M. Jute Mills, without obtaining the consent of the defendants and acquainting them with all material circumstances which came to its knowledge on the subject. In such a situation, the defendants are justified in contending that the dealings of the Bank had been disadvantageous to them and they are entitled to repudiate them and refuse to reimburse the Bank for the losses incurred by it as a result of such dealings, in accordance with Section 215 of the Contract Act.

30. Even assuming for argument's sake that seeking of such instructions was not essential or obligatory if the money suit would have proceeded to trial and disposal by a judgment of the court and that on the strength of that judgment with the aid of some more evidence the Bank would have been entitled to ask the defendants to reimburse it for the losses caused to the Bank as a result of the judgment, even though it had failed to seek instructions from the defendants, but I am definitely of the view that the Bank had no right to enter into a compromise with R. B. H. M. Jute Mills,

treating the sale held on 21-1-1954, as annulled and repudiated, after the part delivery, and retain the balance of the price which undoubtedly in law was the property of the defendants, without referring the matter to them or without their consent. I find no principle or authority to support the contention put forward on behalf of the Bank by their learned counsel, Mr. Syed Akbar Hussain, that all that was done by the Bank in regard to the dispute raised by R. B. H. M. Jute Mills was incidental to the power of sale of the Bank under Section 176 of the Contract Act. It will be disastrous for the commercial world to accept this contention and hold it to be good. In the drastic example which I have given above, it will be noticed then that even in a dispute of the kind which crops up on the loss of the entire goods, the Bank will be at liberty to refund the entire price to the purchaser without referring the matter to the pawner or without his consent, even though the money obviously would be the money of the pawner and must go to satisfy the debts due to him from the Bank.

In my opinion, there is no reasonable or legal solution of the problem with which we are faced in this appeal on account of the dispute raised by the purchaser after the auction sale held in January 1954 which sale, as I have said above, has been held to be a good sale by the learned Additional Subordinate Judge and could not be otherwise attacked before us by the learned Advocate, other than the one which I have endeavoured to arrive at on the basis of certain principles of law.

31. I may also add that the Bank in its present plaint nowhere referred to the fact of entering into the compromise with R. B. H. M. Jute Mills in Money Suit 75 of 1954; nowhere it stated in the plaint as to under what circumstances and why it entered into a compromise with the plaintiff of that suit. The whole and sole basis in the plaint of this suit for throwing the burden on the shoulders of the defendants was that they had practised fraud on the Bank in that they had mixed gudri in a large number of jute bales. In the first instance, it is to be reiterated that this was not the case of the Bank in Money Suit 75 of 1954. Secondly, evidence is absolutely lacking on the point of fraud said to have been practised by the defendants. The learned Additional Subordinate Judge abruptly has arrived at the finding of fraud in paragraph 60 of his judgment, without referring to any relevant evidence, merely on the basis of the fact that, according to the pleader commissioner's report, some bales of jute contained gudri. No one has come forward on behalf of the Bank to say that the defendants at the

time of pledging those bales had represented that the bales said to contain gudri contained jute Nobody has come forward to say that even in ordinary course of business some bales of jute cannot contain any quantity of gudri I have also referred to the fact that there is paucity of evidence in this case as to what was the gudri content in 227 bales which formed part of the undelivered goods If I may express the view, on the basis of the terms of sale held on 21-1-1954, the only right of the purchaser was to an adjustment of the total price on reweighment of the goods Even assuming that they were entitled to reject a portion of the goods which were found to be gudri and not pure jute, at best their right was not to take delivery of gudri and pay the price of the jute portion of the goods which was quite a considerable and major portion. I see no justification, nor could any be pointed out to us from the records of this case, which led the Bank to refund the entire sum of Rs 87 636/12/6 to the purchaser and thus bring about an annulment of the first sale So long as the first sale stood and was not annulled either by a judgment of the court or by consent of the parties, which must include the consent of the defendants of this suit, it was a good sale. There was no question of re-selling the goods by a second sale in exercise of the power under Section 176 of the Contract Act.

32. On a careful consideration of the matter, therefore, I have come to the conclusion that the defendants are not liable to reimburse or pay to the Bank such amounts as have been claimed, as a result of the dispute raised by R B H M Jute Mills The total of such amounts, as has already been discussed and mentioned is Rs 22,273/4/3 The Bank, in my opinion, is not entitled to get a decree against the defendants for this amount.

33. In the result, the appeal is allowed in part and the judgment and decree of the Court below are modified The plaintiff-respondent will have a decree against the defendants for a sum of Rs 43 281 97 P (Rs 65 555/3/9- Rs. 22 273/4/3) only as against the decree for Rs 65 555/3/9- passed by the court below The plaintiff will have also the proportionate costs in the court below on the said sum of Rs 43 281 97 P As the success is divided in this court, I shall make no order as to costs in appeal Interest pendente lite and future at the rate of 6 per cent, per annum will run on the amount of Rs 43,281 97 P from the date of the suit till realisation The preliminary mortgage decree in terms of the decree of the Court below will be passed and be operative in respect of the properties described in lots 1 2 and 3 of schedule B in the plaint. There will be

no mortgage decree in respect of lots 4 and 5

34. WASIUDDIN, J.:— I agree.
TVN/D.V.C. Appeal allowed in part.

AIR 1969 PATNA 394 (V 56 C 101)

N L UNTWALLIA AND
S WASIUDDIN, JJ

Bishop S K. Patro and others, Petitioners v. State of Bihar and others, Respondents.

Civil Writ Jurisdiction Case No 503 of 1967 D/- 10-9-68.

(A) Constitution of India, Arts. 25 and 26 — Articles 25 and 26 to be read and interpreted together — Fundamental right to freedom of religion extends to all persons — Word 'denomination' in Art. 26 includes denomination not only of Indian citizens but of all persons: AIR 1954 SC 282 & AIR 1954 SC 388 Rel. on.

(Para 21)
(B) Constitution of India, Art. 30(1) — Expression 'all minorities' in Art. 30(1) means all minorities of Indian citizens based on religion or language. AIR 1958 SC 956 Foll.

(Para 22)
(C) Constitution of India, Art. 30(1) — Establish and administer — Word 'and' means 'and' and not 'or' — Phrase has to be read conjunctively — Held, that, even assuming in favour of petitioners that the school was being administered by minority of Indian citizens, namely, the Indian Christians, they could not claim protection under Art. 30(1) inasmuch as it was established by Church Missionary Society of London and not by a Society of which Indian Christians were members: AIR 1968 SC 662 Foll.

(Paras 25 and 41)
(D) Constitution of India, Art. 30 — Pre-Constitution educational institution — Method of determining whether it was established and administered by minority consisting of Indian citizens indicated.

(Para 26)
(E) Constitution of India, Arts. 26(a) and 30(1) — Educational institution, pure and simple, imparting secular education, which has been specifically dealt with under Art. 30(1) cannot be characterised as institution for religious and charitable purposes within general provision of Art. 26: AIR 1954 SC 282 and 388 and AIR 1968 SC 662 Ref. to.

(Para 27)
(F) Constitution of India, Arts. 26, 30 — Transfer of assets and right of management in respect of continuing educational or other institution founded or brought into existence by one founder — It cannot be said that by such transfer

transferee brings into existence or re-brings into existence and establishes the institution within meaning of Art. 26 or 30 — If, however, under terms of trust, original institution was discontinued and new institution established by transferee, it may be possible to say that it was new institution established or re-established by transferee — Held, on facts that C. M. S. School was not an educational institution established by a minority nor could it be held to be re-established either in 1943 or 1958 by reason of transfer of trusteeship and management of the institution. (Para 29)

(G) Constitution of India, Arts. 29 and 30 — Educational institution established by minority for conservation of its language, script or culture within Art. 29 — For claiming protection of Art. 30 it is not essential that all students of such institution should be of the minority but there must be some averment in petition that students belonging to minority are receiving education in the institution — School established by Church Missionary Society of London having insignia of cross and imparting some teachings and recitation of prayers from Bible — No averment in petition that any student of minority community was receiving education in school — Held, C. M. S. School was an institution not falling within Art. 29. (Para 30)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 662 (V 55)=
 (1968) 1 SCR 833, S. Azeez Basha v. Union of India 7, 25, 27, 36
 (1965) AIR 1965 Ker 75 (V 52)=
 ILR (1964) 2 Ker 478 (FB), Aldo Maria Patroni v. E. C. Kesavan 9
 (1963) AIR 1963 SC 540 (V 50)=
 (1963) 3 SCR 837, Rev. Sidhraj-bhai Sabbai v. State of Gujarat 6, 8, 9, 26
 (1963) AIR 1963 SC 1811 (V 50)=
 (1963) 2 SCJ 605, State Trading Corporation of India v. The Commercial Tax Officer 20
 (1962) AIR 1962 Pat 101 (V 49)=
 ILR 40 Pat 783 (FB), Dependra Nath Sarkar v. State of Bihar 8
 (1961) AIR 1961 SC 1402 (V 48)=
 (1962) 1 SCR 383, Durgah Committee, Ajmer v. Syed Hussain Ali 7, 36
 (1958) AIR 1958 SC 956 (V 45)=
 1959 SCR 995, In re, Kerala Education Bill 1957 5, 9, 22, 24, 26
 (1954) AIR 1954 SC 282 (V 41)=
 1954 SCR 1005, Commr. Hindu Religious Endowments v. Sri Lakshminidra Thirtha Swamiar of Sri Shirpur Mutt 21, 27
 (1954) AIR 1954 SC 338 (V 41)=
 1954 SCR 1055, Ratilal Panachand Gandhi v. State of Bombay 21, 27
 S. N. Bhattacharyya, K. D. Chatterji, K. D. De and R. M. Misra, for Petitioners;

Lal Narayan Sinha, Shreenath Singh, Nagendra Prasad Singh, K. P. Verma (Standing Counsel) and Mrs. Sudha Rani Jaiswal, for Respondents.

UNTWALIA, J.:— In this writ application we are called upon to decide a very important question of law with reference to Article 30 of the Constitution of India. It is, therefore, necessary to state briefly in the beginning as to who are the parties to the application and what led to its filing.

2. The first petitioner is Rt. Rev. Bishop S. K. Patro, Chairman of the Bhagalpur Diocesan Trust Association and ex-officio President of the Managing Committee of the Church Missionary Society Higher Secondary School, Bhagalpur, hereinafter shortly called C. M. S. School or the School. The second petitioner Ven. Archdeacon E. A. B. Hughes and the third petitioner, Rev. J. E. Ghosh are respectively Treasurer and Secretary of the Trust Association aforesaid. The fourth petitioner is Miss V. M. Peacock, Secretary of the Managing Committee of the C. M. S. School. The impugned orders are (i) order of the Secretary to the Government of Bihar, Education Department, dated 22-5-1967, a copy of which is annexure 18 to the writ application, and (ii) order of the Regional Deputy Director of Education, Bhagalpur, dated 22-6-1967, a copy of which is annexure 19 and a translation of which in English is annexure 19-A.

I propose to state some facts first from the order (Annexure 18) before I refer to the facts stated in the petition. Before coming into force of the Bihar High Schools (Control and Regulation of Administration) Act, 1960 (Bihar Act XIII of 1960) an old Managing Committee was in charge of the affairs of the School, and was running its administration from day to day. In the Managing Committee were Rev. Bishop Philip Parmer as the President of the Committee, Rev. R. W. I. Ghest as its Secretary, the Principal, a teacher's representative and five more persons, out of whom, four are respondents 6 to 9, who were added as intervenor respondents for the reasons to be stated hereinafter. The Director of Public Instruction who is also the President of the Board of Secondary Education, by his order dated 31st (sic) of April, 1962, nominated three persons for inclusion in the Managing Committee according to the rules which, he thought, governed the constitution of the Managing Committee of the School in question. After that, the Sub-divisional Education Officer, Bhagalpur, convened a meeting of the above nominees along with two nominees of the Mission, Principal and teachers' representative and got a President and Secretary elected, which election was ap-

proved by the Director of Public Instruction by his order dated 4-9-1963. It is said that the intervenor-respondents filed an appeal before the Secretary to the Government, Department of Education, and in this appeal, the Secretary took the view that the order of the Director of Public Instruction approving the election of the President and the Secretary of the School was not correct.

The School authorities also were aggrieved by that order as they claimed that this being a school established and administered by a minority within the meaning of Article 30 of the Constitution had a fundamental right to administer it in the way they thought fit and proper; the Government could not interfere. The Secretary, in his impugned order, did not decide the question as to whether the School had the protection under Article 30 of the Constitution, and hence, was not subject to Bihar Act XIII of 1960 in view of the provision contained in the 9th Section of the Act. He left it to the School authorities to get a declaration from the proper authorities as to the character of the school to attract protection under Article 30 of the Constitution. What he did by his impugned order was that he set aside the order of the President of the Board of Secondary Education, approving the appointment of the President and the Secretary of the School.

"in accordance with the Irregular procedure adopted by the SDEO for the constitution of the Committee on receipt of DPE's decision nominating three persons on the Managing Committee".

By the time he came to pass his order, there had come into force the Bihar High Schools (Constitution, Powers and Functions of the Managing Committee) Rules, 1964 hereinafter to be referred to as the 1964 Rules. The Regional Deputy Director of Education, Bhagalpur, Region, then wrote the letter dated 21st of June, 1967, a copy of which is annexure 19, to the Secretary of the C. M. S. School, drawing his attention to the order dated 22-5-1967 passed by the Secretary to the Government to take steps to constitute the Managing Committee in accordance with the aforesaid order. The petitioners feeling aggrieved by the direction of the Regional Deputy Director of Education and thinking that not only in view of Section 9 of Bihar Act XIII of 1960 but also because of Rule 41 of the 1964 Rules, which says—

"These rules shall not apply to the schools established and administered by the minorities whether based on religion or language", and claiming that their School is of the kind to which the provisions of Bihar Act XIII of 1960 and the 1964 Rules in

the matter of administration of the School or constitution of the Managing Committee do not apply, moved this Court under Article 226 of the Constitution impleading in the writ application the State of Bihar as respondent No 1, the Director of Public Instruction and President of the Board of Secondary Education as respondent No 2, the Secretary to the Government of Bihar, Department of Education, as respondent No 3, the Secretary, Board of Secondary Education, as respondent No 4, and the Regional Deputy Director of Education, as respondent No 5. The application was filed on 23-8-1967. It was admitted on 6-3-1968 and it was directed that the status quo should be preserved and the Managing Committee appointed in the year 1962 should continue to manage the C. M. S. School till the disposal of the writ application.

On the 25th of March, 1968 the four added respondents, namely, respondents 6 to 9 who were at one time, as stated above, the members of the Managing Committee of the C. M. S. School, filed an application for being added as party respondents. Their application was allowed by a Bench of this Court by order dated 1-4-1968. Thereafter they put in a long counter-affidavit on the 20th of August, 1968 along with many annexures to resist the writ application filed by the petitioners. An affidavit-in-reply and a supplementary affidavit-in-reply have been put in by the petitioners. It may be stated here that no counter-affidavit has been filed by or on behalf of the original five respondents, namely respondents 1 to 5. None appeared to show cause even at the time of the argument of the case on behalf of respondents 2 to 5. The learned Advocate-General, however, appeared for the State of Bihar, respondent No 1. Petitioners' case was ably presented by Mr. S. N. Bhattacharyya, and cause was shown on behalf of respondents 6 to 9 by their learned Counsel, Mr. Shreenath Singh.

3. The question which has been canvassed before us and falls for our decision in this case is the following—

Whether the C. M. S. School is an educational institution which can be held to have been established and administered by a minority within the meaning of Article 30(1) of the Constitution?

In the main, this question will have two facets—(i) whether this is an educational institution which was established by a minority and (ii) whether it has been administered by the minority. Incidentally, a question will also arise and will be briefly referred to hereinafter as to whether the C. M. S. School is an educational institution of the kind which attracts protection under Article 30(1). We think it advisable to decide all the questions in this case.

4. Many points of law have been firmly settled by the Supreme Court as also by this Court in relation to educational institutions for which protection under Article 30(1) was claimed. I shall first refer to some of these decisions and the principles which have been enunciated therein, and then I shall show that the point of importance which falls for our decision in this case is still *res integra* and no authority of any court was cited to cover it.

5. In "In re The Kerala Education Bill, 1957," AIR 1958 SC 956, it was held—

(i) "It is obvious that a minority community can effectively conserve its language, script or culture by and through educational institutions and, therefore, the right to establish and maintain educational institutions of its choice is a necessary concomitant to the right to conserve its distinctive language, script or culture and that is what is conferred on all minorities by Article 30(1) which has hereinbefore been quoted in full.

(ii) that "Article 30(1) is wide enough to cover both pre-Constitution and post-Constitution institutions", and that the said Article "gives the minorities two rights, namely (a) to establish and (b) to administer educational institutions of their choice," and

(iii) that the "real import of Article 29(2) and Article 30(1) seems to us to be that they clearly contemplate a minority institution with a sprinkling of outsiders admitted into it. By admitting a non-member into it the minority institution does not shed its character and cease to be a minority institution. Indeed the object of conservation of the distinct language, script and culture of a minority may be better served by propagating the same amongst non-members of the particular minority community."

I shall refer to some other points from this decision later.

6. In *Rev. Sidhrajibhai Sabbai v. State of Gujarat*, AIR 1963 SC 540, it was pointed out by Shah, J., delivering the judgment on behalf of the Court, with reference to the Kerala Education Bill case already referred to, that—

".....notwithstanding the absolute terms in which the fundamental freedom under Article 30(1) was guaranteed, it was open to the State by legislation or by executive direction to impose reasonable regulations," but—

"The right established by Article 30(1) is a fundamental right declared in terms absolute. Unlike the fundamental freedoms guaranteed by Article 19 it is not subject to reasonable restrictions. It is intended to be a real right for the protection of the minorities in the matter of

setting up of educational institutions of their own choice. The right is intended to be effective and is not to be whittled down by so-called regulative measures conceived in the interest not of the minority educational institution, but of the public or the nation as a whole."

7. In a recent decision of the Supreme Court in *S. Azeez Basha v. Union of India*, AIR 1968 SC 662, it has been pointed out at p. 670 (column 1) that—

"The words 'establish and administer' in the Article must be read conjunctively and so read it gives the right to the minority to administer an educational institution provided it has been established by it....."

If the educational institution has not been established by a minority it cannot claim the right to administer under Art. 30(1)."

On a consideration of the Act which was passed by the Central Legislature in the year 1920, their Lordships came to the conclusion that the Aligarh University was not an educational institution which was established by the Muslim minority assuming that to be a minority within the meaning of Article 30. They further held that the institution, namely, the University after its establishment in the year 1920 was not being administered by the said minority, and, for both the reasons the claim of the petitioners in the Supreme Court for enforcement of fundamental right under Article 30(1) of the Constitution was negatived. In regard to the point of administration, a passage was quoted from the judgment of the Supreme Court in *Durgah Committee, Ajmer v. Syed Hussain Ali*, AIR 1961 SC 1402, which runs thus—

"If the right to administer the properties never vested in the denomination or had been validly surrendered by it or had otherwise been effectively and irretrievably lost to it, Article 26 cannot be successfully invoked."

Applying the parity of reasonings with reference to the word "administer" occurring in Article 30 *Wanchoo, C. J.*, delivering the judgment on behalf of the Court, came to the conclusion that the Aligarh University was not administered by the minority. Their Lordships also interpreted the word 'established' in Article 30(1) to mean 'to bring into existence'—that is to say—"the right given by Article 30(1) to the minority is to bring into existence an educational institution, and if they do so, to administer it. "When a question was raised before their Lordships of the Supreme Court in *Azeez Basha's case* AIR 1968 SC 662 whether Article 26 would take in its sweep educational institutions on the ground that such institutions are for charitable purposes, they did not decide it observing, however, that there was much to be stated in

favour of the contention that Article 26 will not apply to educational institution for there is a specific provision contained in Article 30(1) with respect thereto and therefore, institutions for charitable purposes in clause (a) of Article 26 refer to institutions other than educational ones I am referring to this aspect of the matter also as hereinafter I shall have the necessity of deciding whether an educational institution attracts the protection of Article 26(a) of the Constitution.

8 I may refer to only one decision of this Court although there are some others and it is the Full Bench decision in Dipendra Nath Sarkar v State of Bihar, AIR 1962 Patna 101 (FB) Relying upon the decision of the Supreme Court in Kerala Education Bill case it was pointed out by Ramaswami, C J. at page 106 (column 2)—

"The language of the Article does not require that the majority of the students in the school must belong to the religious faith of the minority. The Article does not also impose any limitation that the subjects taught in the school must be connected with the religion of the minority

"It does not say that the minorities based on religion should establish educational institutions for teaching religion only it is open to the religious minority to establish educational institutions for the purpose of conserving its religion, language or culture. It is also open to the religious minority to establish educational institutions purely for the purpose of giving a thorough good secular education to their children"

While laying stress upon the above view I may say that the question of interpreting Art. 30 with reference to Art 29 did not arise in Sudrajat's case, AIR 1963 SC 540 because from the facts stated in the very first paragraph of the judgment it appears that the Primary Schools and the Training College were conducted for the benefit of the religious denomination of the United Church of Northern India and Indian Christians generally, though admission is not denied to students belonging to other communities. It has been said that the teachers trained in the Training College in regard to which the interference was sought to be made by the Government for reservation of seats for teachers, were absorbed in the Primary Schools conducted by the Gujarat and Kathiawar Presbyterian Joint Board called the Society.

9. In Aldo Maria Patroni v E. C. Kesavan, AIR 1965 Ker 75 a Full Bench of the Kerala High Court enunciated four propositions on the basis of the two Supreme Court decisions, namely, AIR

1958 SC 956 and AIR 1963 SC 540, one of which is as follows—

"(1) A school established by a minority — whether before or after the Constitution — will come within the ambit of Article 30(1) of the Constitution, even though what it imparts is a general education and its students are drawn not merely from the minority community but from other communities as well"

10 Now I proceed to state the facts from the petition, the counter-affidavit and the affidavit-in-reply, in the first instance for deciding the question as to when and by whom the C M S School, in regard to which the controversy about the formation of the Managing Committee has arisen, was established. In the very first paragraph of the petition, it is said that the school was

"established by the Church Missionary Society London in 1854 now owned by the Bhagalpur Diocesan Trust Association and administered by the Bhagalpur Diocese of the Church of India"

In the various sub-paragraphs of paragraph 3 of the petition, the history of the School and of its administration has been given. The School was established first in the year 1854 as a Primary School at Fort Nathnagar, which, as subsequently stated in the other affidavit, is known as Champanagar. In 1887 it was raised to a High School. The School shifted to Addampur in a rented building taken on lease by the Church Missionary Society by a registered deed of lease executed between the lessor and the lessee on the 5th of June, 1903 a copy of the lease is annexure 3 to the writ application. Subsequently, on the 9th of March, 1910 the property where the school was run was purchased by the Church Missionary Trust Association, a company duly incorporated and registered in England in 1885, from proprietors of Raj Srinagar, a copy of the registered sale-deed is annexure 4. About 2 bighas of land were purchased by two sale-deeds, copies of which are annexures 7 and 8 in the year 1912, for a total sum of about Rs 2000 by the Church Missionary Trust Association, London for the purposes of the School.

11. The case of the petitioners further is that the School has been controlled administered and managed by the Church Missionary Society through a Managing Committee constituted from time to time retaining its Christian character and working according to the policies, decisions and directions of the Diocesan Standing Committee or Diocesan Board of Education. Copy of minutes of the Committee is annexure 9. As per special arrangements with the Government, the key posts of the president and the secretary have always been in the hands of the Church Missionary Society, the

Principal of the School has all along been a Christian and representative of the Church, the School has been financed and maintained by the Church and the Church has been responsible for its control, administration and management.

12. In the year 1957 the Church Missionary Society, London, passed the following resolution as quoted in paragraph 3 (xi) of the petition—

"That the C. M. S., having founded, supported, and assisted certain Christian Schools situated in the Bhagalpur Diocese in the State of Bihar, and having hitherto held the position of proprietor, founder and benefactor, of these Schools, now wishes to hand over these responsibilities to the Church of India, Pakistan, Burma and Ceylon, in the said Diocese; it, therefore, appoints the Diocese, at whose head is the Bishop of Bhagalpur, who is responsible for the spiritual welfare of the same and for the proper administration of all Church affairs therein, to be the proprietor of these Schools, with full authority, through the Diocesan Trust Association or other appropriate domestic organisation, to direct their policy and carry on all negotiations with Government."

It is then asserted that though the property of the School was transferred to the trust of the Bhagalpur Diocesan Trust Association, the administration and management of the School remained in the hands of the Bhagalpur Diocese which controls the administration of the School through its Council, Standing Committee and Education Board. The principal of the School was always appointed by the Bishop of the Diocese. The Standing Committee saw no harm in allowing the rest of the members of the managing committee to contain persons other than the representatives of the Diocese and accordingly it was allowed to be done, in deference to the desire of the Government's educational authorities.

13. As to the denominational character of the School, the facts stated in the petition are that a big cross has been fixed in the front of the School building which is conspicuous in itself and proves that the School belongs to, and is administered by, the Church. From time to time the authorities of the Education Department on inspection of the School, noted in the Visitors' Book that it is a Mission School; extracts from the Visitors' Book are annexure 20. It is further said that regular scripture classes are held in the School and lessons on the life and teaching of Lord Jesus Christ are taught and examinations are held in the subject for all students, as will appear from the examination programmes and the annual returns and the Church Missionary Gleaners 1905, 1911 and 1914,

copies of which are annexures 21 to 25. Every morning, before the classes begin, the Lord's Prayers from prescribed Church books are offered by the students and staff. Each meeting of the Managing Committee of the School begins and closes with prayers from the "Book of Common prayer". Thus claiming the C. M. S. School to be a Christian religious denominational institution, it is asserted that it is not governed by the 1964 Rules; the impugned orders are ultra vires of Arts. 26 and 30 of the Constitution. Upon these grounds, the petitioners have asked this Court to restrain the respondents from interfering with the right of the petitioners to control, administer and manage the affairs of the C. M. S. School.

14. The salient facts which may be noted from the counter-affidavit of Shri K. C. Mukherjee, respondent No. 7, which is the only counter-affidavit filed on behalf of respondents 6 to 9, are these. It is not correct to state that the School was established or founded by the Church Missionary Society of London and is owned by the Bhagalpur Diocesan Trust Association or that it is administered by the Bhagalpur Diocese or the Church of India. The Bihar Act XIII of 1960 and the 1964 Rules framed thereunder do apply to the School in question. The Church Missionary Society started a lower primary school in Champanagar 4 miles west of Bhagalpur. Subsequently, in course of time a High School came into being with manifold help and contributions from the public and public funds. The School may have been initially sponsored by the Society and that is the reason that it was called the C. M. S. High School. The School was originally started in a rented building belonging to Srinagar Raj. The primary school started by the Society is still in existence at Champanagar. The rented building and the compound were purchased in the year 1910 with Government grant of Rs. 10,000 besides financial help from other sources. The money was received by the School authorities on the usual conditions laid down in the rules relating to the grant in aid to native schools and further specific conditions as laid down in the aforesaid order of the Director of Public Instruction. The Managing Committee of the School was duly constituted in accordance with the rules of the Government and properties, assets, management and administration and all the interests of the institution vested in the said Managing Committee as constituted from time to time in accordance with the Government rules. A sum of Rs. 28,200 was paid by the Government to the School authorities for the purpose of building a hall and six class rooms on certain conditions including that the School shall be governed by a regular

Managing Committee, the constitution of which was to be approved by the Director of Public Instruction and it was to be in accordance with the grant-in-aid rules.

Further numerous substantial grants were made to the institution by the Government, several donations and contributions were made by various individuals including the Bakhtiarpur Estate, Sri R N Lal and Dipnarain Singh, large areas of land were acquired by the Government under the Land Acquisition Act for purposes of the School as public purposes and were given to the School on lease on nominal rent or otherwise. The lands acquired by the Government continued to belong to Government and they were leased out to the School on nominal rent under agreements in the form provided in Appendix A to the General Rules relating to grants-in-aid to Schools. Similarly, grants by the Government of money to the school used to be made under agreements in the form provided in appendix B to the aforesaid Rules. All properties acquired by and for the School have always been the properties of the School vested in its Managing Committee as would be evidenced by the entries in the assessment list of the Bhagalpur Municipality. The claim of the petitioners that the Bishop of Bhagalpur Diocese has always been the president and the representatives of the Missionary and the Secretary and Principal have always been appointed by the Missionary has been refuted.

It is claimed that they were elected by the Managing Committee. The School authorities submitted to the Government regulations in the years 1958 and 1959 when at their instance they separated the post of the principal and the Secretary. Some instances have been quoted to show that the principal has been removed or appointed by the Managing Committee and not by the Bishop of the Standing Committee of the Bhagalpur Diocese. The claim of the petitioners that the School maintains its Christian character by the various facts stated in the petition has been refuted in the counter-affidavit wherein it has been asserted that on the walls of the School there are inscriptions from the Hindu religious text books, in the School there is a Hindu hostel in which Hindu prayers are offered, and various other facts are asserted to attack the claim of the petitioners as to the School being of a religious denominational character.

15. In the affidavit-in-reply, it is reiterated in paragraph 3—

"it is strongly asserted that the School was established, owned and, as always it has been, administered by the said Society from beginning, and after the transfer of

ownership to the above Diocese, administered by the said Diocese", meaning by the word 'Society' with reference to the context the 'Church Missionary Society, London', and by the word 'Diocese' the 'Bhagalpur Diocese owning the School through Bhagalpur Diocesan Trust Association'. It is explained in the affidavit in reply that the present C M S. School is the one, which was established by the London Society in 1854, as will appear from the Bihar Government District Gazetteer, 1962 Edition, relating to Bhagalpur, extracts from pages 115 and 116 of which have been annexed as Annexure 28. The existence of a lower primary school in Champnagar is explained by the fact of establishment of another school by one Mrs Perfect. The emblems of the School and the crest inscribed at the top of the wall have been explained in paragraph 3 (i) (e) of the affidavit in reply. As to the acquisition of property from Srinagar Raj in 1910, it is asserted that the property was purchased for Rs 25,000/- before the Government grant of Rs 10,000/- was received. The sale-deed was executed on 19th of March, 1910, and registered on 14th of April, 1910. The amount of Rs 10,000/- was received from the Government in September, 1910, as is the case of the respondents also in their counter-affidavit. The document of sale, a copy of which is annexure 4 to the writ application, shows that the Society was the vendee of the property and continued to be so till 1958, when the Society transferred the said property by registered deed of transfer to the Diocese, a copy of which deed is annexure 15 to the writ application.

The definite case of the petitioners is that the School was established by the Church Missionary Society of London and its property is now legally held by the Bhagalpur Diocese. The Bhagalpur Diocese was established in 1943. Before 1943 the permanent proprietary powers to control and direct the Managing Committee of the School were exercised by the agent of the Society in Calcutta named the Calcutta Corresponding Committee, shortly known as C C C Annexure 32 series to the affidavit in reply are the copies of minutes of the Board of Education and Standing Committee to substantiate the fact of control and management. Thereafter, details have been mentioned in the affidavit in reply as to how from time to time only Christian Principals were appointed in the School and that also always by the Church Missionary or the Bishop. The documents executed when the acquired lands were leased out to the School authorities or grants of money were made by the Government from time to time have been stated to be documents

of guarantee to secure the payment of the money under certain circumstances which had not the effect of surrendering the administration or management of the School.

16. It may be stated here that one Shri A. K. Mukherji, who had been removed from the post of Principal of the School some years ago, had filed a writ application numbered as M. J. C. 899 of 1961 in this Court, which was dismissed by a Bench of this Court to which I was a Party. Some references to some affidavits and annexures have been made with reference to the record of M. J. C. 899/61. I do not consider it necessary to give any details from them except in regard to one annexure which will be referred to hereinafter. Some reference has been made to the filing of a title suit in court below by some persons, which, according to the petitioners, was dismissed as being infructuous and according to the counter-affidavit of respondents 6 to 9 was withdrawn. A reference has been made to the petition of show cause filed on behalf of the Government in that suit, but I do not think it necessary even to refer to that. Over and above these facts, reference has been made by the petitioners to some resolutions of the Managing Committee passed in a meeting held in the year 1960 or later on to show that some of the respondents 6 to 9 had attended those meetings in which it was asserted that the School is a minority school and some resolutions have been used by the said respondents to show that the School authorities had submitted to be governed by the rules of the Government as then existing and had surrendered their right of claiming the School to be a minority School.

In the view which I am going to take with reference to some of the salient features, I do not think that on the principle of estoppel, waiver or acquiescence either the petitioners can be defeated in this case or the contesting respondents can be estopped from challenging the claim of the petitioners as to the character of the C. M. S. School. It is, therefore, not necessary to give the facts relating to them in any detail.

17. The learned Advocate General appearing for the State of Bihar conceded and, in my opinion, rightly that the present C. M. S. Higher Secondary School is the one which was established as a Primary School in the year 1854; it was established, as is the case of the petitioners, by the Church Missionary Society, London. On a consideration of the various statements made in the petition and affidavits of the parties and on going through the various annexures appended thereto, it is abundantly clear that the present educational institution, namely,

the C. M. S. School, in respect of which the controversy has arisen in this writ application, is the same School which was established in the year 1854 by the Church Missionary Society, London. The Lower Primary School existing at Champanagar these days is another school and not the Lower Primary School which was established by the Church Missionary Society in 1854. Even though after the School was raised to the high school standard in 1887, there was some break in the matter of recognition for a period of about 5 years as mentioned in the Gazetteer referred to by the petitioners, there was no discontinuance of the educational institution at any time. The educational institution continued without any break from 1854 and continued till to-day.

For the purpose of deciding the question of establishment of the educational institution within the meaning of Article 30 of the Constitution, it is not quite relevant to take into consideration the subsequent acquisitions of property either by the Church Missionary Society or grant of properties by the Government by money grants or by acquiring lands under the Land Acquisition Act; endowment of properties or money by some other persons later on is also of no consequence. The educational institution, which was established in the year 1854, had no immovable property of its own. It must have started with some movable properties provided by the Church Missionary Society, London. It's not known who were the trustees on behalf of the Society, in the second half of the 19th century. What we get however, from annexure 3 is that the leasehold interest in Adampur Premises of the School was acquired in the year 1903 in the name of a company registered and incorporated in England in 1885 under the English Companies Act having its registered office at 16, Salisbury Square, London F.C. The name of the Company was Church Missionary Trust Association and the lease was taken by the Company "for the purpose of holding therein a School for the education of Children and young persons and for other similar purposes".

This indicates that the Trust Association had become trustee of the property on behalf of the Church Missionary Society, London. There does not seem to be a dispute in this regard, and that is the reason that all the sale-deeds, copies of which are annexures 4, 7 and 8, taken in the year 1910 or 1912, were in the name of the Church Missionary Trust Association. They were for the purposes of the School. It is not necessary to examine as to who contributed the money for acquisition of the property in the year 1910. The property was acquired for Rs.

25,000 A substantial portion of it was contributed by the Church Missionary Society and other persons, who were all Christians. It is not clear as to how the sum of Rs 10,000/- received from the Government later was utilised. Even assuming in favour of respondents 6 to 9 that it went towards the payment of the consideration money of Rs 25,000/- in the sense that the loan which was raised for purchasing the property was liquidated by the sum of Rs 10,000/-, the fact remains that the acquisition of property was made by the Church Missionary Trust Association which became the legal owner of the property for the purposes of the School which was founded and established by the Church Missionary Society. The founder of the Trust was the Society; the trustee was an incorporated company, namely, the Church Missionary Trust Association. Annexure 2 to the writ application which is an extract from the Church Missionary Gleaner of the year 1913 to which reference was made by the learned Advocate General says—

"The C M S High School is the oldest educational institution in Bhagalpur, having been started as far back as 1854 by the Rev Mr Droese, for the purpose of giving an Anglo-vernacular education to Indian lads desirous of obtaining such."

18. I may now refer here to one fact mentioned in the Gazetteer, certain passages from pages 115 and 116 of which were placed before us by the petitioners. But in this connection I would like to refer to a fact mentioned at page 113 wherein it is stated that in 1848 the Chaplain of Bhagalpur, the Rev Mr. Vaux wrote to the Secretary of the Church Missionary Society in Calcutta pleading the need of Bihar, and especially for the Paharias and Santhals, asking for a missionary to be sent there, and promising the local congregation would provide a house and a school building, and pay for the expenses of a school. The response of the Church Missionary Society (C. M. S.) in England was to send to Bhagalpur the Rev E. Droese a German Missionary who had been working in India since 1842 with the Berlin Mission and had recently been ordained by Bishop Wilson of Calcutta. And then at page 115 it is said that the C M S School traces its origin back to the primary school which was opened at Champanagar in 1854 by Rev. E. Droese and which was raised to high standard and affiliated to Calcutta University in 1887.

19. Nowhere in the petition or in the affidavit-in-reply it is asserted by the petitioners that the School was opened, started, founded or brought into existence, and thus established by Indian Christians. Surprisingly enough, even in

regard to the present ownership and administration, nowhere it is stated by the petitioners that it is the Christian minority of the Indian citizens who are seeking protection of their School under Article 30 of the Constitution. It is not the case of the petitioners, anywhere that Indian Christians were members of the Church Missionary Society, London, or the Christians residing or domiciled in India had any hand in the establishment of the educational institution, namely, the C. M. S. School. In such a situation it has got to be held that the petitioners have failed to prove that C. M. S. School was established by the minority, which is entitled to protection under Article 30 of the Constitution. This brings us to the question as to what is meant by the term 'minority' occurring in Article 30.

20. In *State Trading Corporation of India, Ltd. v. The Commercial Tax Officer*, AIR 1963 SC 1811 when a question arose whether an artificial person, namely, a company can be held to be a citizen for the purpose of claiming the various fundamental rights recognised for the citizens only in Part III of the Constitution, it was held by the majority that the word 'citizen' meant a natural person who was a citizen of India as described in Part II of the Constitution, and not an artificial or a juristic person. In that connection, B. P. Sinha, C. J., pointed out at page 1816 that some fundamental rights dealt with in Part III of the Constitution are available to 'any person' whereas the other fundamental rights can be available only to all citizens. In the category mentioned in paragraph 10 of the judgment, it has been pointed out that fundamental rights engrafted in Articles 14, 20, 21, 22, 25, 27, 28 and 31 are available to 'any persons' which term would include all sorts of persons — aliens, artificial or juristic persons — while fundamental rights stated in Articles 15, 16, some of the sub-Articles of Article 18, Articles 19 and 29 are available to the citizens only. No reference was made to Articles 23 and 24 because in those Articles neither the word 'person' is there nor does the term 'citizen' occur.

The other two Articles omitted from the catalogue aforesaid are Articles 26 and 30. It is, however, significant to note here that except Article 25 all the other Articles, in which catalogue may be included Articles 23 and 24, give protection to all kinds of persons including aliens, because protection afforded therein has been put in a negative form. To illustrate my point, with reference to Article 31 wherein it has been provided that no person shall be deprived of his property save by authority of law, it should be borne in mind that in regard to deprivation of property no distinction has

been made between a citizen or an alien or even a juristic person, but where fundamental rights have been stated to exist in an affirmative sense, they have been mostly stated to exist for the citizens only.

21. Articles 25 to 28 occur under the heading "Right to Freedom of Religion". Article 25 states that subject to certain matters all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. That means that this right has been stated to exist not only for the citizens of India but for all persons including the aliens. The Constitution-makers, in their wisdom, decided not to interfere with the freedom of conscience and the right of all people freely to profess, practise and propagate religion. But it is important to remember that a very vital safeguard was provided for curtailment that right in Sub-Article (2) of Article 25 whereby it was provided that—

"Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic financial, political or other secular activity which may be associated with religious practice;"

If in this background the expression "every religious denomination or any section thereof" occurring in Article 26 is interpreted, it would be quite reasonable to take the view that the word 'denomination' takes in its sweep not only the citizens of India but all persons. There is no question of the denomination being a minority or a majority. In *Commr., Hindu Religious Endowments v. Sri Lakshminidra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005=(AIR 1955 SC 282) it has been stated at p. 1022 by Mukherjee, J., as he then was, that the word 'denomination' means a collection of individuals classed together under the same name: a religious sect or body having a common faith and organisation and designated by a distinctive name. On reading the judgment of the Supreme Court in this case as well as in another case of *Ratilal Panachand Gandhi v. State of Bombay*, 1954 SCR 1055=(AIR 1954 SC 388), it would be clear that Articles 25 and 26 have got to be read and interpreted together. So read and interpreted, the word 'denomination' will include a denomination not only of Indian citizens but of all persons.

22. In contra-distinction of Article 25 the term used in Article 29 which along with Article 30 occurs under the heading "Cultural and Educational Rights" is "Any section of the citizens". This fundamental right has not been extended to aliens. The marginal note of Article

29 is "Protection of interests of minorities" and the marginal note of Article 30 is "Right of minorities to establish and administer educational institutions". It is true that in Article 30 the expression used is "All minorities". But, in my opinion, that cannot but mean all minorities of Indian citizens. There are two reasons for this interpretation. One is, as pointed out with reference to some of the decisions of the Supreme Court and other Courts, that Article 30 has got to be read with Article 29. The second reason is that even apart from Article 29 the word 'minority' necessarily suggests a contrast with the term 'majority', unlike the word 'denomination'. As I have said above, 'denomination' may consist of people who are in majority, may consist of people who are in minority. That aspect has got no importance for the purpose of Article 26. But as soon as the Constitution makers used the word 'minorities' in Article 30, obviously and undoubtedly they used it in relation to majority.

What is then meant by such comparison or contrast between minority and majority? Was it meant that the minority based on religion or language as compared to the majority of the world population based on religion or language shall have the right to establish and administer educational institutions of their choice? Or, was it meant that the minority based on religion or language as compared to the majority of the Indian citizens whose religion or language was distinct from that of the majority shall have the right to establish and administer educational institutions of their choice? The answer to my mind obviously is that by 'minority' would be meant the minority of the Indian citizens based on religion or language, which shall have the right stated in Article 30(1) of the Constitution; otherwise, the comparison would be impossible. A question arose before the Supreme Court in the Kerala Education Bill case, AIR 1958 SC 956 as to what was meant by the word 'minority' but on the facts which were placed before the Supreme Court with respect to the Indian citizens of Kerala the only dispute was in which particular area the comparison was to be confined. It was held by their Lordships of the Supreme Court that since they were examining the State law, the comparison should be made between minority and majority population of the State of Kerala, obviously meaning thereby the population of the Indian citizens of Kerala. This finds further support from some of the observations of S. R. Das, C. J., occurring at page 986. Learned Chief Justice said:

"So long as the Constitution stands as it is and is not altered, it is, we conceive,

the duty of this Court to uphold the fundamental rights and thereby honour our sacred obligation to the minority communities who are of our own."

23. One thing more may be pointed out in this connection that while no obligation has been cast under Article 26 on the State to grant any aid to institutions for religious and charitable purposes established and maintained by any religious denomination, Sub-Article (2) of Article 30 of the Constitution says—

"The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language."

It has been held that the State while granting aid to educational institution administered by a minority cannot impose restrictions so as to annihilate its power of management. The right under Article 30 has not been curtailed by any restrictive provision while the right under Article 25 and consequently under Article 26 can be subjected to some kind of restriction for the safety of the State or in the interest of the State or the general public. Can it then be said that the right under Article 30 has been recognised to exist for all minorities irrespective of the question as to whether the minority consists of Indian citizens alone or consists of aliens also? The answer must be that the Constitution-makers could never have intended to recognise the existence of a fundamental right of the kind engrafted in Article 30 for non-citizens.

24. I may lend support to the view which I have taken above by referring to some special provision for special grants for the benefit of Anglo-Indian Community made in Article 337 of the Constitution. What is meant by 'Anglo-Indian community' has been defined in Article 366(2). This was an important community which was claiming protection of its educational institutions before the Supreme Court in the Kerala Education Bill case, AIR 1958 SC 956 and reading the definition of 'Anglo-Indian community' in Article 366(2), it should be clear further that what was meant by the expression 'All minorities' in Article 30 was minority constituted of Indian citizens.

25. If that be so, there cannot be any doubt that a minority which seeks to establish an educational institution of its choice after the commencement of the Constitution must be a minority of Indian citizens. If aliens residing in India claiming to constitute a minority on the basis of religion or language want to establish and administer an educational institution

of their choice, they cannot claim protection under Article 30. Unless there be a law forbidding them to establish an educational institution, it may well be that they can establish an educational institution. But they cannot resist interference with the administration of the institution by the Government or any law made by the State. That being so, even assuming in favour of the petitioners, although this is also not claimed by them, as I have said above, that C. M. S. School is being administered by a minority which consists of Indian citizens, namely, the Indian Christians, can it claim that it has a right to administer the School even though it was established by the Church Missionary Society of London and not by a Society of which the Indian Christians were the members?

In a situation like this, one may be tempted to take the view that the word 'and' which occurs between the words 'establish' and 'administer' in Article 30 should be read as 'or' and the two words — 'establish' and 'administer' — should be read disjunctively. But in view of the clear exposition of law by the Supreme Court in the case of *Aligarh University*, AIR 1968 SC 662 it is not open to do so, the word 'and' means 'and' and the phrase has got to be read conjunctively.

26. The next question of difficulty then arises as to how it is to be determined whether the section of the people who established the educational institution consisted of Indian citizens or not at the time of establishment of the institution. *Hidayatullah, J.*, as he then was, in his separate judgment but concurring with the majority, has traced the history of the law and concept of citizenship and nationality from ancient times upto the present day. In that connection his Lordship has pointed out at page 1827 that there was no law of citizenship in India before the commencement of the Constitution. Thus comes the difficulty for giving the answer to the question just posed by me. But if the words 'establish' and 'administer' in Article 30 have got to be read conjunctively, the reasonable and rational answer to give to the question is thus. After finding who were the persons who had established the educational institution, it has to be seen with reference to what has been stated in part II of the Constitution as to whether those persons could be deemed to be citizens of India, by a legal fiction, on application of what has been engrafted therein.

To illustrate my point with reference to the facts of the two cases before the Supreme Court, namely, the Kerala Education Bill case, AIR 1958 SC 956 and *Sidhrajbal's* case, AIR 1963 SC 540, if the School would have been established

by a Society consisting of Indian Christians or those who were generally or ordinarily residing in India or domiciled in India one could say that the School was established by a minority consisting of persons who will be deemed to be Indian citizens and would thereby fulfil the requirement of Article 30 both of establishing and administering if that minority has been administering the institution. But, unfortunately for the petitioners, there is no statement or averment by them—and, perhaps, it could not be so—that the School was established by Christians residing in India or domiciled in India. Their case in clearest terms, as I have said above, is that the School was established by the Church Missionary Society of London. It is difficult to assume or presume in their favour that it was established by Indian Christians.

27. Although, as I have said above, the question was left open in *Azeez Basha's case*, AIR 1968 SC 662 by the Supreme Court as to whether an educational institution can be said to be an institution for religious and charitable purposes within the meaning of clause (a) of Article 26 of the Constitution, I am under a necessity to decide this matter as, according to the view I have expressed above, the freedom guaranteed in Article 26 to establish and maintain institutions for religious and charitable purposes is available not only to Indian citizens but also to aliens. In my opinion, however, the educational institution of the kind with which we are concerned in this case cannot be and has not been claimed to be an institution for religious and charitable purposes. It is not an institution for propagation of Christianity, it is not an institution where the education mainly consists of teaching tenets of Christianity. The institution is for imparting secular education and, as I pointed out from annexure 2 to the writ application, the purpose was to give Anglo-vernacular education to the Indian lads.

Nor was it an institution for charitable purposes in any sense of the term. It is not the claim of the petitioners that no fee is charged in the institution and education is imparted by way of charity to Indian lads. The mere fact of the Cross being there or some of the prayers at some moments being from the Bible either in the School or in the Managing Committee and the mere fact of teaching of Bible in some period although the last fact is controverted by respondents 6 to 9 as having been introduced very late in the year 1960 or afterwards, are not sufficient to indicate that the C. M. S. School is an institution for religious or charitable purposes. The School was affiliated

to the Calcutta University. Now examinations are held under the Bihar School Examination Board. Students from all communities are imparted education in the School. Hostels for Hindu students are separately situated in the School compound. It is an educational institution pure and simple for imparting secular education. And, to crown all, nowhere it is stated on behalf of the petitioners that there is a single Christian student in the School, although from the counter-affidavit of respondents 6 to 9, it appears that some Christian students are there in the School and they reside in a separate hostel.

A religious institution may have one of its functions of imparting of religious education as pointed out by the Supreme Court in the two cases referred to above in 1954 SCR 1005 and 1055 (=AIR 1954 SC 282 and 388). But the kind of educational institution, pure and simple, which has been specially dealt with under Article 30 cannot be characterised as an institution for religious and charitable purposes within the general provision of Article 26. Although in some respects in the functions of the institutions there may be some overlapping, the pith and substance of the functions of the institution of the kind with which we are concerned in this case cannot but make this to be an educational institution within the meaning of Article 30. It cannot be an institution for religious or charitable purposes within the meaning of Article 26(a). Although Article 26 has been referred to at one or two places in the petition, the facts to found the claim of protection of Article 26 are singularly lacking in the petition as also in the affidavit-in-reply. And that is the reason that all the arguments which have been advanced on behalf of the petitioners have been with reference to Article 30 of the Constitution.

28. The next argument on behalf of the petitioners was that since the establishment of the Bhagalpur Diocese in the year 1943, the Diocese came to administer the affairs of the School. It should, therefore, be held that the institution was re-established in the year 1943 and was re-established by the Bhagalpur Diocese. This point has been stated merely to be rejected. It is difficult—rather impossible—to take the view that the School was established or re-established in any sense of the term in the year 1943 when the Bhagalpur Diocese was established. Moreover, according to the case of the petitioners, as I have pointed out above, before the passing of the resolution in 1957 in pursuance of which the transfer-deed of 1958 was executed by the Church Missionary Trust Association, a company incorporated in England, in favour of the Bhagalpur Dio-

cesan Trust Association which is incorporated under Section 26 of the Indian Companies Act, 1913, the entire management and the control of the affairs of the School was in the hands of the Church Missionary Society of London The Calcutta Corresponding Committee (C. C. C.) and even the Bhagalpur Diocese were all functioning on behalf of or as agents of the Church Missionary Society itself they were not managing the affairs of the School in their own right.

That is also clear from the resolution passed in 1957 by the Church Missionary Society London as quoted from paragraph 3(xi) of the petition. By the resolution, the Church Missionary Society, London, wished to hand over the responsibility of the Church of India, Pakistan, Burma and Ceylon to the Bhagalpur Diocese and appointed the Diocese at whose head was the Bishop of Bhagalpur who is responsible for the spiritual welfare of the Diocese and for the proper administration of all the Church affairs therein, to be the proprietor of the Schools, with full authority, through the Diocesan Trust Association or other appropriate domestic organisation, to direct their policy and carry on all negotiations with Government. The deed which was executed in the year 1958, a copy of which is annexure 15 was executed by the Church Missionary Trust Association Ltd., in favour of the Bhagalpur Diocesan Trust Association stating therein that the instrument of transfer was "from one trustee to another" meaning thereby that the instrument of transfer transferred the trusteeship from one trustee to another and along with that were transferred the properties not only of the educational institutions but also the other properties for other purposes belonging to the Church Missionary Society, London, or the Church Missionary Trust Association. In the recital it is said that the Church Missionary Society was for Africa and the East and the term 'East' would include India too. But thereafter it is said that the Society was merely a voluntary association of persons on whose behalf the Company acted as trustee. The transferee has been made the trustee of the Trust property in place of the transferor Company and very many properties have been transferred including the properties which existed for extension of education as mentioned in paragraph 3 of the deed.

29. The argument on behalf of the petitioners was that if not from 1943 then in any event from 1958 onwards the Bhagalpur Diocese through the Bhagalpur Diocesan Trust Association became the founder and proprietor of the School entitled to carry on its administration. I

am unable to accept this argument. The word 'institution' according to Webster's Third International Dictionary means "something that is instituted as a significant and persistent element (as a practice, a relationship, an organization) in the life of a culture that centres on a fundamental human need, activity, or value occupies an enduring and cardinal position within a society and is usually maintained and stabilized through social regulatory agencies". In this background it is to be remembered that an institution as such is not capable of being transferred in the sense of transfer of a property. It cannot be transferred from one hand to another without an element of discontinuance. The organization was not transferred as it could not be. What was transferred by annexure 15 was the trusteeship as well as the trust property including the School property. The clear case of the petitioners is that the educational institution which was established in the year 1854 continued even till today. It is not claimed, nor could it be so claimed in law that the institution itself was transferred.

It will be of use here to refer to Articles 1277 and 1278 at pages 612-613 of the Halsbury's Laws of England, 3rd Edition, Volume 13, as to what is meant by transfer of schools and substitution of schools. The former means a transfer of the school from one site to another and the expression "substitution of schools" has been used to mean that under certain law the Minister is entitled to allow substitution of school without discontinuance of the school. It would be clear from passages occurring therein that the notion of transferring a school from one founder to another or by one trustee to another is not known to law. To all intents and purposes the transfer of the trusteeship or the properties of the institution may vest the right to administer the school in the transferee. Yet it is difficult to take the view that the educational organization which was founded, created or brought into existence and thus established by one founder by such transfer becomes transferred to, and re-established by, the transferee. If I may draw an analogy from our experience of religious institutions like math, temple, mosque or church, it has never been heard that the institution has ever been transferred by a transfer deed. What can be the subject-matter of transfer is the property appertaining to the institution including the right of management. But in a continuing institution when its property or trusteeship or right to management is transferred, I cannot persuade myself to take the view that by such transfer the transferee brings into existence or re-brings into existence, to quote the phrase used by the learned counsel for the petitioners,

and establishes the institution within the meaning of Article 26 or 30 of the Constitution.

I am, therefore, definitely of the view that in no sense of the term the petitioners can be said to have established the C. M. S. School in the year 1958. It would have been a different matter if the institution which was brought into existence in the year 1854 was discontinued, if legally under the terms of the trust it could be discontinued and if on transfer of the trust property a new institution was established by the transferee. In that event, it was possible to take the view that it was a new institution which was established or even, to use the word 're-establish', it was re-established by the transferee of the trust properties, may be, in the same premises. In my opinion, therefore, the petitioners have failed to make out a case that the C. M. S. School is an educational institution which has been established by a minority based on religion or language within the meaning of Article 30 of the Constitution. That being so, they are not entitled to enforce the fundamental rights guaranteed under the said Article.

30. As I have said above, incidentally a question arises as to whether the educational institution is an institution of the kind which can be said to have been established by a minority for conservation of its language, script or culture within the meaning of Article 29. In that connection, I have already referred to, and extracted, passages from the Supreme Court decisions as also from the Full Bench decision of this Court, which point out that it is not necessary that all the students of such an institution should be of the minority. But that is not to say that the protection under Article 30 will be available even to an educational institution in respect of which there is no averment in the petition that any student belonging to the minority is receiving education in the institution. On the facts stated in the petition and in the affidavit in reply, I am inclined to hold in favour of the petitioners that the insignia of Cross is there in the School, the emblem of the School shows that it has the character of showing that this is a Missionary School in the sense of having been established by a Christian Missionary. I am also inclined to hold in their favour that prayers are held in the school from Bible and some teaching, although it may be of late, is imparted from the Bible.

The case of respondents 6 to 9 in that regard does not seem to be correct. Their explanation of the 4 things appearing in the emblem of the School seems to be ridiculous. Yet I am doubtful whether

those things by themselves would be sufficient to indicate that the C. M. S. School is an educational institution established and administered by the Christian minority for the purpose of conserving their language, script or culture when, I find, no student of the minority community is stated to be receiving education in this institution for such preservation along with the secular education. It is not claimed by the petitioners that by adopting or maintaining Christian character of the school in some respect an attempt is made, much less with any success, to convert the students of other communities or of other religion to their faith through this educational institution. The totality of the facts rather indicates the other way that no interference is sought to be made through this educational institution in the matter of conserving of their own language, script or culture.

31. Now coming to the second question which falls for our decision, as stated earlier in this judgment, as to whether the C. M. S. School has been administered by the minority assuming that it has been established by the minority, I do not propose to refer to the numerous facts as they appear from the various petitions and affidavits and their annexures as, I think, it is not necessary to refer to all of them. I however propose to take up the salient facts with reference to which arguments have been advanced by learned counsel for respondents 6 to 9 in a different way and the learned Advocate-General in a different form.

32. It has already been stated that the School was being managed for day to day affairs by a Managing Committee. It is not known whether there was any grant of money or property by the Government or any member of the public between the year 1854 and 1909. During that period, undoubtedly the School was under the exclusive control of the Church Missionary Society or its delegates or agents. When the Bakhtiarpur Estate or any other member of the public donated any land or any amount to the institution, it is not claimed that in pursuance of that donation any special rights were claimed by, or conferred on, them giving them a seat in the Managing Committee as a matter of right or even otherwise. The only thing which requires consideration is as to what were the conditions imposed by the Government when grants of money were made by it or when lands were leased out to the school after acquiring them under the Land Acquisition Act for public purposes. It is not necessary to enter into the controversy of there being any deed or instrument on all the occasions of the grants. It will be sufficient to refer to only two docu-

ments which are on the records of this case. Before I do so, I would like to refer here to the general rules relating to grant in aid to schools in Bihar and Orissa payable from Provincial revenues as published in the Bihar and Orissa Gazette, February 3, 1915, Part I, page 113, the notification is dated the 29th January 1915. The general conditions attachable to grants are to be found in Appendix A appended to the rules in form of agreement for grant of land or building under Rule 7(4) of Section 1. In Appendix B is given the form of agreement for grant of money to extend existing buildings or construct buildings on land belonging to an educational institution under Rule 7(4) of Section 1. The salient terms from these forms have been quoted in the counter-affidavit as also verbatim as to be found in the two documents which I am going to refer.

33. Annexure G/1 to the counter-affidavit is a copy of the reply to the supplementary affidavit filed on behalf of the School authorities in M. J. C 899/61 along with the annexures Annexure 2 of the said reply is a true copy of the trust deed executed on 10-2-1916 by Rev. E. T. Sandys, constituted Attorney of the Church Missionary Trust Association and members of the Managing Committee of the School, of whom Rev. E. T. Sandys was one. This document was executed when a grant of Rs. 28,200 was made to the School. Out of this grant, the price of the acquired land was paid by the School authorities. The condition of the grant is—

"(a) Save as the Local Government may permit the said building shall not be used by the School authority for any other than educational purposes prior to the lapse of a period of 20 years from the date on which the said sum of Rs. 28,200 is paid to the School authority.

(b) The said School shall be governed by a regular managing committee, the constitution of which shall be approved by the Director of Public Instruction and shall be in accordance with the grant-in-aid rules.

(g) The School shall be managed as regards control, maintenance, staff, fees, free studentships, curriculum, discipline residential arrangements and in all other respects in accordance with the Government grant-in-aid rules and to the satisfaction of the local Government."

34. Ext. G is an Indenture executed on 18-11-1919 by Rev. E. T. Sandys and others as members of the Managing Committee of the School and the Secretary of State acting through the Collector of Bhagalpur. The deed is a deed of agreement and the facts of mutual agreement

are enumerated in it. It was executed when a piece of land acquired was leased out to the School. The important conditions to be noted from this deed are as follows—

"(1) Save as the local Government shall permit the said land shall be used solely for the purposes of the school,

(2) The school shall be governed by regular Managing Committee the constitution of which shall accord with the Rules of the Education Department of Bihar and Orissa for the time being in force, governing schools in receipt of grants-in-aid.

x x x x

(6) The School shall be managed as regards control, maintenance, staff, fees, free studentships, curriculum, discipline, residential arrangements and in all other respects in accordance with the Rules of the Education Department of Bihar and Orissa for the time being in force, governing schools in the receipt of grants and to the satisfaction of the local government,"

35. The sum and substance of the conditions imposed are that the Managing Committee was to govern the school, the Managing Committee was to be constituted with the approval of the Director of Public Instruction, it was to be constituted in accordance with the rules governing schools receiving grants-in-aid and it was to be constituted according to the rules for the time being in force. For violation of the terms of the deed of 1916, it was provided that in case of remediable defects the school authorities shall remedy them on demand, and if they fail to do so, they were to be bound to repay to the Secretary of State the said sum of Rs. 28,200 or the portion thereof, and the Secretary of State shall have the power at his option either to have the defect caused by such breach remedied at the expense of the School authority or to require or sue for the repayment of the said amount by the School authority. In the deed of 1919 it was provided that if the conditions at any time were broken from any cause whatsoever then the Secretary of State shall be entitled to re-enter upon the said land and the school authority shall be bound to give him or any officer authorised in his behalf quiet and peaceable possession of the said land and of all buildings on certain further conditions provided in the deed.

36. On the basis of these documents Mr. Shreenath Singh submitted that the case is covered by the principles of law laid down by the Supreme Court in paragraph 37 of its judgment in AIR 1961 SC 1402, the relevant lines from which are quoted in the judgment of the Supreme Court in Azeez Basha's case, AIR 1968 SC

662 have already been quoted by me. The learned Advocate-General, however, submitted that he was not prepared to go so far as to say that the right to administer the school never vested in the minority or had been voluntarily surrendered by it or had otherwise been effectively or irretrievably lost to it, but the Government grants in the form of either land or money were conditioned by the term that the School will be maintained by a Managing Committee which will be constituted according to the rules as mentioned therein in force from time to time. The grant being subject to those conditions, the trustees or the school authorities receiving the grant are bound by those conditions. The conditions were not matters of law but of contract. Learned Advocate General, therefore, submitted that even after the commencement of the Constitution those conditions appended to the grant have got to prevail and to be given effect to. The conditions of contract of the grant cannot be held to be void because they infringed the fundamental right guaranteed under Article 30 of the Constitution.

37. I may, however, refer here to Annexure 10 to the writ application which is dated 3-5-1918. This is a copy of the resolution of the Managing Committee of the C. M. S. High School held on the 3rd May, 1918. On a consideration of the model rules for Managing Committee sent by the Director of Public Instruction, it was resolved to point out to the Government certain modifications in those rules. The modifications suggested were—

"The Church Missionary Society reserve to themselves the right to have the following Ex-Officio members in and appoint the President and Secretary of the Managing Committee:—

1. The Secretary of the C. M. S.
2. The Senior C. M. S. Missionary in Bhagalpur as President of the Committee.
3. The C. M. S. Missionary Principal as Secretary of the Committee."

Annexure 11 is the copy of the letter dated 21-9-1918 from the officiating Inspector of Schools, Bhagalpur Division, communicating to the Secretary of the C. M. S. School that the modifications proposed in the case of the C. M. S. High School at Bhagalpur as stated in the letter of the Secretary dated 4th of May, 1918, which must have been written in pursuance of the resolution dated 3-5-1918, were approved. Annexure 35 to the affidavit-in-reply is a copy of the minutes of the Managing Committee meeting held on 25th June, 1919. The rule sent by the Inspector of Schools with the modifications incorporated therein were read in the meeting and sanctioned, and it is speci-

fically stated that they were so done with the approval of the Director of Public Instruction.

38. I would now refer to two letters copies of both of which are contained in annexure 36 to the affidavit-in-reply. The first is the letter dated 12th September, 1944 from the Secretary, Board of Secondary Education, Bihar, written to the Inspector of Schools, copy of which was forwarded to the Secretaries of the non-government High Schools in the Bhagalpur Division. A query was made on the assumption that proprietary schools did not raise any subscription or donation, whether the proprietors of such schools were willing to transfer the school buildings to the Managing Committee by deed of gift. The reply given by the Secretary of the C. M. S. High School is dated October 20, 1944. The letter is addressed to the Inspector of Schools wherein it is said that the proprietors would not consider it wise to transfer the school buildings to the Managing Committee by deed of gift, nor would the Managing Committee desire to undertake the responsibility of holding possession of the buildings.

39. I may also note here that on a consideration of the various matters stated by the parties in the various affidavits, the clear picture which emerges is this, that even after the Government grants which, as stated on behalf of respondents 6 to 9, were quite substantial having been made from time to time, the President of the School was always the head of the Missionary who was the Bishop after the establishment of the Bhagalpur Diocese in the year 1943, and the Principal, although he was not always a Missionary, was invariably a Christian. He was acting as the Secretary also but in the year 1958 the two posts were bifurcated at the instance of the Government and Rev. Ghose was eventually made the Secretary of the School. From the copies of the resolution of the Standing Committee of the Diocese or the Education Board, some of which have been appended to the writ application, and some to the affidavit in reply, it is clear that the Bishop of the School as the head of the Missionary had the dominating hand in the management of the School.

It is not correct to say that the Principal was appointed, suspended or dismissed by the Managing Committee. The Managing Committee, as it appears, was merely carrying out —formally in effect — the decisions of the Diocese or the Bishop. The Managing Committee was electing the Bishop as the President of the Managing Committee but that was

also a mere formality as even in the resolution it was said that the President was elected ex-officio, meaning thereby that the Managing Committee had no volition in the matter; it was merely to accept the Bishop as its President by a formal resolution. Even after the separation of the posts of Principal and Secretary, the Secretary was a representative of the Church. It is therefore, abundantly clear that the modification rules suggested and approved in the year 1918 and 1919 were always given effect to. The pivotal decisions were taken by the representative or the nominee of the Church Missionary.

Under the rules which were stated in the Government notification dated 29-1-1915 for constitution of the Managing Committee it was provided that the members of the Committee should be representative of the various classes of the community. The number of members of the Managing Committee has been varied from time to time. In that notification the minimum fixed was 6 and the maximum was 10. The constitution of a committee of a school seeking a grant-in-aid or the renewal of a grant-in-aid should be approved by the authority competent to renew the grant after consultation with the District Magistrate or the Director of Public Instruction as provided in the deeds of 1916 and 1919. All intermediate resignations, removals or appointments were to be reported to the Inspector and all such appointments should be approved by the Inspector in consultation with the District Magistrate. Even though in regard to some of the matters under the terms of the grant the authorities of the School were obliged to constitute the Managing Committee according to the grant-in-aid rules but that was in no way tantamount to the effect that the Church Missionary Society had voluntarily surrendered its right of administering the School or it was otherwise irrevocably lost to it.

Allowing some interference with the constitution of the Managing Committee in accordance with the grant-in-aid rules, and that also not to the fullest extent but truncating it to the considerable extent by the modifications made in 1918 and 1919 to my mind, it is clear, cannot lead to that conclusion. The Church has been administering the School and although for getting Government grant it allowed governmental interference as it was obliged to do in the management of the day to day School affairs, it is difficult to say that it surrendered its right of management. The facts of the Durgah Committee case were so very different that it is difficult to apply the principle laid down by the Supreme Court in that case to the facts of the instant case.

40. The argument put forward by learned Advocate-General is also not acceptable to me. Reading the two documents — one of the year 1916 and the other of the year 1919 — separately but as a whole, I am not prepared to hold that the grants conditioned with certain terms had the effect of creating a trust impressed with those conditions which must be fulfilled in any event. If such conditions are sought to be imposed by the Government today on an educational institution established by a minority entailing refusal of the grant if such conditions are not accepted, it is manifest, the imposition will be hit by Article 30(2) of the Constitution. There was no such fundamental right in existence at the time the documents of 1916 and 1919 were executed. The conditions imposed therein were not of a kind which can be said to be enforceable for all times to come. Certain rights were given to the Government for recovery of the money or the taking back of the land on breach of the conditions. It is remarkable in this case that no counter-affidavit has been filed, as stated above, by respondents 1 to 5 claiming the enforcement of the conditions on the basis of the documents of 1916 and 1919. No show cause petition has been filed on their behalf.

One could appreciate the arguments put forward on behalf of the learned Advocate-General to defeat the petitioners on the first point, but it is difficult to follow his argument on the second point with the aid of some of the annexures appended to the counter-affidavit filed on behalf of respondents 6 to 9. On the other hand as stated in paragraph 3(xvi) of the petition, in Title Suit 81 of 1962 the Director of Public Instruction who is respondent No 2 had filed a show cause petition in which the stand taken by the Education Department was that the School was started by the Church Missionary Society, London, and was managed by the said Society and that the Church had control over the School and was represented in the Managing Committee by the President, Secretary and Principal of the School. This statement of the Director of the Public Instruction in the show cause petition filed in Title Suit 81 of 1962 cannot help the petitioners on the first point, but surely it does help them on the second point which I am at present discussing and specially in absence of any other affidavit in the present writ proceeding.

In answer to our query, the learned Advocate-General could not tell us any reason as to why a counter-affidavit has not been filed on behalf of respondents 1 to 5. I am constrained to observe that if the School in question could be held to be

an educational institution established by a minority within the meaning of Article 30, on the materials as they are and in absence of a counter-affidavit on behalf of respondents 1 to 5, an attempt to defeat the fundamental right to administer the School by the minority, in any event, should not have been made on behalf of respondents 1 to 5. The case made out by respondents 6 to 9 is not such as to defeat the claim of the petitioners if otherwise they were entitled to succeed. At one time they were members of the Managing Committee. They did not claim that they had made any contribution of money or land to the institution at any time. It is remarkable that they have taken upon themselves, ostensibly for a public cause but may be for a different reason, the burden to defeat the rights of the minority, if it could be held to be so, in administering the C. M. S. School.

It is a common place, as even stated by the learned Advocate-General that the Christian Missionaries have rendered yeoman service through their educational institutions of the kind with which we are dealing in this case by virtue of their efficient administration of such institutions. I am sorry to say that we have still to reach our cherished goal of having even an equally efficient administration of an educational institution with the governmental interference and the goal of an abler administration seems to be lost in remote future.

41. In my opinion, one short point also gives a complete answer to the contention of the learned Advocate-General. If the School was to be administered by the rules for the time being in force according to the deed of 1916 or 1919, the rules in force at the present moment are the 1964 Rules, rule 41 of which clearly shows that they do not apply to the Schools established and administered by the minorities whether based on religion or language. If this School could be held to have been established and administered by the minority, under the present Rules of 1964 even under the terms of the deeds of 1916 and 1919, it will be exempt from being governed under the said Rules. As I have said above, the School was administered by the Church Missionary Society or the Bhagalpur Diocese, some amount of interference was not tantamount to non-administration of the School by them and, therefore, under Rule 41, if otherwise they were entitled to the protection, I would have felt no difficulty in giving this protection to the C. M. S. School from interference with its administration on the second ground urged either on behalf of respondents 6 to 9 or by the learned Advocate-General on behalf of the State. Mainly on the first point decided by me

against the petitioners and somewhat on the incidental point decided by me against them, as stated above, I have come to the conclusion that the C. M. S. School is not an educational institution which can be held to have been established by a minority nor does it seem to be an educational institution of the kind which can be given protection under Article 30 of the Constitution.

42. In the result, the application is dismissed but there will be no order as to cost.

43. WASIUDDIN, J.:— I agree.

JHS/D.V.C.

Petition dismissed.

AIR 1969 PATNA 411 (V 56 C 102)

R. J. BAHADUR AND
P. K. BANERJI, JJ.

State of Bihar, Petitioner; v. Chukia Uraon and another, Accused-Respondents.

Death Ref. No. 20 of 1968 and Criminal Appeal Nos. 403 and 404 of 1968 dated 17-1-1969 from decisions of Sess. J., Purnea D/- 23-9-1968 and 21-9-1968 respectively.

Penal Code (1860), Ss. 302/34 — Common intention — Enmity between A and C — Deceased D was helping Mst. A in her cultivation — On date of occurrence when B and C were forcibly harvesting Tori crop, there was exchange of hot words between D and C — Later on in the day B and C came together armed concealing weapons in their clothes — They caused injuries to three prosecution witnesses and seriously assaulted D — The suddenly developed common intention to kill gathered from conduct of B and C, the weapon they used and the injuries they caused to D — Conviction of accused under Ss. 302/34 I. P. C. held to be proper — However, under the circumstances sentence of death was altered to one of rigorous imprisonment for life — Criminal P. C. (1898), S. 423. (Paras 15, 16)

Tara Kant Jha, for the Reference and the State; Thakur Gurusewak Singh (Amicus Curiae) against the Reference and for Appellants.

BAHADUR, J.:— This is a reference under Section 374 of the Code of Criminal Procedure from the Sessions Judge of Purnea for the confirmation of the sentence of death imposed upon two persons, namely, Chukia Uraon and Birwa Uraon, on their conviction for the offence of murder under Section 302/34 of the Indian Penal Code. Chukia Uraon and Birwa Uraon have also appealed from jail and their appeals are respectively numbered as criminal appeal No. 404 of 1968 and cri-

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manal appeal No 403 of 1968. The reference and the two appeals have been heard together and they will be governed by this judgment. Mr. Thakur Gurusewak Singh has appeared in the case as an amicus curiae in support of the appeals.

2. It appears that Chukia Uraon is the younger brother of Dasu Uraon, the husband of Mosst Dasia (P. W. 5) of village Korgama within the jurisdiction of police station Kahtiar. Birwa Uraon is the son of the sister of Dasu Uraon. Dasu died about nine years before the alleged occurrence which took place on the 23rd of December, 1965 Dasu had left behind him his widow Dasia and a son named Shyam Lal Uraon (P. W. 1) On Dasu's death, his land came in possession of Mosst, Dasia who had them cultivated through her brother Tetar Uraon (P. W. 2). One Dewani who was a distant cousin of Shyam Lal Uraon (P. W. 1) assisted Mosst, Dasia in her cultivation, Chukia is said to have been creating obstruction in the way of Mosst Dasia in having her lands cultivated and harvested, after the death of her husband. Some litigation took place between Chukia and Dasia over the lands and a suit was pending between them at the time of the occurrence. The prosecution case is that at about 12 noon on the afore-mentioned date, namely, 23-12-1965, Budhu Uraon (P. W. 6), while he was taking rest in his house, heard a hulla and came out and proceeded towards the house of Chukia where he found Chukia with a blood-stained kudal in his hand and Birwa with a Pharsa fleeing away towards the west and found Tetar Uraon (P. W. 2), Shyam Lal Uraon (P. W. 1) and Hathi Uraon (P. W. 3) and others collected at the place of occurrence. On going there, he found his son Dewani fallen dead in a pool of blood on the ground. Budhu also noticed Tetar being injured who told him (Budhu) that his son Dewani had been killed by accused Chukia Uraon and Birwa Uraon who had fled at the arrival of the witnesses Budhu was also informed that Chukia had forcibly harvested the Tori crop of Mosst, Dasia over which there was some altercation between Dewani and Chukia as a result of which both the accused had killed his son. This was the information given by Budhu at the police station at 4 P.M. on the said date, which was the basis of the first information report and it was recorded by Ram Narain Singh (P. W. 10) who was officer-in-charge.

3. The prosecution case further is that on the date of occurrence Chukia along with Birwa had forcibly harvested the Tori crop in the morning and sent them to the house of Chukia upon which there was some exchange of hot words between Dewani and Chukia, after which Dewani

and other persons returned to the house of Chukia and at about 12 noon both the accused persons came armed with Kudal and Pharsa and caused hurt to the various persons as stated by Budhu in his first information report.

4. The Sub-Inspector of police (P. W. 10), after recording the first information report, reached the place of occurrence the same evening at 7.50 P.M. and found it to be a field belonging to one Mathura Mahto on the contiguous west and backside of which was the house of one Khirdhari Mahto, also known as Girdhari. He found the dead body lying with his head towards south and feet towards north. He held inquest over the dead body and arranged to send the corpse for post-mortem examination. P. W. 10 examined some persons and stayed on the night at the place.

5. On the next date, 24-12-1965, he examined P Ws 3, 4 and some other persons and searched the houses of Birwa and Chukia, and recovered a blood-stained Kudal (Ext. 1) from the house of Birwa. He had on the previous day collected blood-stained earth from near the dead body. He also inspected the Tori field and prepared the sketch map which is Ext. 4. He had found P Ws 1, 2 and 5 to be injured and had sent them to Katihar hospital. He had sent the blood-stained earth, blood-stained Kudal and blood-stained Charkhana half shirt and a dhoti to the Chemical Examiner for examination. He found village Korgama to be a scattered village where there were only about 8 houses near the place of occurrence. The village Korgama was also known as village Kelabari. After completing the investigation in due course, P. W. 10 submitted chargesheet against these two persons who are hereafter referred to as the appellants.

6. The defence of the appellants at the trial, as can be gathered from their statements under Section 342 of the Code of Criminal Procedure and from the trend of cross-examination of the prosecution witnesses was that Dewani and Chukia were jointly in possession of the family lands and the Tori crops which had been harvested by the accused on the date of occurrence had been grown by Chukia and not by the widow of Dasu, namely, Mosst, Dasia. Their further plea was that the deceased Dewani was a wrestler type of man who had been engaged by Dasia for fighting with accused Chukia and that on the date of occurrence after the harvesting of the Tori crops, Dewani along with Tetar and Shyam Lal had gone to the house of Chukia and adopted a threatening attitude, which resulted in a serious altercation between them. Their

further plea was that Dewani used to be engaged by the villagers in their quarrels and it is possible that he may have been killed in one of those encounters. The specific defence of Birwa was that he was not at all present in village Korgama on the date of occurrence and he denied the presence or the recovery of the blood-stained Kudal from his house.

7. The learned Judge on consideration of the evidence led by the prosecution came to the conclusion that the charge under Section 302/34 of the Indian Penal Code had been established against the appellants. He further found that Chukia Uraon was also guilty under Section 324 of the Indian Penal Code for causing hurt to P. W. 5 Mosst. Dasia; and Birwa Uraon was further guilty under Section 324 of the Indian Penal Code for causing hurt to P. Ws. 1 and 2, namely, Shyam Lal Uraon and Tetar Uraon. The learned Judge, however, passed on separate sentence under the said count.

8. There can be no doubt that Dewani was brutally assaulted on the day in question as alleged by the prosecution. The evidence of the prosecution witnesses, namely, P. Ws. 1, 2, 3 and 4, clearly shows that Dewani had been assaulted which resulted in his death. Their evidence finds support from the medical evidence, namely, that of P. W. 12, Dr. S. S. Prasad who was at the relevant time the Civil Assistant Surgeon of Purnea Sadar Hospital. He held the post-mortem examination on the corpse of Dewani on 25-12-1965 and found the following nine ante-mortem injuries:

- I. Three incised wounds on left side of head, behind left ear:—
 - (a) 2"x1/2"x bone cut.
 - (b) 3"x1/2"x bone cut.
 - (c) 2 and half inches x 1/2"x bone cut.

Thick marks due to pressure of weapon were present at the end of each of the injuries contiguous to the injuries due to the heavy-cutting weapon used and were soiled with dry earth and mud.

2. Incised wound on the back of head 2 and half inches x 1/2"x bone cut and also fractured depressed in bone with the cut over the bone due to heavy-cutting weapon.

3. One punctured wound with incised margins 1/4"x1/6"x3/4" on left side of the neck by sharp pointed weapon.

4. Three punctured wounds with incised margins on left cheek:—

- (a) 1/4"x1/6"x bone fractured.
- (b) 1/2" x 1/4" x bone fractured.

(c) 1/2" x 1/6" x bone fractured, caused by sharp-pointed weapon.

5. Two incised wounds on back of left forearm in lower part above the wrist.

(a) 1/2" x 1/6" x bone fractured left radius.

(b) 1/2" x 1/6" x 1/4" with the pressure marks of the weapon connecting the two injuries in the same bone. This was due to heavy cutting weapon.

6. Incised wound on left calf 2 1/2" x 1/2" x 3/4" due to sharp cutting weapon.

7. A thick linear impression two inches long caused by a heavy cutting weapon.

8. Two superficial linear incised marks in upper part of right arm on its back and inner aspects:—

(a) 1/4" long.

(b) 1-1/6" long.

Both caused by heavy cutting weapon.

9. Incised wound on upper part of right arm on its back and inner aspects raising a slanting flat of skin 1" x 1/2" x 3/4" situated at a higher level than injury No. 8 caused by sharp cutting weapon.

On dissection, the membrane of brain was found cut at the site corresponding to injury No. 2. The brain was found injured. The time between death and the post-mortem examination was about two or three days, i.e., between 48 to 72 hours. In the opinion of the doctor, death was due to haemorrhage, shock and injuries caused to the vital organs. The injuries appeared to have been caused by a heavy cutting weapon which may have been by a Kudal. The doctor further stated that a Pharsa could cause both punctured and cut wounds if both the ends were pounced. It was elicited from him in his cross-examination that injury No. 3 could be caused by a bhala, if gently used. He further stated that if a Pharsa had no pointed end, it could not cause punctured wounds. The learned Judge has also considered this matter in great detail and has come to a finding that Dewani was murdered on the date as suggested by the prosecution. This part of the prosecution case is, therefore, clearly established and it is not necessary to deal further with this aspect of the matter.

9-11. The only question that requires consideration is whether these two appellants were the assailants of Dewani as also of the three other persons, namely, P. Ws. 1, 2 and 5. The evidence of the eye witnesses has, therefore, to be examined. (After examining the evidence of prosecution witnesses, his Lordship pro-

ceeded) If the evidence of these witnesses are accepted, as has been accepted by the trial Judge then there can be no doubt that the charges have been clearly established against these appellants

12. Learned counsel arguing the case for the appellants has raised a number of points which may now be noticed. His contention is that the prosecution has failed to establish the place of occurrence in the case and it is not known whether it was the angan of Dasia where the occurrence took place or whether at the place where the Pual was kept. The consistent evidence of the eye witnesses is that Dasia was assaulted by Chukia with a Kudal and when Dewani wanted to intervene, then the two accused persons ran up to him and when Dewani fled for his life, he was assaulted by them in the field of Mathura Mahto on the back of Khirdhari's house at a distance of half a rasi north-west of the house of Mosst. Dasia. This evidence finds full support from the evidence of the Investigating Officer who had occasion to inspect the place of occurrence as already stated in the earlier part of the judgment. He had also found the dead body to be lying close to the place. Learned counsel endeavoured to support his contention by taking us through the evidence of P W 1 where slight discrepancy appears in his evidence, but that has been clarified by the learned Judge. We have also examined the evidence of the other witnesses and I have no hesitation in holding that the place of occurrence has been established as alleged by the prosecution and the slight difference that appears from the evidence of P W 1 is not of material importance as the map clearly shows that the places are quite close to each other.

13. Learned counsel has then contended that the manner of occurrence has not been proved in this case and, therefore, the appellants are entitled to an acquittal. It is difficult to accept this contention as the witnesses are quite consistent in their evidence about the manner of occurrence also. This evidence can be divided into three parts, namely, the incident in the morning and then the assault on the three other persons followed by the chase and assault on Dewani and there is no serious discrepancy in the evidence of any of the eye witnesses so as to accept the submission made on behalf of the appellants

14. Learned counsel has also urged that none of the witnesses should be accepted as eye witnesses. In view of the reappraisal of the evidence of the witnesses, I am satisfied that the evidence of P Ws 1, 2, 3 and 4 has been rightly accepted to be the evidence of eye witnesses.

15. Lastly, learned counsel has urged that the application of Section 34 with Section 302 is erroneous and that it should be held that there is no evidence worth the name to sustain the conviction of these appellants for the murder of Dewani and for the assault on the three persons. I am not persuaded by this argument because on clear and consistent evidence of the eye witnesses there can be no doubt that the three persons, namely, P Ws 1, 2 and 5 had been assaulted as also Dewani had been seriously assaulted which resulted in his death as alleged by the prosecution. There is also clear evidence that there was enmity between Mosst Dasia and Chukia and Dewani was helping Dasia in her cultivation. It has been found that there was an incident in the morning and later in the day these two appellants came together armed concealing weapons in their clothes and they caused injuries to the three persons and then also pursued Dewani and caused injuries on his person. The common intention to kill Dewani of these two appellants which must have suddenly developed can, therefore, be gathered from their act, namely, their conduct and the weapons they had used and the injuries which they caused on Dewani. In this view of the matter, I am satisfied that they had common intention to kill Dewani and, therefore, the appellants have been rightly convicted under Section 302/34 of the Indian Penal Code, which is affirmed. In view of the evidence the conviction of the appellants under S 324 of the Indian Penal Code, which is affirmed. In view of the evidence the conviction of the appellants under Section 324 of the Indian Penal Code of Chukia for the injury on P. W 5, and of Birwa for the injury on P. Ws 1 and 2, are also upheld.

16. There is, however, a question regarding the sentence which should be imposed upon the appellants for their conviction under Section 302/34 of the Indian Penal Code. I have examined this matter very carefully and have also considered the reasons given by the learned Judge for imposing the sentence of death on them. I do not agree with the observation of the learned Judge that the murder was committed in a well planned manner. It is true that the appellants had pursued Dewani and then assaulted him and caused a number of injuries on his person, but it must also be borne in mind that there was admittedly enmity between Chukia and Mosst. Dasia over the land, and Birwa had also a grievance that his claims as a near relation were also being ignored. It will not be, therefore, unreasonable to hold that these persons being Uraon and being aged about 30 years each were liable to sudden accession of rage when they were not perhaps entirely responsible for their action. Having regard to these

circumstances, I do not think that the extreme penalty provided by law is necessarily called for. I think, therefore, that on the facts and circumstances of this case, the ends of justice would be met by commuting their sentence to rigorous imprisonment for life.

17. For the foregoing reasons, the reference is discharged and the appeals are dismissed with the modification that the sentence of death imposed upon the two appellants is altered to one of rigorous imprisonment for life.

18. BANERJI, J.:— I agree

SSG/D.V.C.

Reference discharged,
Appeal dismissed.

AIR 1969 PATNA 415 (V 56 C 103)

K. B. N. SINGH, J.

Sahdeo Tanti, Petitioner v. Bipti Pasin and another, Opp. Party.

Criminal Revn. No. 187 of 1968, D/- 11-2-1969 from Order of Second Asst. S. J. Samastipur D/- 13-1-1968.

(A) Criminal P. C. (1898), S. 369 — Order rejecting prayer of prosecution for cross-examining witness — Order is in the nature of interlocutory order and not judgment — Hence Court can allow the prayer on a second application, even on the same facts, in the ends of justice.

(Para 4)

(B) Evidence Act (1872), S. 154 — Hostile witness — Witness only tendered before but not examined — Still Court can declare him hostile and allow party to cross-examine him — Power of Court to declare witness hostile is not limited by section to cases where there is any previous statement of the witness and from which he is alleged to have departed.

(Para 6)

(C) Evidence Act (1872), Ss. 154 and 5 — Permission to cross-examine witness by itself is not enough to discredit the witness. AIR 1959 Pat 66 Rel. on.

(Para 6)

(D) Evidence Act (1872), S. 154 — A party can cross-examine even a witness tendered by it. AIR 1958 Pat 422 Rel. on.

(Para 6)

Cases Referred: Chronological Paras

(1959) AIR 1959 Pat 66 (V 46) =
1959 Cri LJ 226, Sarjug Prasad
v. The State 6

(1958) AIR 1958 Pat 422 (V 45) =
1958 Pat LR 18 = 1958 Cri LJ
931, Manzurul Haque v. State
of Bihar 6

(1933) AIR 1933 Pat 517 (V 20) =
14 Pat LT 494, Emperor v.
Haradhan 6

Parmeshwar Prasad Sinha and Arun Behari Mathur, for Petitioner.

ORDER:— This application in revision is directed against an order of the learned Assistant Sessions Judge, permitting the prosecution to cross-examine P. W. 10.

2. The case of the complainant-opposite party was that she was married to one Gultain Pasi of village Chatneshwar but she later developed intimacy with the petitioner and started residing with him since about one year before the filing of the complaint. Thereafter she became pregnant. Her further case is that the petitioner wanted her to agree to abortion, which she refused. Thereafter, the petitioner gave blows with his foot on the abdomen of the complainant and after she fell down, he further assaulted her and after retaining her box containing her belongings worth Rs. 525/-, he ousted her from the house.

After cognizance was taken on the complaint filed by the opposite Party, the petitioner was committed to the Court of Session for trial under Sections 312, 403 and 511 of the Indian Penal Code.

3. At the trial before the Assistant Sessions Judge, Jadu Pasi (P. W. 10) was tendered on behalf of the prosecution and was cross-examined on behalf of the petitioner on the 19th December, 1967. The prayer of the prosecution to cross-examine this witness was, however, rejected. Subsequently, a petition was filed on behalf of the prosecution by the Assistant District Prosecutor on the 20th December, 1967, for permission to cross-examine P. W. 10, which has been allowed by the order giving rise to the present application.

4. Mr. Parmeshwar Prasad Sinha, on behalf of the petitioner, has urged that the learned Assistant Sessions Judge, having rejected the prayer for cross-examination of P. W. 10 on the 19th December, 1967, should not have allowed the same prayer on the 13th January, 1968, on the same set of facts. It is true that the learned Assistant Sessions Judge rejected the prosecution prayer for cross-examining P. W. 10 on the 19th December, 1967, which he has allowed on the 13th January, 1968, for the reasons stated in the order. The order passed by the Assistant Sessions Judge on the 19th December, 1967, not being a judgment within the meaning of Section 369 of the Code of Criminal Procedure, no error seems to have been committed by the learned Assistant Sessions Judge in ordering for recall of the witness for his cross-examination. After all, the earlier order being in the nature of

an interlocutory order it was open to the court below, in the ends of justice, to order for cross-examination of P. W. 10.

5. Mr. Sinha next urged that as P. W. 10 was not examined at any earlier stage and before the Sessions Court also he was only tendered, there was no previous statement of the witness from which it could be said that he had been gained over and there was no occasion for declaring him hostile. It will be relevant at this stage to refer to Section 154 of the Evidence Act, which lays down —

"The Court may, in its discretion, permit the person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party"

From a bare reading of the aforesaid section it is apparent that there is nothing in Section 154 of the Evidence Act to warrant an inference that only when any previous statement of the witness is available and if he is alleged to have departed from that that the court can declare that witness hostile. To accept this extreme submission of the learned counsel is to read in the section such limitation, on the power of the court to allow cross-examination of a witness, by the party calling the witness, which is not there. This will very much limit its scope.

In the instant case, P. W. 10, in cross-examination on behalf of the petitioner on the 19th December, 1967, stated that the complainant was living with the petitioner only for the last about six months and prior to that she was living with her husband Gultain Pasi. It was on this account

that the prosecution prayed to the court for cross-examining this witness.

6. Learned Counsel has urged that it is to do away with the effect of the statement which is advantageous to petitioner that permission has been sought on behalf of the prosecution to cross-examine this witness. Simply because permission has been granted to cross-examine a witness by itself, is not enough to discredit the witness. It will be useful to refer in this connection to the case of Sarjug Prasad v. The State, AIR 1959 Pat 66, wherein the legal position in this regard has been enunciated as follows —

"When a public prosecutor declared a prosecution witness to be hostile and cross-examines him after taking the Court's permission, it merely amounts to a declaration by him that the witness is adverse or unfriendly to the prosecution and not that the witness is untruthful. Reference may be made in this connection to Emperor v Haradhan, AIR 1933 Pat 517. The true rule is that either party may rely upon the evidence of such a witness, and the Court can come to its own conclusion after a consideration of the whole of his evidence."

That a party can cross-examine even a witness tendered by it cannot be disputed in view of the Bench decision of this Court in the case of Manzurul Haque v State of Bihar, 1958 Pat LR 18 = (AIR 1958 Pat 422).

7. No other point was urged.

8. In the result, there is no merit in this application and it is accordingly dismissed.

MKS/D.V.C.

Application dismissed.

END

a compromise is primarily one of fact and if the parties to the litigation are not at issue on that particular point, in my view, the Court is not competent to go into that matter and say that the said decree was not based on a compromise. The function of the Court is to give decision on a disputed question of fact. But when both the parties are agreed about a particular fact, the Court cannot take upon itself to say, in the first instance, that there is such a dispute and then proceed to settle it. It was contended by the learned counsel for the petitioner that the statements of the parties in the present divorce proceedings should be ruled out of consideration under the provisions of section 92 of Evidence Act. The said section has nothing to do with the point in dispute. In the application under section 9, the statements of the parties were recorded and thereafter the Court passed the order after which a decree followed. The present statements made by the parties in the divorce proceedings do not in any way contradict, vary, add to or subtract from their earlier statements or from the order or decree of the Court passed thereafter. In the present statements, nothing is being said by the parties to contradict, vary, add to or subtract from their previous statements. Both the parties are agreed that the said decree was based on a compromise. At the utmost what could be said was that they merely explained that the earlier decree was passed on the basis of a compromise.

40. It was suggested on behalf of the appellant that the parties, in the instant case, did not jointly make a request in writing to the Court that a decree for restitution of conjugal rights be passed.

41. All that is needed is that the parties should settle their differences and make statements before the Court. It is then for the Court to act on those statements and pass a decree on their basis. This was precisely what was done in the instant case. In the order that followed, it was specifically mentioned that the petition for restitution of conjugal rights was accepted in accordance with the statements of the parties. In the decree also that followed the order, the same thing was repeated. That clearly shows that but for the statements of the parties, the petition under section 9 would not have been granted, unless, of course, the husband had been able to prove, by reliable evidence, that the respondent had withdrawn from his society without any reasonable excuse and, admittedly no such evidence had been adduced by him, so much so that even the issues had not been framed in the case.

42. It was then argued by the appellant that the statements made by the parties were the result of the efforts of

reconciliation having been made by the Court under the provisions of S. 23 (2) of the Hindu Marriage Act. The court did its duty in trying to bring the parties together and as it had succeeded in doing so, the parties, as a consequence, made those statements. The decree that followed, according to the learned counsel, was thus not based on any consent, but was the outcome of the efforts of reconciliation.

43. This contention has also no merit. If the suggestion is that the Court succeeded in reconciling the parties in bringing them together and persuading the wife to go and live with her husband, then the only proper course for the Court was to dismiss the petition for restitution of conjugal rights as having become infructuous, because the wife had agreed to go back to the husband and that is what he wanted. If, on the other hand, the result of the efforts of reconciliation on behalf of the Court was that a decree for restitution of conjugal rights be passed, then obviously since the wife agreed to such a course, the said decree was based on consent, because otherwise in law, a decree under section 9 could not have been made, unless the Court was satisfied, on evidence, that the wife had withdrawn from the society of her husband without any reasonable excuse and such evidence was, admittedly, not produced before the Court. The object of sub-section (2) of section 23 is not that if the Court is successful in reconciling both the parties, then it is bound to pass a decree under the Act. The idea of reconciliation is that the parties should not break their home. It obviously could not be the intention of the legislature that the reconciliation should result in a decree which, if not satisfied, might further end in proceedings for divorce. Reconciliation naturally does not mean that one of the parties should be provided with a handle for starting divorce proceedings which might end in breaking the matrimonial home.

44. In England, if such a situation, as in the instant case, had arisen, two courses were open to the Courts to deal with the matter. After reconciliation, either the proceedings would have been stayed at the instance of the wife or else if the Court was not satisfied that the wife really wanted to go back to the husband, the husband's petition would have been tried on merits. In India, the procedure for staying the proceedings is not there. Either the petition in such circumstances would have been dismissed as having become infructuous or the matter would have been tried on merits. In the present case, the petition was neither dismissed as infructuous nor was the controversy between the parties

tried on merits. If a decree has followed, in such a situation as was the case in hand, there is no other conclusion possible except this that the said decree was based on the consent of the parties. The Court could not otherwise make such a decree, unless the husband had produced evidence on the basis of which the Court could have been satisfied that the wife had withdrawn from the society of her spouse without any reasonable excuse. As I have already said, no such evidence was adduced in the instant case and the Court was not competent to pass the said decree. If the Court knew that under the law, a decree under section 9 could not be passed on the basis of a compromise between the parties it would have framed issues and tried the case on merits because there was no other course open for it except to satisfy itself about the existence of the ground mentioned in section 9 and then pass a decree if it was so satisfied. If the Court, at that time did not believe that the wife was genuinely interested in going back to the husband, it would not have passed the decree but would have resolved the controversy on merits. Likewise the husband in such a situation, would also have immediately come forward saying that he did not believe a word of what the wife was saying and would have further stated that she was merely wanting to get his petition dismissed and would have insisted on the trial of the dispute on merits. The Court, it appears was under the impression, rightly or wrongly, that a decree for restitution of conjugal rights had to be passed when the parties had agreed to such a course and it actually did make such a decree, without having satisfied itself about the ground mentioned in section 9 for passing such a decree. If it knew at that time that a decree for restitution of conjugal rights could not be passed on the basis of a compromise between the parties he would have insisted on the trial of the petition on merits and then passed a decree and that also if it was satisfied about the ground mentioned in section 9, otherwise it would have dismissed the petition. It could not be said that the trial Judge passed the decree for restitution of conjugal rights in the instant case, because he did not believe that the intention of the wife to go back and live with her husband was genuine. If that had been so, he would have tried the husband's petition under section 9 on merits.

45. In view of what I have said above, I have not the least hesitation in holding that the decree dated 18-5-1960 was a consent decree.

46. Having held that the said decree was a consent decree, the next question

that requires consideration is whether such a decree is a nullity or not. If it is a nullity, then it will be taken as if it does not exist in the eye of law and it can be completely ignored. In that contingency, it could not form the basis of divorce proceedings on the ground that it had not been complied with within a period of two years from the date on which it was passed. The Letters Patent Appeal in that case would have to be dismissed, because the husband would not be able to get a decree of divorce on its strength.

47. When does a decree passed by a Court become a nullity? This is the point which needs decision. In Wharton's Law Lexicon, the word 'nullity' has been defined as "a thing which is null and void, an error in litigation which is incurable." According to Concise Oxford Dictionary, 'nullity' means "nothingness, a mere nothing, a non-entity." Undoubtedly, a thing which is a nullity will be treated as non est and having no existence in the eye of law. A decree, in my opinion, becomes a nullity if either the statute under which it is passed expressly declares that such a decree cannot be made and if made, it will be treated as a nullity or the Court, in which the proceedings had been taken which ultimately resulted in that decree, had no jurisdiction to try that matter. It is undisputed that in the Hindu Marriage Act, 1955 (hereinafter called the Act) under the provisions of which a petition for restitution of conjugal rights is made, it is nowhere laid down that a decree for restitution of conjugal rights cannot be passed on the consent of the parties and if so passed, it becomes a nullity. Therefore, one thing is clear that the statute, under which such decrees are made, does not prescribe that a consent decree of this kind is a nullity. Such a decree, therefore, is not expressly declared to be a nullity by the statute. Learned counsel for the respondent did not bring to our notice any other statute whereunder such a decree had been declared a nullity.

48. Now, what do we mean when we say that a court has no jurisdiction to try a matter? This question has been answered by Sir Asutosh Mookerjee in a Full Bench decision of the Calcutta High Court in AIR 1921 Cal 34 (FB), where it was observed:

"The authority to decide a cause at all and not the decision rendered therein is what makes up jurisdiction and when there is jurisdiction of the person and the subject matter, the decision of all other questions arising in the case is but an exercise of that Jurisdiction." Jurisdiction merely means authority to decide. Had the Subordinate Judge, who passed the decree, authority to decide

the petition for restitution of conjugal rights made under section 9 before him? According to section 19 of the Act, every petition under the Act was to be presented to the District Court within the local limits of whose ordinary original civil jurisdiction the marriage was solemnised or the husband or wife resided or last resided together. "District Court" has been defined in S. 3 (b) of the Act. It means "in any area for which there is a city civil court, that Court and in any other area the principal civil court of original jurisdiction and includes any other civil court which may be specified by the State Government, by notification in the Official Gazette, as having jurisdiction in respect of the matters dealt with in this Act". The learned Judge who was dealing with that petition, had been empowered by the State Government to deal with all the matters dealt with under the Act. Indisputably therefore, he had the authority to decide the matter and he had the necessary jurisdiction.

49. Learned counsel for the respondent submitted that the Subordinate Judge had no jurisdiction to pass a consent decree under section 9 of the Act. According to section 9, when either the husband or the wife had without reasonable excuse, withdrawn from the society of the other, the aggrieved party could apply, by petition, for restitution of conjugal rights, and the court on being satisfied of the truth of the statements made in such petition and that there was no legal ground why the application should not be granted, could decree restitution of conjugal rights. According to the learned counsel, before the Court could grant a decree under section 9, it had to be satisfied that the wife in the instant case, had withdrawn from the society of the husband without reasonable excuse. No such evidence had been produced by the husband and, therefore, there was no basis on which the learned Judge could have been so satisfied. His satisfaction with regard to the truth of the statements made in the petition filed by the husband, was a condition precedent for passing the decree. Then again under section 23 of the Act, the Court had to be satisfied that any of the grounds for granting relief existed and further that the petition was not presented or prosecuted in collusion with the respondent and then and in such a case, but not otherwise, the court could pass a decree. In the instant case, according to the learned counsel, there was absolutely no material before the learned Judge on the basis of which he could be satisfied that the wife had withdrawn from the society of the husband without reasonable excuse and that any of the grounds for the granting of the

decree for restitution of conjugal rights existed. On the other hand, there was evidence before the Court on which it could be said that the petition under Section 9 of the Act was being prosecuted in collusion with the wife. Under these circumstances, according to the learned counsel, the Subordinate Judge had no jurisdiction to pass the decree for restitution of conjugal rights.

50. Learned counsel for the respondent, in my view, is confusing the lack of jurisdiction of a Court to deal with a matter with the erroneous exercise of that jurisdiction. If a Court has either mis-interpreted or mis-construed certain provisions of the Act or has ignored them or not complied with them before passing a decree, all that could be said was that he had not properly exercised the jurisdiction vested in him and thus given an erroneous decision in the case. It could not, however, be said that he had no jurisdiction to deal with the case. A court, as is often said, can decide rightly as well as wrongly, but if its decision is wrong, it cannot be held that the court lacked inherent jurisdiction to deal with that matter. In this connection, Sir Asutosh Mookerjee in *Hriday Nath Roy's case*, AIR 1921 Cal 34 (FB), has again observed:

"Jurisdiction is the power to hear and determine and it does not depend upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carries with it the power to decide wrongly as well as rightly."

Even assuming that the contention of the learned counsel for the respondent was correct that no decree of restitution of conjugal rights could be passed on the basis of consent of both the parties, and that there was no material on the record in the instant case on which the court could be satisfied that the wife had withdrawn from the society of her husband without reasonable excuse and further that the petition under section 9 was being prosecuted with the collusion of the wife, it could not, in my opinion, be said that the decree ultimately passed in the case was without jurisdiction and, therefore, a nullity. It could, at the most, be held that the decree was erroneous or contrary to law. If that was so, it could be set aside by taking appropriate proceedings by way of appeal under section 28 of the Act or by a separate suit, if one is competent under the law. If no action was taken, that decree though erroneous, had become final between the parties. Such a decree would be considered to be valid for all purposes. It is capable of execution and the executing court would not be able to

go behind it. It can be set up as a defence in a subsequent suit. It can form the basis of another suit or proceeding if certain rights flow therefrom. But it cannot be challenged or reversed in collateral proceedings. A decree which is void or which is a nullity, on the other hand, should be completely ignored, as if it never existed and it could be challenged even in collateral proceedings.

51. The Supreme Court in *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340, observed that it was a fundamental principle that a decree passed by a court without jurisdiction was a nullity and that its invalidity could be set up whenever and wherever it was sought to be endorsed or relied upon even at the stage of execution or even in collateral proceedings.

52. *Shamsher Bahadur J.* and myself had, on an earlier occasion, to deal with a somewhat similar problem in *Amar Sarjit Singh v. State of Punjab*, Civil Writ No 575 of 1966 D/- 3-11-1967 (Pun). The following observations in that judgment prepared by *Shamsher Bahadur J.* could be quoted with advantage:

"The learned Advocate-General, on behalf of the State, has submitted that the power to decide a matter carried with it the right of deciding both rightly or wrongly. It is only the absence of jurisdiction vested in an authority that makes an order passed by it a nullity. If an authority has a power to pass an order and passes wrongly, it has only erred in the exercise of its undoubted power and the wrong or erroneous decision is only reversible at the instance of the appellate or revisional authority. . . . The Advocate General in his submission has sought the support of the Full Bench decision of the Calcutta High Court in ILR 48 Cal 133 : AIR 1921 Cal 34 (FB), where in the leading judgment of Sir Asutosh Mookerjee, Acting Chief Justice, the following passage of the judgment of Lord Hobhouse in (1900) 27 Ind App 216, was approved:

"A court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken, the decision, however, wrong, cannot be disturbed."

As put by Sir Asutosh Mookerjee, "jurisdiction is the power to hear and determine, and it does not depend either upon the regularity of the exercise of that power or upon the correctness of the decision pronounced, for the power to decide necessarily carried with it the power to decide wrongly as well as rightly." As observed by the learned Judge, "we must not thus overlook the cardinal position that in order that jurisdiction

may be exercised, there must be a case legally before the Court and a hearing as well as a determination." The jurisdiction, according to the Full Bench decision, may have to be considered with reference to place, value and nature of the subject-matter, and the power of a tribunal may be exercised within defined territorial limits. The gist of the matter, as observed by Sir Asutosh Mookerjee, is that "the authority to decide a cause at all and not the decision rendered therein is what makes jurisdiction; and when there is jurisdiction of the person and subject-matter, the decision of all other questions arising in the case is but an exercise of that jurisdiction." The existence or the continuance of jurisdiction is not dependent upon the correctness of the determination. In AIR 1962 SC 1621, the Supreme Court through Mr. Justice S. K. Das, observed

"Jurisdiction means authority to decide whenever a judicial or quasi-judicial tribunal is empowered or required to enquire into a question of law or fact for the purpose of giving a decision on it, its findings thereon cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal. . . . The question whether a tribunal has jurisdiction depends not on the truth or falsehood of the facts into which it has to enquire, or upon the correctness of its findings on these facts, but upon their nature, and it is determinable at the commencement, not at the conclusion, of the inquiry."

Giving instances of the absence of jurisdiction it was stated by the Supreme Court at page 1629 that:

"A tribunal may lack jurisdiction if it is improperly constituted, or if it fails to observe certain essential preliminaries to the inquiry. But it does not exceed its jurisdiction by basing its decision upon an incorrect determination of any question that it is empowered or required (i.e. has jurisdiction) to determine."

A similar principle was enunciated in an earlier Supreme Court decision in *Ebrahim Aboobakar v. Custodian General*, AIR 1952 SC 319, where Chief Justice Mahajan, speaking for the Court, said:

"Want of jurisdiction may arise from the nature of the subject-matter so that the inferior Court might not have authority to enter on the inquiry or upon some part of it. . . . But once it is held that the Court has jurisdiction but while exercising it, it made a mistake, the wronged party can only take the course prescribed by law for setting matters right inasmuch as a Court has jurisdiction to decide rightly as well as wrongly."

Even when a question which falls within the powers of a tribunal is decided wrongly, it becomes binding on the principle of constructive *res judicata*. In other words, a wrong decision given on a question which the tribunal undoubtedly has the power to determine is not a question which is at large or open for determination for all times."

In view of what I have said above, I would hold that a consent decree for restitution of conjugal rights passed under the Act, would not be a nullity and when the same has become final between the parties, it can form the basis of divorce proceedings.

53. I want to make it clear that in the present case it is unnecessary for me to decide as to whether a court is competent to pass a consent decree in a matrimonial cause under the Hindu Marriage Act and whether such a decree, if passed, would be erroneous and contrary to law or not. For answering the question whether a consent decree was a nullity or not, I have assumed that a decree of that kind could not be passed under the Act.

54. It may be stated that during the course of his arguments, learned counsel for the respondent also made a reference to a Bench decision of this Court to which I was a party in 1962-64 Pun LR 1091 where it was held that before a valid decree for ejectment was passed against a tenant, the satisfaction of the court as to the existence of one or the other ground mentioned under section 13 of the Delhi and Ajmer Rent Control Act, 1952, was essential and further that an ejectment decree passed only on the statement of parties without the Rent Controller satisfying himself on merits, was contrary to the statutory provisions of the Act and was a nullity. In that case, the main judgment was prepared by Bedi, J. and while agreeing with my learned brother that the revision petition should be accepted, I had added a few words and towards the end, I had stated that the decree for eviction was, consequently, a nullity and was not enforceable. I must confess that the word 'nullity' therein, had been used by me rather loosely or inadvertently and the only justification for doing so, which I could now give, was that the precise matter, as to whether the decree in that case was a nullity or merely erroneous and contrary to law, was perhaps not debated before us. It would be apparent from the judgment of Bedi, J. that the respondents' counsel in that case, had raised a contention that if it be held that the decree was defective and a nullity, it could have been challenged in appeal and not in execution proceedings. After giving certain facts, the learned Judge,

however, had held that the respondents were estopped from raising the above objection, because they could not blow hot and cold in the same breath. In the circumstances of that case, I should have held that the decree was erroneous and contrary to law and not a nullity and it could be executed. I may also point out that in a later decision in 1964-66 Pun LR 347, where the same point was involved, though I had followed the Bench decision in K. L. Bansal's case and held the decree to be a nullity, but while determining the next question, namely whether such an objection could be taken in the executing court or a separate suit had to be filed for that purpose, I observed:

"It is undisputed that an Executing Court cannot go behind the decree and is bound to execute it. It cannot refuse to do so, because either the decree is against law or contravenes the provisions of any statute. The only exception to this rule is that when the decree is passed by a Court, which had no jurisdiction to pass it by reason of the inherent defect of jurisdiction in the court passing it, the Executing Court can ignore it (see in this connection Full Bench decision in Pirji Safdar Ali v. Ideal Bank Ltd., AIR 1949 East Punj 94). The Supreme Court in AIR 1954 SC 340, has observed thus—It is a fundamental principle that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial or whether it is in respect of the subject-matter of the action, strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties."

"The present case is not covered by the exceptions in the above-mentioned authority, because the Court had jurisdiction to pass the decree."

This would show that I was of the view that such a decree could not be ignored by the executing court as the court which passed the decree had jurisdiction to do so.

55. With these observations, I agree that the appeal be accepted, the decree of the learned Single Judge reversed and that of the trial Judge restored, but with no order as to costs.

ORDER OF THE COURT

56. In view of the majority decision, it is held that if a consent decree for restitution of conjugal rights under section 9 of the Hindu Marriage Act, 1955, is passed, it will not be a nullity. If it is not challenged in appeal or by way of other remedy available under the law

and becomes final. It cannot be ignored and can form the basis of divorce proceedings under section 13 of the Hindu Marriage Act, 1955

57. It is however, unanimously decided that this appeal be accepted, the decree of the learned Single Judge reversed and that of the trial Judge granting dissolution of marriage by divorce restored but with no order as to costs.

RSK/D V.C.

Appeal allowed.

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(V 56 C 72)

FULL BENCH

D K. MAHAJAN, SHAMSHER BAHADUR AND R. S. NARULA, JJ

Gurdev Singh and others, Plaintiffs-Appellants v Mohna Ram and others, Defendants-Respondents

Regular Second Appeal No 1503 of 1965, D/- 18-3-1969, against decree of Dist J Ferozpur, D/- 1-10-1965

Tenancy Laws — Punjab Security of Land Tenures Act (10 of 1953), S. 19-A — Does not bar pre-emption suit by landlord holding maximum permissible area. (1967-69 Pun LR 319, Overruled).

Section 19-A of Punjab Security of Land Tenures Act does not create a bar in the way of a land-owner already holding his maximum permissible area under the Act from instituting a suit for pre-emption of land and obtaining a decree for its possession.

It is only when the matter reaches the stage of acquiring possession by depositing the pre-emption amount under R 14 of Order 20 of the Code of Civil Procedure, and of obtaining possession of the land in execution of the decree, that the bar of S 19-A comes into effect, if at that time the decree-holder already holds the maximum permissible area allowed to him by the Ceiling Act. (Para 10)

Section 19-A has not deprived a big land-owner either of his primary or inherent right to the offer of agricultural land which is intended to be sold nor of the secondary or remedial right to follow the thing sold. It is only the third part of the right of pre-emption i.e. his right of substitution in place of the vendee that has been affected by Section 19-A. The right of substitution is the right to acquire the property sold, and a successful pre-emptor acquires the property sold, for the first time when he deposits the pre-emption money.

(Para 10)

There is nothing in Section 19-A which takes away even by necessary intend-

ment the ordinary jurisdiction of a Civil Court to entertain a suit by a big land-owner for possession of agricultural land in exercise of his right of pre-emption. There is no doubt that if the provisions of Section 19-A stood as an absolute bar in all circumstances to the successful execution of a decree for pre-emption the Court could not possibly be asked to indulge in a mere pastime to pass a decree which would be incapable of execution. But there can be more than one eventualities in which a decree passed in favour of a big land-owner may be successfully executed by such a plaintiff-decree-holder without offending Section 19-A if he ceases to be a big land-owner on the date on which he seeks to acquire title to the property in dispute or wants to obtain its possession. 1967-69 Pun LR 319 Overruled, AIR 1966 Punj 310 and 1965 Cur LJ 519 Rel. on; Case law discussed.

(Para 9)

Cases Referred: Chronological Paras
(1967) 69 Pun LR 319=1967 Cur LJ

200, Kartar Singh v Ghukar Singh, 4, 7, 13

(1866) AIR 1966 Punj 310 (V 53)=

67 Pun LR 735 Bhupinder Singh v Smt. Surinder Kaur 3, 4, 6, 7, 13

(1966) AIR 1966 Punj 374 (V 53)=

ILR (1966) 2 Punj 125 (FB), Ramji Lal Ram Lal v State of Punjab 12

(1965) 1965 Cur LJ 519, Mangla v. Sukhminder Singh 4, 6, 7, 13

(1958) AIR 1958 SC 838 (V 45)=

1959 SCR 878, Bishan Singh v. Khazan Singh 6, 8, 9, 10

(1954) AIR 1954 SC 417 (V 41)=

1955 SCR 70 Audh Behari Singh v Gajadhar Jaipuria 11

(1951) AIR 1951 Punj 52 (V 38)=

53 Pun LR 159 (FB), Sham Sunder v. Ram Das 9

(1944) AIR 1944 Lah 172 (V 31)=

ILR (1944) 25 Lah 473 (FB), Faiz Mohammad v Chaudhary Fajar Ali Khan 11

(1944) AIR 1944 Lah 319 (V 31)=

ILR (1944) 25 Lah 443 (FB) Zahur Din v Jalal Din 11

(1916) AIR 1916 PC 179 (V 3)=

44 Ind App 80, Deonandan v. Ramdhari 6, 8

(1835) ILR 7 All 775 = 1885 All

WN 182, Gobind Dayal v Inayatullah 9

Harnam Singh Wasu, Sr. Advocate with B S Wasu and L S Wasu, for Appellants; M L Sethi Sr Advocate with N L Dhillon, for Respondents.

NARULA, J. The solitary question which calls for decision in this reference to the Full Bench is whether section 19-A of the Punjab Security of Land Tenures Act (10 of 1953) as subsequently amended (hereinafter called the Ceiling Act)

creates a bar in the way of a land-owner already holding his maximum permissible area under the Act from instituting a suit and obtaining a decree for possession by pre-emption. The circumstances in which this question has arisen may first be surveyed briefly. One Gurmel Singh sold to Mohna Ram and other respondents 237 Kanals and 2 Marlas of agricultural land for Rupees 22,945/-. Gurdev Singh and his three brothers, the plaintiffs claiming to be the sons of the brother of the father of the vendor, filed the suit from which the present appeal has arisen, for possession of the said land by pre-emption. In paragraph 2 of their written statement, the vendees took a defence to the suit in the following terms:

"In reply to the contents of paragraph No. 2 of the petition of plaint it is submitted that all the plaintiffs have been owners and in possession of more than 30 standard acres of land each prior to the sale of the land in suit. Even if the least area of the land in dispute be added to the land already owned and possessed by them, the area of each of them would exceed 30 standard acres. As such, no plaintiff has got the right of pre-emption regarding the land, in suit, sold to the defendants. None of the plaintiffs is entitled to file a suit for pre-emption against the defendants."

2. By his judgment, dated September 4, 1964, the Subordinate Judge, Fazilka, dismissed the suit for pre-emption on the finding that though the plaintiffs were proved to be sons of the father's brother of the vendor, their right to pre-empt the sale had been taken away by section 19-A of the Ceiling Act, as each of the plaintiffs owned more than thirty standard acres of land on the date of sale of the land in dispute. The learned Subordinate Judge held that inasmuch as section 19-A precluded the purchase of land in excess of the permissible area, the plaintiffs could not claim that they had any preferential or primary right to purchase land in violation of the provisions of that section. Whereas the appeal preferred by plaintiffs-appellants other than Gurtej Singh was dismissed, the appeal of Gurtej Singh plaintiff was allowed to the extent of 3 standard acres and 14 units out of the land in dispute on the finding that he was a small land-owner inasmuch as he owned only 26 standard acres and 2 units of land which was less than his permissible area by 3 standard acres and 14 units.

3. Before Shri Sant Ram Garg, District Judge, Ferozepore, it was conceded on behalf of the plaintiffs-appellants that acquisition of agricultural land in exercise of the right of pre-emption amounted to "acquisition" of land within the

meaning of Section 19-A of the Ceiling Act. The Division Bench judgment of this Court in *Bhupinder Singh v. Smt. Surinder Kaur*, 67 Pun LR 735 : (AIR 1966 Punj 310) was cited before the District Court, and was noticed in the judgment of that Court. In the face of the binding Division Bench judgment of this Court, the learned District Judge entertained the argument to side-track the issue, and held that the point canvassed before him had not been raised before the Bench of this Court, and that, therefore, what had to be seen was whether at the time of the sale each of the plaintiffs had a cause of action to acquire more agricultural land by pre-emption or not. Thus having evaded the impact of the decision of the High Court on the instant case, the first appellate Court went into the question of the individual holding of each of the plaintiffs-appellants and partially allowed the appeal in favour of Gurtej Singh plaintiff-appellant to the extent indicated above. Regarding the manner in which the learned District Judge avoided following the Division Bench judgment of this Court which fully covered the point in issue, we need not say anything more in this judgment than express our strong disapproval of his conduct in this matter which conduct lacks judicial propriety.

4. Not satisfied with the decision of the first appellate Court on the pure question of law referred to above, the plaintiffs came up to this Court in Regular Second Appeal 1503 of 1965. After hearing the counsel for the appellants to some extent, my Lord Mahajan, J. before whom the appeal originally came up for hearing noticed the conflict between Division Bench judgments of this Court (*Dulat and Mahajan JJ.*) in 67 Pun LR 735 : AIR 1966 Punj 310 and in *Mangla v. Sukhminder Singh (minor)* 1965 Cur LJ 519, on the one hand and in the Bench decision of the Court (*S. B. Kapoor and Gurdev Singh, JJ.*) in *Kartar Singh v. Ghukar Singh* 1967-69 Pun LR 319, on the other, and therefore, directed that it was in the fitness of things that the matter may be examined afresh by a Full Bench in order to finally settle as to which of the two views expressed in the above cases was the correct one. It is in pursuance of the said order of reference of my learned Brother, dated March 27, 1967, that this case has been placed before us for deciding the above-said question.

5. Section 4 of the Punjab Pre-emption Act (1 of 1913) as subsequently amended (hereinafter referred to as the Pre-emption Act) which confers the right of pre-empting a sale, is in the following terms:

"The right of pre-emption shall mean the right of a person to acquire agricultural land or village immovable property or urban immovable property in preference to other persons, and it arises in respect of such land only in the case of sales and in respect of such property only in the case of sales or of foreclosures of the right to redeem such property.

Nothing in this section shall prevent a Court from holding that an alienation purporting to be other than a sale is in effect a sale."

Out of the three categories of property mentioned in section 4, we are concerned in this case with agricultural land. Section 5 contains exceptions to the right of pre-emption conferred by section 4. Regarding agricultural land it is stated in clause (b) of section 5 that no right of pre-emption shall exist in respect of such land being waste land reclaimed by the vendee. Section 6 provides inter alia that a right of pre-emption shall exist in respect of agricultural land subject to the provisions of clause (b) of section 5. It further states that "every such right (right of pre-emption) shall be subject to all the provisions and limitations in this Act contained." Section 8 authorises the State Government to declare by notification that in any local area or with respect to any sale or class of sales, no right of pre-emption or only such limited right as the State Government may specify shall exist. Section 9 excludes from the purview of exercise of right of pre-emption sales made by or to Government or by or to any local authority, or to any company under the Land Acquisition Act. A list of persons in whom right of pre-emption vests in respect of sales of agricultural land is given in order of preference in section 15 of the Pre-emption Act. As the sale in the instant case was by a sole owner, the right of pre-emption claimed by the appellants was obviously under sub-clause "Secondly" of clause (a) of sub-section (1) of section 15, which provides that the right of pre-emption in respect of agricultural land shall vest where the sale is by a sole owner in the brother or brother's son of the vendor.

6. Section 19-A of the Ceiling Act runs as follows—

"(1) Notwithstanding anything to the contrary in any law, custom, usage, contract or agreement, from and after the commencement of the Punjab Security of Land Tenures (Amendment) Ordinance, 1958, no person, whether as land-owner or tenant, shall acquire or possess by transfer, exchange, lease, agreement or settlement any land, which with or without the land already owned or held by him shall in the aggregate exceed the permissible area:

Provided that nothing in this section shall apply to lands belonging to registered co-operative societies formed for purposes of co-operative farming, if the land owned by an individual member of the society does not exceed the permissible area

(2) Any transfer, exchange, lease, agreement or settlement made in contravention of the provisions of sub-section (1) shall be null and void."

Whereas the appellants claim that Section 19-A (quoted above) merely bars the actual acquisition of title to or possession of land by a plaintiff, who is not a small land-owner though he may take all preliminary steps for acquiring such title or possession such as filing a suit for recovery of possession, and even obtaining a decree in that suit, it has been contended on behalf of the respondents that S. 19-A imposes a disqualification on a big land-owner from making any such claim on the basis of a right of pre-emption. The question as to which of the two contentions is correct came up for consideration for the first time before a Division Bench of this Court (Dulat and Mahajan, JJ.) in Bhupinder Singh's case, 67 Pun LR 725 = (AIR 1966 Punj 310) (Supra) Dulat, J., who prepared the judgment of the Division Bench, made the following observations before entering into the merits of the legal controversy:—

"It does appear and is not disputed before us that the Punjab Security of Land Tenures Act, Section 19-A, does prohibit the acquisition of land by an individual beyond the permissible area which admittedly is 30 standard acres, and, if we could be persuaded that the effect of the decree granted to the pre-emptor in this case is that the pre-emptor will necessarily acquire more than 30 standard acres, we would refrain from granting such a decree."

The learned Judge then referred to the scope of a pre-emption decree in the following terms:—

"The pre-emption decree merely says that in case the amount in question is deposited by a certain date the pre-emptor would be entitled to possession, and it is impossible to say at the time of passing the decree whether the pre-emptor will or will not come to own the land for it can just as well happen, in case the pre-emptor chooses not to deposit the money or is for various reasons unable to do so, that the suit may stand dismissed."

In view of this situation, the Bench held that it was unable to hold as a matter of law that the granting of a pre-emption decree violates or has the effect of violating the provisions contained in S. 19-A of the Ceiling Act and that being so, the Bench held that there seemed to be no reason why a pre-emptor should be debarred from obtaining a pre-emption

decree in the terms in which it is framed. The argument of the vendee to the effect that it could be presumed that a pre-emptor would take advantage of the decree and by taking possession of the land covered by the decree he would come to own and possess more than he is entitled to under the law, was repelled by the Division Bench on the ground that the contention amounts to anticipating an event which may never come about, for it can just, as well happen that by the time the pre-emptor comes to deposit the money in Court, he may have parted with all or a substantial part of his own holding. For the foregoing reasons it was held that the question whether the pre-emptor will or will not at any time hold more than the land he is allowed to hold under Section 19-A of the Ceiling Act, can only be decided when, after having deposited the pre-emption money in Court, he seeks assistance of the Court to attain possession, because only if he does get possession of more than the permissible area will the law be violated.

The same question again arose before the same Division Bench of this Court in the case of Mangla 1965 Cur LJ 519 (supra). It was contended before the Bench that what has to be seen is whether the pre-emptor had a right of pre-emption when he filed the suit, and whether that position was maintained at the time when the decree was granted in his favour. After referring to the earlier judgment of the Court in Bhupinder Singh's case, 67 Pun LR 735 = (AIR 1966 Punj 310) the learned Judges disposed of the question in the following words.—

“Ownership passes only after the terms of the decree are complied with. It is, therefore, not right to say that by the granting of a pre-emption decree the pre-emptor becomes the owner of the land he is seeking to pre-empt. The decree is merely contingent and comes into force when the pre-emption amount is deposited in Court and certainly not before this so that there is no way of finding out at the time of the decree whether the pre-emptor will ultimately become the owner of the land in question or not. To say, therefore, that the pre-emption decree in the present case will make the plaintiff pre-emptor the owner of more than permissible area of land, seems to us entirely wrong and an anticipation unwarranted by law. Mr. Aggarwal does suggest that a pre-emption decree should be taken to vest the property in the pre-emptor but this has not been the view of the Courts and the Supreme Court decision in Bishan Singh v. Khazan Singh, AIR 1958 SC 838 makes it quite clear that a pre-emptor does not become the owner of the land and is not substituted for the owner till

the terms of the decree are complied with. The Supreme Court has in this connection approved the rule laid down by the Privy Council in *Deonandan v. Ramdhari*, AIR 1916 PC 179 expressing the same view, namely that the actual substitution takes place when possession is taken under the decree. Nothing happens at the date of the decree and the question, whether any violation of Section 19-A of the Punjab Security of Land Tenures Act has or has not taken place, cannot be determined at the time of the granting of a pre-emption decree and that question has to be deferred, in our opinion, to the time of the execution of the decree, for only then it can be found out whether the decree-holder seeks to acquire more than the area permitted by Section 19-A of the Punjab Security of Land Tenures Act. On this view of the matter it is not possible for us to disturb the conclusion reached by the learned Single Judge that the pre-emption decree in this case is not violative of any provision of the Punjab Security of Land Tenures Act.”

7. Somewhat different view of the matter was taken by the Division Bench of S. B. Capoor and Gurdev Singh, JJ. in Kartar Singh's case, 1967-69 Pun LR 319 (supra). After noticing the earlier Division Bench judgments in Bhupinder Singh's case, 67 Pun LR 735 = (AIR 1966 Punj 310) and in the case of Mangla, 1965 Cur LJ 519, and after referring to the provisions of Section 4 of the Pre-emption Act, the learned Judges found that both the previous decisions were distinguishable on facts, and that the observations of the Court in those earlier cases could not apply to the case of Kartar Singh, 1967-69 Pun LR 319 as Kartar Singh plaintiff was, on the date of the institution of the suit, already in possession of more than the permissible area, and it was, therefore, not open to him to acquire any further agricultural land by transfer etc. without violating the provisions of Section 19-A of the Ceiling Act. In a way the Bench agreed with the contention which is now sought to be advanced before us by Mr. Madan Lal Sethi, the learned counsel for the respondents, that a plaintiff cannot institute a suit for possession in exercise of his right of pre-emption if on the date of the sale which is sought to be pre-empted, the plaintiff had no right to acquire any land as he was already in possession of more than 30 standard acres.

8. After carefully considering all the submissions made before us by the learned counsel for both sides, we are of the opinion that the fallacy in the arguments advanced by the learned counsel for the respondents lies in his equating the quali-

fication for pre-empting a sale, and equating the right to acquire property by pre-emption with the acquisition itself. We put the following hypothetical case to Mr Sethi:—

'A' owns 30 standard acres of land, and enters into an agreement with B to purchase from the latter 10 standard acres of land on March 1, 1969, the sale to be completed within one month. On March 15, 'A' disposes of by absolute sale 15 standard acres of his original holding. After being left with only 15 standard acres out of his original holding, 'A' completes the agreed sale, and purchases on the 20th of March, 10 standard acres of B's land. Will the purchase of the 10 standard acres of land by 'A' from 'B' on March 20 be hit by Section 19-A of the Ceiling Act?

Mr Sethi's reply to the above question was in the negative. We are unable to see any difference between the case of an intending purchaser who is disqualified from purchasing further land agreeing to purchase additional land and removing the disqualification before actual purchase on the one hand, and the case of a plaintiff pre-emptor who owns more than 30 standard acres on the date of the decree who disposes of as much of his original holding as the land which he wants to acquire by pre-emption between the date of the decree, and the date of the deposit of the pre-emption money in terms of the decree. Section 19-A does not fall in the category of exceptions to the right of pre-emption contained in Sections 5, 8 and 9 of the Pre-emption Act. The right to claim property by pre-emption is conferred by Section 4 subject to the exceptions contained in Sections 5, 8, 9 and 23. The qualifications entitling a plaintiff to pre-empt a sale of agricultural property are mentioned in order of preference in Section 15. What is prohibited by Section 19-A is to acquire the title to the land as well as to acquire possession of land in excess of one's permissible area. The question then arises as to when does a successful plaintiff pre-emptor acquire title to the land which is the subject-matter of the sale sought to be pre-empted by him. The answer to this question is contained in the statutory provision of Cl (b) of sub-rule (1) of R. 14 of O. 20 of the Code of Civil Procedure. Sub-rule (1) of R. 14 of O. 20 states as follows.—

"Where the Court decrees a claim to pre-emption in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

(a) specify a day on or before which the purchase-money shall be so paid and

(b) direct that on payment into Court of such purchase-money, together with

the costs (if any) decreed against the plaintiff, on or before the day referred to in Cl (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs."

From a reading of the above quoted provisions, it is plain that the title of the pre-emptor is deemed to accrue to the land which is the subject-matter of the pre-empted sale from the date of payment of the pre-emption money in Court, and neither from the date of the original sale nor from the date of the suit, nor even from the date of the decree. In AIR 1916 PC 179, it was held that in a suit for pre-emption, ownership of the property does not vest in the pre-emptor from the date of the sale notwithstanding success in the suit but from the date of possession obtained on payment of the amount fixed under the decree. It was further decided that till payment of purchase-money on the date fixed in the decree under which pre-emptor obtains possession of property, the original purchaser continues to be the owner of the property and is entitled to rents and profits thereof. While approving the dictum of the Privy Council in Deonandan Prasad Singh's case, AIR 1916 PC 179 their Lordships of the Supreme Court held in AIR 1958 SC 838, as follows:—

"The right of pre-emption could be effectively exercised or enforced only when the pre-emptor has been substituted by the vendee in the original bargain of sale. A conditional decree whereunder a pre-emptor gets possession only if he pays a specified amount within a prescribed time and which also provided for the dismissal of the suit in case the condition was not complied with, could not obviously bring about the substitution of decree-holder in place of the vendee before the condition was complied with. Such a substitution took place only when the decree-holder complied with the condition and took possession of the land."

9. There is no quarrel with the proposition of law canvassed before us by the learned counsel for the appellants, to the effect that the right of pre-emption is a right of a plaintiff pre-emptor to be substituted in place of the original vendee in the sale in question. To support this proposition our attention was invited to the illustrious judgment of Mahmood, J. in Gobind Dayal v Inayatullah, (1885) ILR 7 All 775. The fact, however, remains that according to the authoritative pronouncements of their Lordships of the Supreme Court in Bishan Singh's case, AIR 1958 SC 838 such substitution takes

place only if and when the pre-emption money is deposited in Court. It is settled law that the exclusion of the general jurisdiction of a Civil Court has not to be readily inferred and such exclusion must either be explicitly expressed or clearly implied. If the Legislature intended to bar the institution of a suit for pre-emption by a big land-owner nothing could be simpler than making a provision to that effect either in the Pre-emption Act itself or even in the Ceiling Act. In the absence of any such provision, it cannot be held that the jurisdiction of a Civil Court to entertain a suit for pre-emption by a person who has a preferential right to the vendee, has been barred by implication by Section 19-A.

In *Sham Sunder v. Ram Das*, 53 Pun LR 159 = (AIR 1951 Punj 52) (FB) it was held by a Full Bench of this Court that Section 13 of the East Punjab Urban Rent Restriction Act, 1947, does not oust the jurisdiction of Civil Courts to grant a decree for eviction, but merely controls the execution of such a decree by prescribing procedure for the eviction of tenants. An illustration of a case where the passing of the decree by the Court was itself barred in the absence of the happening of a specified event, is contained in Section 3 of the Punjab Registration of Money Lenders' Act (3 of 1938), which provides inter alia that notwithstanding anything contained in any other enactment for the time being in force, a suit by a money-lender for the recovery of a loan, shall be dismissed unless the money-lender at the time of the institution of the suit (or at the time of passing the decree) is registered under the Act, and holds a valid licence in the prescribed form. In the Pre-emption Act itself Section 23 provides that no decree shall be granted in a suit for pre-emption in respect of the sale of agricultural land until the plaintiff has satisfied the Court that the sale in respect of which pre-emption is claimed is not in contravention of the Punjab Alienation of Land Act (13 of 1900), and that the plaintiff is not debarred by the provisions of Section 14 of the Pre-emption Act from exercising the right of pre-emption. If the Legislature intended to convey what the appellants want us to hold, a provision in the nature of Section 23 would have been made at a proper place either in the Pre-emption Act or in the Ceiling Act. In our opinion there is nothing in Section 19-A which takes away even by necessary intendment the ordinary jurisdiction of a Civil Court to entertain a suit by a big land-owner for possession of agricultural land in exercise of his right of pre-emption. There is no doubt that if the provisions of S. 19-A stood as an absolute bar in all circumstances to the successful execution of a

decree for pre-emption, the Court could not possibly be asked to indulge in a mere pastime to pass a decree which would be incapable of execution. But, as already illustrated, there can be more than one eventualities in which a decree passed in favour of a big land-owner may be successfully executed by such a plaintiff decree-holder without offending against Section 19-A if he ceases to be a big land-owner on the date on which he seeks to acquire title to the property in dispute or wants to obtain its possession.

10. Section 19 of the Pre-emption Act states that when any person proposes to sell any agricultural land in respect of which any persons have a right of pre-emption, he may give notice to all such persons of the price at which he is willing to sell such land. Section 20 provides that the right of pre-emption of any person shall be extinguished unless such person shall within the period of three months from the date on which the notice under Section 19 is duly given or within the permissible extended time allowed by the Court, present to the Court a notice for service on the vendor of his intention to enforce his right of pre-emption. It is quite conceivable that on receipt of such a notice in respect of valuable agricultural land, measuring 10 or 20 standard acres, a land-holder already owning thirty standard acres of his permissible area, may lawfully dispose of ten or twenty standard acres of his original holding which may be of land which is not to his liking and avail of an opportunity given to him by the notice under Section 19 and acquire the land offered to be sold. In such an eventuality, there would, in our opinion, be no violation of the prohibition contained in Section 19-A. On the facts of the same illustration if the person on whom the notice under Section 19 is served, purchases land offered to him which is in excess of his permissible area, the purchase of the said land would be void and ineffective because of the bar contained in sub-section (2) of S. 19-A. The vendor cannot, however, plead that whereas he gave notice to some other possible pre-emptor, he could not be expected to serve such a notice on the person already holding thirty standard acres on the ground that he was not qualified to purchase the land in dispute. The qualifications for exercising the right of pre-emption in respect of the agricultural land are contained in Sections 4 and 15. Sales which are not subject to such right of pre-emption are mentioned in S. 5 (b), Sections 8, 9 and Section 23. The right to file a suit claiming possession by pre-emption is conferred by Section 4 of the Pre-emption Act read with Section 9 of the Code of Civil Procedure.

But when the matter reaches the stage of acquiring possession by depositing the pre-emption amount under R. 14 of O 20 of the Code of Civil Procedure, and of obtaining possession of the land in execution of the decree, the bar of Section 19-A comes into effect. If at that time the decree-holder already holds the maximum permissible area allowed to him by the Ceiling Act. The right to acquire land is a fundamental right guaranteed by Article 19 (1) (f) of the Constitution, and cannot be taken away from a citizen save by authority of law. The only person from whom the right to acquire agricultural land has been taken away is the person who already holds the maximum permissible area with him under the Ceiling Act at the time of his acquiring the land in dispute. The primary or inherent right of pre-emption has been described by the Supreme Court in the case of AIR 1958 SC 838, as a mere right to the offer of a thing about to be sold and not as a right to the thing sold itself. Mr. M. L. Sethi contended that a big land-owner has been deprived of his primary or inherent right by Section 19-A. We do not find any warrant for this proposition. In our opinion, S. 19-A has not deprived a big land-owner either of his primary or inherent right to the offer of agricultural land which is intended to be sold, nor of the secondary or remedial right to follow the thing sold. It is only the third part of the right of pre-emption i.e. his right of substitution in place of the vendee that has been affected by Section 19-A. The right of substitution is the right to acquire the property sold, and a successful pre-emptor acquires the property sold, for the first time when he deposits the pre-emption money. It is significant to note that no provision in the Ceiling Act prohibits the sale of the proprietary rights of a land-owner. It is only the acquisition of land beyond the maximum permissible area by a purchaser which is made void by Section 19-A.

11. The right to pre-empt must exist prior to or at the time of the sale. The right to pre-emption must continue to subsist in the plaintiff right from the date of the sale to the date of the decree by the trial Court. The provision of Section 19-A does not in any manner affect the said right. It only bars actual acquisition of title or possession. In *Audh Behari Singh v. Gajadhar Jaipuria*, AIR 1954 SC 417, the Supreme Court held that the law of pre-emption creates a right which attaches to the property and can be enforced by or against the owner of the land for the time being although the right of the pre-emptor does not amount to an interest in the land itself. Mr. Sethi wanted us to hold that if a person is prohibited from acquiring cer-

tain land, he cannot be said to have a preferential right to claim the property in question. The fallacy in this submission of Mr. Sethi is that whereas a person who does not have a preferential right to acquire a property by pre-emption cannot possibly acquire it, the reverse of that proposition is not necessarily correct. A person having a legal and preferential right of pre-emption may still never be able to acquire the pre-emptible property:—

(i) because he may lose the right to pre-empt after the sale and before the filing of a suit by him, or

(ii) because the property may not be offered to him, and he may never exercise the right by filing a suit, or

(iii) because he may file a suit, but lose the preferential right during the pendency of the suit, and before the passing of the decree; or

(iv) because even after obtaining a decree, he may not deposit the pre-emption money within time, or

(v) because some statute may bar the execution of the decree for possession; or

(vi) because some law like Section 19-A of the Ceiling Act may prohibit the decree-holder from actually acquiring or possessing the subject-matter of the suit for pre-emption in case the plaintiff falls within the mischief of such a barring provision at the relevant time.

Mr. Sethi referred to two Full Bench judgments of the Lahore High Court in AIR 1944 Lah 172 (FB) and *Zahur Din v. Jalal Din*, AIR 1944 Lah 319 (FB) and argued that nothing which happens after the decree is relevant for purposes of deciding a claim for pre-emption. That is indeed so. But while interpreting Section 19-A of the Ceiling Act, we are not concerned with the right of pre-emption, but the right to acquire title to or possession of land.

12. Whereas it was held by Full Bench of this Court in *Ramji Lal Ram Lal v. State of Punjab*, AIR 1966 Punj 374 (FB), that the question as to when a decree-holder's title to the property would be completed, seemed to be besides the point for determining the right of pre-emption. It is the said question with which we are concerned for correctly interpreting Section 19-A.

The Full Bench observed:—

"We are only concerned in a suit for pre-emption with a plaintiff's preferential right to acquire the property and to get himself substituted for the vendee in the sale which he wishes to pre-empt and not with the question as to when he becomes the owner of the property after

his suit for pre-emption has been decreed."

The dicta of the abovementioned three cases are, therefore, not of much help to us in answering this reference.

13. For the foregoing reasons we are of the opinion that the law laid down by a Division Bench of this Court (Dulat and Mahajan JJ.) in Bhupinder Singh's case 67 Pun LR 735 = (AIR 1966 Punj 310) and in the case of Mangal, 1965 Cur LJ 519 is correct, and that the observations of the other Division Bench (S. B. Kapoor and Gurdev Singh, JJ.) in Kartar Singh's case, 1967-69 Pun LR 319 which are contrary to the pronouncement of the Court in Bhupinder Singh's case, 67 Pun LR 735 = (AIR 1966 Punj 310) do not lay down the correct law. We say this with the greatest respect to the learned Judges who decided the case of 1967-69 Pun LR 319. The Regular Second Appeal will now be placed before the learned Single Judge for being disposed of in accordance with law keeping in view our decision relating to the true scope and interpretation of Section 19-A of the Ceiling Act. Costs of the hearing before the Full Bench shall abide the result of the Regular Second Appeal.

14. MAHAJAN J.:— I agree.

15. SHAMSHER BEHADUR J.:— I also agree.

BNP/D.V.C. Appeal allowed.

AIR 1969 PUNJAB & HARYANA 429 (V 56 C 73)

SHAMSHER BAHADUR AND
R. S. NARULA JJ.

Ram Saran Dass Kapur, Petitioner v. Commissioner of Income-tax, Patiala, Respondent.

Income-tax Ref. No. 3 of 1965, D/-24-3-1969.

Income-tax Act (1922), Ss. 28, 5 (7-C) — Proceeding under S. 28 — Transfer of from one Income-tax Officer to another — Latter's failure to give opportunity of being heard — Imposition of penalty is bad — Fact that assessee is already heard by previous Officer or did not specifically request for re-hearing is immaterial — (1961) 42 ITR 129 (Pat), Dissented from.

Where after giving the opportunity of being heard to the assessee, the proceeding is transferred from one Income-tax Officer to another, it is mandatory upon the Officer to whom the case is transferred, to give the opportunity of hearing before imposition of penalty. Even if an assessee does not exercise his statutory right of getting the case reopened or of specifically asking for a re-hearing of the case under Section 5 (7-C) and once he

had the opportunity of being heard before different officer he is entitled to allege that sub-section (3) of S. 28 has been violated as he has not been given a reasonable opportunity of being heard, by the Officer imposing penalty upon him. (1961) 42 ITR 129 (Pat), Dissented from. (Case Law discussed). (Paras 5, 6 and 8)

The mandatory requirement of sub-section (3) of S. 28 of the Act is wholly independent of the enabling provision of Section 5 (7-C). An order passed under Section 28 (1) (c) without affording adequate opportunity required to be given to an assessee under sub-section (3) of Section 28 would never be valid. An order which is invalid on account of being violative of the requirements of S. 28 (3) cannot be validated by invoking the first proviso to Section 5 (7-C). So far as personal hearing is concerned, such a hearing can have some meaning only if it is given by the very person who has to ultimately decide the matter. Oral hearing by one officer cannot be of any advantage to his successor in deciding a case. To hold otherwise would amount to saying that the farce of a hearing is equal to a real, genuine and effective hearing. (Para 5)

It is well known that no amount of written representations, howsoever detailed, can in all cases, be treated as an equally effective substitute of a personal hearing. It is easier for an assessee to persuade an assessing authority to his point of view by removing his doubts and by answering his questions at a personal hearing, than by merely availing of the cold effect of a written representation. (Para 5)

Cases Referred: Chronological Paras

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| (1969) 1969-71 ITR 646 = ILR (1969) | |
| 1 Punj 53, Satprakash Ram Naranjan v. Commr. of Income-tax | 7 |
| (1967) 1967-63 ITR 130 = 1966-2 Mys LJ 500, Hulekar & Sons v. Commr. of Income-tax, Mysore | 7 |
| (1967) 1967-66 ITR 14 = ILR (1967) 17 Raj 592, A. C. Metal Works v. Commr. of Income-tax, Delhi and Rajasthan | 7 |
| (1965) AIR 1965 Punj 84 (V 52) = 66 Pun LR 1037, Amir Singh v. Govt. of India | 6, 7 |
| (1964) 1964-53 ITR 57 = 1964-1 ITJ 271 (Mys), Shop Siddegowda and Family v. Commr. of Income-Tax, Mysore | 7 |
| (1963) 1963-48 ITR 262 (Cal), Kanailal Gatani v. Commr. of Income-tax and Excess Profits Tax, West Bengal | 7 |
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| (1960) AJR 1960 Cal 543 (V 47) = 1960-40 ITR 178, Calcutta Tanneries | |

(1944) Ltd Calcutta v Commr of Income-tax, Calcutta 2, 7, 8
 (1959) AIR 1959 SC 308 (V 46) =
 (1959) Supp (1) SCR 319, G
 Nageswara Rao v Andhra Pradesh
 State Road Transport Corpora-
 tion 6, 7, 8

Balraj Kohli with Ram Rang for Petitioner, D N Awasthy with B S Gupta, for Respondent.

NARULA J — The following question has been referred to this Court under Section 66 (1) of the Indian Income-tax Act (11 of 1922) (hereinafter called the Act) by the Income-tax Appellate Tribunal (Delhi Bench 'B') —

"Whether in the facts and circumstances of the case, the imposition of penalty by the Income-tax Officer 'F' Ward, (Amritsar) is bad in law?"

2. The relevant facts giving rise to this reference are these

In respect of the proceedings for assessment of income-tax for the assessment years 1946-47 and 1947-48, concealed income of Rs 47,000 and Rs 10,000 respectively was discovered after voluntary disclosure of an additional income of Rs 40,667 in each of the abovesaid years had been made by the assessee in addition to the amount of the original assessment on the income of Rs 19,943 for the first year and Rs 45,824 for the second year. After the conclusion of the proceedings relating to assessment of concealed income, notice dated November 24, 1955, in respect of the assessment year 1946-47 was issued to Shri Ram Saran Das Kapur applicant (hereinafter called the assessee) under sub-section (3) of Section 28 of the Act to show cause why a penalty should not be levied on the assessee for concealing the income in question. Similar notice in respect of the assessment year 1947-48 was served on the assessee on December 26, 1955. In reply to the notice, dated, November 24, 1955, the assessee submitted written objections, dated April 14, 1956 in which he objected to the legality of the notice, the jurisdiction of the Income-tax Officer, the vagueness of the notice and various other matters, and in which he finally stated in the penultimate paragraph as follows —

"That a personal hearing may kindly be given to explain the case personally"

A verbatim copy of the objections, dated April 14, 1956, was sent by the assessee to the Income-tax Officer, Special Ward, Amritsar (which Income-tax Officer had issued and served the notice, under Section 28(3) of the Act on the assessee) in respect of the assessment year 1947-48. It is the common case of both sides that in pursuance of the specific request contained in the written reply of the assessee, the Income-tax

Officer, Special Ward, gave an opportunity of personal hearing to the assessee and actually heard his arguments in support of those objections. Before the Income-tax Officer, Special Ward, who had heard the assessee, could give a decision in the matter, the cases for the imposition of penalty on the assessee were transferred to the Income-tax Officer, 'F' Ward, Amritsar. There is nothing to show that the assessee sent any communication or made any request to the Income-tax Officer for any further hearing. This fact is also admitted that the Income-tax Officer, 'F' Ward, never gave any opportunity of being heard to the assessee, and merely passed two separate orders, dated July 30, 1959, imposing a penalty of Rs 15,000 in respect of the year 1946-47, and of Rs 4,000 in respect of the year 1947-48. Aggrieved by the orders of imposition of penalty, the assessee went in appeal to the Appellate Assistant Commissioner of Income-tax who by his order, dated October 29, 1959, set aside the order under appeal.

The Income-tax Officer went up in appeal against the order of the Income-tax Appellate Assistant Commissioner to the Appellate Tribunal. By order, dated October 30, 1961, the Appellate Tribunal allowed the appeal of the assessing authority, set aside the order of the Appellate Assistant Commr and remitted the appeal of the assessee for re-hearing to the Appellate Assistant Commissioner as he had not dealt with certain objections which were raised by the Department before the Tribunal. By his post-remand order, dated September 24, 1962, the Appellate Assistant Commissioner upheld and confirmed the order of the Income-tax Officer in respect of the imposition as well as the quantum of the penalty in respect of the two years in dispute. In the assessee's appeal preferred against the post-remand order of the Appellate Assistant Commissioner, the Appellate Tribunal by its judgment, dated September 23, 1963, repelled all the contentions of the assessee.

The contention of the assessee with which we are concerned was disposed of in sub-paragraphs (ii) and (iii) of paragraph 6 of the Appellate Tribunal's final order in the following words —

"(ii) We have already noted above that the assessee besides filing a written explanation dated April 14, 1956 requested that he may be heard personally. The Income-tax Officer did hear him personally on August 27, 1957. Thereafter the case went to the jurisdiction of the Income-tax Officer 'F-Ward'. Section 5 (7-C) lays down that where an income-tax authority ceases to exercise jurisdiction and is succeeded by another, the income-tax authority so succeeded may continue the proceeding from the stage at

which the proceeding was left by his predecessor. The first proviso to the sub-section lays down that the assessee concerned may demand that before the proceeding is so continued the previous proceeding or any part thereof be re-opened. We find that no such demand was made by the assessee (before the Income-tax Officer, F-Ward Shri Gujjar Mal who passed the penalty order on July 30, 1959) to the effect that the assessee be re-heard or any part of the previous proceeding be re-opened. In these circumstances the Income-tax Officer F-Ward Shri Gujjar Mal was perfectly justified in law in passing the penalty order.

(iii) In support of his contention the learned counsel for the assessee relies upon the ruling of the Calcutta High Court in the case of Calcutta Tanneries, (1944) Ltd. Calcutta v. Commissioner of Income-tax, Calcutta, reported in 1960-40 ITR 178 = (AIR 1960 Cal 543), where the facts of the case were almost identical to those of the assessee. This ruling has been considered and dissented from by their Lordships of the Patna High Court in the case of Murlidhar Tejpal v. Commissioner of Income-tax, Patna, reported in 1961-42 ITR 129 (Pat). Respectfully following the later ruling of the Patna High Court, we would hold that the penalty order was validly passed by the Income-tax Officer, F-Ward." It was the question of law decided in the above quoted passage of the order of the Appellate Tribunal which was sought by the assessee to be referred to this Court in the assessee's application under Section 66 (1) of the Act. The application of the assessee was allowed and the present reference was made by the Tribunal on July 10, 1964.

3. The relevant questions of fact which have been decided by the Tribunal and with which findings we are bound and on the basis of which we have to answer the question referred to us, are summarised below:—

(i) that the notices under Section 28 (3) of the Act calling upon the assessee to show cause why penalty under Cl. (c) of sub-section (1) of S. 28 should not be imposed on the assessee were issued and served by the Income-tax Officer, Special Ward, Amritsar;

(ii) that two separate written replies to the abovesaid show-cause notices were sent by the assessee to the Income-tax Officer, Special Ward, on April 14, 1956;

(iii) that a specific prayer had been made by the assessee in writing in paragraph 9 of each of his written replies to the show-cause notices for being afforded "a personal hearing" so as to enable the assessee "to explain the case personally;"

(iv) that the opportunity asked for by the assessee was duly granted to him and

the assessee did actually show cause against the threatened imposition of penalty at the oral hearing availed of by him before the Income-tax Officer, Special Ward;

(v) that no decision in this respect was given by the Income-tax Officer, Special Ward, who heard the assessee and the jurisdiction to levy penalty on the assessee subsequently stood transferred to Shri Gujjar Mal, Income-tax Officer, F-Ward;

(vi) that before Shri Gujjar Mal, Income-tax Officer, 'F' Ward, no request was made by the assessee under S. 5 (7-C) of the Act either for re-opening any of the two cases or for affording the assessee a re-hearing of either of the two cases;

(vii) that the Income-tax Officer, 'F' Ward, did not afford the assessee any opportunity of personal hearing;

(viii) that on the record of the case received by him on transfer from the Income-tax Officer, Special Ward, the assessing authority, i.e., the Income-tax Officer, 'F' Ward, imposed penalties on the assessee without any further proceedings or hearing.

4. In order to appreciate and in order to satisfactorily answer the question referred to us it is necessary to notice at this stage the relevant provisions of Section 28 (1) (c), S. 28 (3) and S. 5 (7-C) (with its first proviso) of the Act, which are reproduced below:—

"28(1)(c) If the Income-tax Officer, the Appellate Assistant Commissioner or the Appellate Tribunal, in the course of any proceedings under this Act is satisfied that any person—

(a)

(b)

(c) has concealed the particulars of his income or deliberately furnished inaccurate particulars of such income,

he or it may direct that such person shall pay, by way of penalty, in the case referred to in Cl. (a), in addition to the amount of the income-tax, and super-tax, if any, payable by him, a sum not exceeding one-and-a-half time that amount and in the cases referred to in Cls. (b) and (c), in addition to any tax payable by him, a sum not exceeding

"28(3) No order shall be made under sub-section (1) or sub-section (2) unless the assessee or partner, as the case may be, has been heard, or has been given a reasonable opportunity of being heard."

"5(7-C) Whenever in respect of any proceeding under this Act, an Income-tax authority ceases to exercise jurisdiction, and is succeeded by another who has and exercises jurisdiction, the Income-tax authority so succeeding may continue the proceeding from the stage at which the proceeding was left by his predecessor:

Provided that the assessee concerned may demand that before the proceeding is so continued the previous proceeding or any part thereof be re-opened or that before any order for assessment is passed against him he be reheard."

5 Mr D N. Awasthi, the learned counsel for the Revenue, has owned and pressed the same arguments which prevailed with the Appellate Tribunal. He has submitted that all the requirements of sub-section (3) of S 28 having once been complied with by the Income-tax Officer, Special Ward, the assessee had thereafter no right to have the matter re-opened or re-heard otherwise than by making a specific prayer for that purpose under sub-section (7-C) of S 5 of the Act. Counsel submitted that the operation of Section 5 (7-C) starts from the point where the proceedings under sub-s (1) or (2) of Section 28 have already culminated, and that if an assessee does not exercise his statutory right of getting the case re-opened or of asking for a rehearing of the case under Section 5 (7-C), he cannot allege that sub-section (3) of S 28 has been violated as he has not been given a reasonable opportunity of being heard, if he has once had such an opportunity before any Income-tax Officer even if he is different from the officer who ultimately imposed the penalty. I think there is clear fallacy in the submission of the learned counsel in this behalf. Section 5 (7-C) does not necessarily come into operation after the entire opportunity referred to in Section 28 (3) has already been granted. The point of time when Section 5 (7-C) comes into operation has no relation to the stage at which the proceedings are transferred from the previous Income-tax Officer to the new one. Sub-section (7-C) of S 5 comes into operation as soon as an income-tax authority ceases to exercise jurisdiction and is succeeded by another authority who has and exercises jurisdiction irrespective of whether the assessee had or had not fully availed of the entire opportunity provided to him under Section 28 (3). If all that remained to be done by the preceding officer was to write an order, and everything which such officer was expected to keep in view at the time he ceases to exercise jurisdiction is available in full to the succeeding officer, there is no bar to the latter merely writing out an order after applying his own mind to the whole of that material unless the assessee exercises his right under the first proviso to sub-section (7-C) of S 5, and asks for either the whole case being re-opened or merely for being re-heard before the passing of the final order. But if one of the things which were to influence the decision of the assessing authority was the effect of an oral hearing already granted to an assessee (either because such a

hearing had been asked for or was otherwise necessary in law) the succeeding officer must give a fresh opportunity of oral hearing to the assessee before deciding the matter. There is no known method by which the effect of a personal hearing could be transferred by the preceding officer to his successor unless, possibly, the whole discussion is tape-recorded and the tape is played back to the successor. Admittedly no such thing happened in this case. It is well known that no amount of written representations, however detailed, can in all cases, be treated as an equally effective substitute of a personal hearing. It is easier for an assessee to persuade an assessing authority to his point of view by removing his doubts and by answering his questions at a personal hearing, than by merely availing of the cold effect of a written representation. By making these observations, I may not be understood to suggest that it is necessary in all cases to give a personal hearing to an assessee in response to the notice under Section 28 (3) of the Act even if he does not ask for it. Mr. Awasthi frankly conceded that if in the face of the assessee's written request for a personal hearing, the Income-tax Officer, Special Ward, had refused to give him an oral hearing, and had passed an order imposing penalty, the order could be successfully impugned, and he would not be able to support it. He, however, submitted that such a personal hearing having once been afforded to the assessee, he was bound to make a fresh specific request to the successor Income-tax Officer, if he again wanted to be heard. We are unable to agree with this submission, as it is based on the assumption that the oral hearing afforded to the assessee by the Income-tax Officer, Special Ward, could possibly be utilised to his advantage in making the order of imposition of penalty by the succeeding Income-tax Officer. The mandatory requirement of sub-section (3) of S. 28 of the Act is in our opinion wholly independent of the enabling provision of Section 5 (7-C). An order passed under Section 28 (1) (c) without affording adequate opportunity required to be given to an assessee under sub-section (3) of S 28 would never be valid. An order which is invalid on account of being violative of the requirements of Section 23 (3) cannot be validated by invoking the first proviso to Section 5 (7-C). So far as personal hearing is concerned, it seems to us to be plain that such a hearing can have some meaning only if it is given by the very person who has to ultimately decide the matter. Oral hearing by one officer cannot possibly be of any advantage to his successor in deciding a case. To hold otherwise would amount to saying that the farce of a hearing is equal to a real, genuine and effective hearing.

6. I asked Mr. Awasthi that if the case had been transferred from the Income-tax Officer, Special Ward, to the Income-tax Officer 'F' Ward before the oral hearing was given to the assessee, could the successor officer decide the matter without affording the assessee an opportunity of being heard merely on the ground that the assessee had not made an application under Section 5 (7-C)? Mr. Awasthi frankly submitted that no prayer under Section 5 (7-C) would have been necessary in that eventuality and the successor Income-tax Officer would have been bound to afford a personal hearing to the assessee before passing any valid orders in the matter. Counsel said that this would have been necessary because the assessee had asked for a personal hearing, and he would, in those circumstances, have had no opportunity at all of a personal hearing. Once it is conceded that if personal hearing is required to be given in a case, and is not granted by an Income-tax Officer before he is transferred, his successor is bound to grant such a hearing before he can pass a valid order, it is in our opinion fallacious for the Revenue to contend, as is indeed sought to be contended indirectly, that the oral hearing by the previous officer is as effective and valid for the officer who actually decided a case as it would have been if the successor officer himself had orally heard the assessee. In order to press his submission Mr. Awasthi had to go to the length of stating that technically an order of a successor Income-tax Officer would be perfectly valid if he were to write on the order-sheet of a case under Section 28 (1) something like this:

"My predecessor issued notices under Section 28 (3). The assessee submitted his written replies which were considered by my predecessor. The assessee was also orally heard by my predecessor. At that stage the jurisdiction to hear this case has been passed over to me. The assessee has not made any prayer for re-opening the case or for re-hearing. So I need not re-do what my predecessor has already done, and need not, therefore, again consider the written replies submitted by the assessee, and need not hear him. Accordingly, I impose on the assessee a penalty of Rs."

The hollowness of the argument of the Revenue is, in my opinion, amply revealed by Mr. Awasthi's submitting that so far as strict compliance with law is concerned, no fault can be found with an order of the kind mentioned above. In *Nageswara Rao v. Andhra Pradesh State Road Transport Corporation*, AIR 1959 SC 308, a somewhat similar question arose relating to the duty of the State Government to give a personal hearing to objectors against a scheme framed under Ch. IV-A

of the Motor Vehicles Act (4 of 1939). The procedure which had been prescribed by the State of Andhra Pradesh for the hearing of such objections was that the Secretary to the Government had to give personal hearing, but the decision had to be given by the Chief Minister. Their Lordships of the Supreme Court observed that personal hearing enables the party appearing at such hearing to persuade the authority concerned by reasoned arguments to accept his point of view. Their Lordships held:—

"If one person hears and another decides, then personal hearing becomes an empty formality."

With the above observations, the Supreme Court held that the procedure followed in the case of *G. Nageswara Rao*, AIR 1959 SC 308 (of hearing by the Secretary and decision by the Chief Minister) offended against the basic principles of judicial procedure. To accede to the view canvassed before us by Mr. Awasthi would amount to holding contrary to the pronouncement of the Supreme Court in *G. Nageswara Rao's* case, AIR 1959 SC 308. A Division Bench of this Court (Grover and Khanna, JJ.) held in *Amir Singh v. Govt. of India*, 1964-66 Pun LR 1037 = (AIR 1965 Punj 84) that where the Collector of Customs who is bound to hear a party against whom he proposes to make an order had granted personal hearing is transferred, an order passed by his successor without granting a fresh personal hearing violates the principles of natural justice. If, therefore, it is once admitted as has been rightly conceded by Mr. Awasthi, that an order passed without giving a personal hearing to an assessee who had specifically asked for one in proceedings for the imposition of penalty under Section 28 (1) (c) of the Act, would not be valid, the enabling provision of Section 5 (7-C) of the Act does not appear to us to remove in any manner the infirmity which would otherwise be apparent in a successor passing an order on the basis of an oral hearing given by his predecessor in office.

7. The question referred to us is fortunately not *res integra*. It was first considered by a Division Bench of the Calcutta High Court (Lahiri C. J., and Bachawat, J.) in (1960) 40 ITR 178 = (AIR 1960 Cal 543). After the Manager of the assessee had been heard twice in response to a notice of proceedings under Section 28 (1) (c) of the Act, he stated on the second hearing that he had nothing more to submit in support of the assessee's contention. No order was, however, passed by the Income-tax Officer who had given the two hearings, and before whom the proceedings had been closed on behalf of the assessee. Thereafter the proceed-

ings were transferred to another Income-tax Officer before whom no prayer was made by the assessee either to re-open the case or to re-hear the same. Nor did the succeeding Income-tax Officer afford any opportunity of re-hearing to the assessee. The case stood transferred to the succeeding Income-tax Officer before the Income-tax (Amendment) Act (25 of 1953) which introduced Section 5 (7-C) was passed. The Division Bench of the Calcutta High Court proceeded to answer the question whether the assessee loses the right of hearing under Section 28 (3) if he does not exercise his right under the first proviso to Section 5 (7-C) after referring to the distinction between proceedings for assessment and proceedings for imposition of a penalty, and referring to the admitted facts of the case, held as below:—

"The question, however, still remains whether the assessee has lost its right of hearing under Section 28 (3) on account of its failure to exercise its right of having the proceeding reopened under the first proviso to Section 5 (7-C). Mr Meyer appearing for the Commissioner of Income-tax contends that the right conferred by the proviso to Section 5 (7-C) is a substitute for the right conferred upon the assessee by Section 28 (3) so that if an assessee has failed to exercise the right under the proviso there is no further right of hearing under Section 28 (3). I am however unable to accept this contention. The right conferred by the first part of the proviso is a right to have the proceeding reopened whereas the right conferred by Section 28 (3) is a right of being heard. In my opinion, there may be a hearing without having the proceeding reopened and that hearing may be confined to the hearing of arguments only. As a result of the assessee's failure to exercise its right under the first part of the proviso the assessee has undoubtedly lost its right of having the proceeding reopened but I fail to see how it has lost its right of being heard under Section 28 (3) before the officer who has been vested with jurisdiction to continue the penalty proceeding."

Their Lordships of the Calcutta High Court held that the combined effect of Sections 28 (3) and 5 (7-C) is to authorise the succeeding Income-tax Officer to pass an order upon the evidence produced before his predecessor-in-office, but the effect is not to authorise the former to pass an order upon arguments advanced before the latter. On the basis of the abovesaid finding, the Division Bench of the Calcutta High Court answered the reference in favour of the assessee and observed that the Court could not but hold that the succeeding Income-tax Officer had no authority to pass an order of

imposition of penalty without giving the assessee a further opportunity of advancing the arguments before him.

Subsequently a Division Bench of the Patna High Court, while delivering its judgment in (1961) 42 ITR 129 (Pat), expressly differed from the view expressed by the Calcutta High Court in the Calcutta Tanneries' case, 1960-40 ITR 178 = (AIR 1960 Cal 543) (supra), and held that in their opinion the combined effect of S. 28 (3) and S. 5 (7-C) of the Act is that the succeeding Income-tax Officer has the authority to pass an order upon the explanation of the assessee produced before his predecessor-in-office if the assessee had failed to exercise his right under Section 5 (7-C) demanding that the proceedings should be re-opened. With the greatest respect to the learned Judges of the Patna High Court, we are of the opinion that the distinction so clearly brought out in the Calcutta Tanneries' case, 1960-40 ITR 178 = (AIR 1960 Cal 543) between the re-opening of the proceedings and the re-hearing of arguments was not succinctly brought to the notice of the Patna High Court. In any event, the facts on which the decision of the Division Bench of the Patna High Court in Murlidhar Tejpal's case, 1961-42 ITR 129 (Pat) was based were clearly distinguishable in material particulars from the facts of the case before us. In that case no request at all had been made by the assessee for an oral hearing even before the original Income-tax Officer. In the absence of such a request oral hearing was not necessary and inasmuch as no oral hearing had been afforded to the assessee by the original Income-tax Officer, there would have been no violation of the principles of natural justice referred to by the Supreme Court in G Nageswara Rao's case, AIR 1959 SC 308 and even by a Division Bench of this Court in Amir Singh's case, 1964-66 Pun LR 1037 = (AIR 1965 Punj 84) in the proceedings for imposition of penalty against Murlidhar Tejpal.

When a similar question arose before an earlier Division Bench of this Court (Mehar Singh, C. J. and Shamsheer Bahadur, J.) in Satprakash Ram Naranjan v. Commissioner of Income-tax, (1969) 71 ITR 646 (Punj) the view of the matter taken by the Calcutta High Court in Calcutta Tanneries' case, 1960-40 ITR 178 = (AIR 1960 Cal 543) was expressly approved by this Court. The judgments of the Rajasthan High Court in A. C. Metal Works v. Commissioner of Income-tax, Delhi and Rajasthan, (1967) 66 ITR 14 (Raj) and of the Mysore High Court in Shon Siddagowda and Family v. Commissioner of Income-tax, Mysore, (1964) 53 ITR 57 (Mys), were distinguished on the ground that no personal hearing had been

claimed by the assessee in those cases even before the original Income-tax Officer, and there had been no oral arguments. It was also noticed that in the Rajasthan case a written explanation had been submitted in place of oral arguments. Likewise it was noticed that in the Mysore case, the assessee had confined himself to an explanation in writing which alone was available for consideration to the original Income-tax Officer, and which alone was considered by the successor authority. Similar distinction was drawn in the facts of the case decided by the Mysore High Court in Hulekar & Sons v. Commr. of Income-tax, Mysore, (1967) 63 ITR 130 (Mys). The case before us appears to fall within the ratio of the judgment of this Court in Satprakash Ram Naranjan's case, 1969-71 ITR 646 (Punj) and does not fall within the compass of the facts which led to the respective decisions in the Rajasthan case and the Mysore cases. For the same reasons, we are unable to derive any assistance from the judgment of the Calcutta High Court, to which Mr. Awasthi has referred in Kanailal Gatani v. Commissioner of Income-tax and Excess Profits Tax, West Bengal, (1963) 48 ITR 262 (Cal). No oral arguments had been advanced by the assessee before the original Income-tax Officer, and the question of the assessee being prejudiced by one officer hearing and the other deciding neither could nor did arise in that case. Mr. Nirmal Mukherjee, who appeared for Kanailal Gatani before the assessing authorities, had stated expressly before the original assessing authority that "beyond his written statement filed in the matter he had nothing to add." It was on the facts and in the circumstances of that case that the Calcutta High Court held that in the absence of a specific request of the assessee under the pressure of Section 5 (7-C) of the Act, the validity of the order of the succeeding officer deciding on the basis of the record already available was not affected. Their Lordships of the Calcutta High Court emphasised this aspect of the matter by observing as follows:—

"On the facts of the present case, I am of the opinion that Mr. Roy (the succeeding Income-tax Officer) was entitled to make the order, having satisfied himself as to the correctness of it and, inasmuch as no witnesses had been called and no arguments advanced, he was in a position to make the order and that no illegality has been committed."

The Calcutta High Court also made it clear in the penultimate paragraph of its judgment that they had decided the case upon the law as it stood before S. 5 (7-C) was introduced by the Amending Act of 1953, and that the High Court must not

be deemed to have expressed any opinion upon the point whether a re-hearing or a fresh hearing was necessary under Section 5 (7-C), unless it was demanded by the assessee. The judgment of the Calcutta High Court in Kanailal Gatani's case, 1963-48 ITR 262 (Cal) is, therefore, not in point for answering this reference.

8. Inasmuch as the Appellate Tribunal repelled the arguments advanced before it by the assessee by following the view of the Patna High Court in Murlidhar Tejpal's case, 1961-42 ITR 129 (Pat) in preference to the view of the Calcutta High Court in Calcutta Tanneries' case, 1960-40 ITR 178 = (AIR 1960 Cal 543) and inasmuch as we have agreed with the Calcutta view, and have further held that the facts of the Patna case were distinguishable and any observations in the judgment of the Patna High Court which come into conflict with the ratio of the judgment in the Calcutta Tanneries' case, 1960-40 ITR 178 = (AIR 1960 Cal 543) take a rather narrow view of the legal position which would be inconsistent with the authoritative pronouncement of the Supreme Court in G. Nageswara Rao's case, AIR 1959 SC 308, we have no hesitation in answering the question referred to us in the affirmative, i.e. in favour of the assessee. The costs of the assessee in this reference shall be borne by the Revenue.

9. SHAMSHER BAHADUR J.:— I agree.

DVT/D.V.C.

Reference answered accordingly.

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(V 56 C 74)

GURDEV SINGH AND
J. S. BEDI JJ.

Chhotta Singh and others, Petitioners v. Pritam Singh and others, Respondents.

Criminal Original No. 96 of 1966, D/- 22-3-1967 against order of J. S. Bedi, J., D/-14-11-1966.

Contempt of Courts Act (1952), S. 3 — Pepsu Tenancy and Agricultural Lands Act (13 of 1955), S. 39 — Financial Commissioner acting under S. 39 is Court subordinate to High Court.

The Financial Commissioner acting under the provisions of Section 39 of the Pepsu Tenancy and Agricultural Lands Act, 1955, is a Court subordinate to High Court for the purposes of Section 3 of the Contempt of Courts Act, 1952, and its contempt can be taken notice of and punished by High Court. (Para 24)

Apart from the specific provision of Section 84 (5) of Punjab Tenancy Act

EM/FM/C360/69/B

1887 making it incumbent upon the Financial Commissioner to hear the parties before interfering with the order against which the revisional proceedings are pending before him, the scheme of the Pepsu Tenancy and Agricultural Lands Act, 1955, itself leaves no doubt that the Financial Commissioner, in exercise of his revisional powers, functions as a Court. That he is a Court subordinate to High Court for the purpose of Section 3 of the Contempt of Courts Act no longer admits of any doubt, as under Art. 227 of the Constitution, the High Court exercises judicial control over all Courts and tribunals functioning within the limits of its territorial jurisdiction. Case Law Discussed. (Para 23)

Cases Referred: Chronological Paras

- (1967) AIR 1967 SC 1494 (V 54) = Criminal Appeal No 18 of 1965, D/-13-3-1967 = 1967 Cri LJ 1380, Thakur Jugal Kishore Sinha v. Sitamarhi Central Co-op Bank Ltd. 13, 16, 23
- (1965) AIR 1965 Pat 227 (V 52) = 1965 (1) Cri LJ 748 Sitamarhi Central Co-op Bank Ltd. v. Thakur Jugal Kishore Sinha 11
- (1964) AIR 1964 Bom 147 (V 51) = 1964 (1) Cri LJ 652, Malbar Hill Co-op Housing Society v. K. L. Gauba 12
- (1963) 1963 (1) Cri LJ 507 = 1962 All LJ 57, Raja Humanshu Dhar Singh v. Kunwar B. P. Sinha 12
- (1963) AIR 1963 Bom 254 (V 50) = 1963 (2) Cri LJ 603, Registrar High Court, A. S. Bombay v. S. K. Irani Advocate 11
- (1962) AIR 1962 All 315 (V 49) = 1962 (2) Cri LJ 1 (FB) Ram Saran Tewari v. Raj Bahadar Verma 11
- (1959) AIR 1959 Madh Pra 50 (V 46) = 1959 Cri LJ 199, Chunilal Ken v. Shyamal Sukhran 22
- (1956) AIR 1956 SC 66 (V 43) = 1956 Cri LJ 156, Brajansdan Sinha v. Jyoti Narain 13, 18
- (1956) AIR 1956 SC 153 (V 43) = 1955-2 SCR 1013, Virindar Kumar Satyawadi v. State of Punjab 17
- (1955) AIR 1955 Bom 103 (V 42) = 1955 Cri LJ 351, Lakhama Peshva v. Venkatrao Swamirao Nazare 11
- (1937) 1937-2 KB 309 = 106 LJ KB 728, Cooper v. Wilson 16, 18

H. S. Wasu, for Petitioners; H. L. Sarin, Balraj Behal and Behal Singh Malik, for Respondents.

GURDEV SINGH J.:— In this petition under Section 3 of the Contempt of Courts Act Chhotta Singh and others complain of disobedience of the orders of this Court dated 15th December, 1965 and 11th February, 1966 in Civil Writ No. 2955 of 1965, as well as of the order of the

Financial Commissioner dated 5th November, 1965 passed in proceedings between the parties under the Pepsu Tenancy and Agricultural Lands Act. The matter came up before my learned brother Bedi J., who being of the opinion that the question whether the Financial Commissioner is a Court subordinate to the High Court, the contempt of which can be punished by this Court was not free from difficulty, referred the case to a larger Bench by his order dated 14th of November, 1966.

2. The petitioners, Chhotta Singh and others, were settled under the orders of the prescribed authority (Naib-Tahsildar) dated 21st December, 1962 on some of the lands that had been declared surplus in the hands of Gurdial Singh, respondent No. 3, a big landowner in village Bugaran, District Bhatinda. An appeal against this allotment of land to the petitioners was preferred by Gurcharan Singh, respondent No. 5, who claimed to be a tenant of the land in question under Gurdial Singh. The Collector, Bhatinda decided this appeal on 5th of August, 1965 and remanded the case for fresh decision. Thereupon the landowner Gurdial Singh (respondent No. 3) dispossessed the petitioners and obtained possession of the surplus area that had been allotted to them by the prescribed authority. The petitioners went up in revision against the Collector's order and the petition was accepted by the Financial Commissioner on 5th of November, 1965. The Financial Commissioner held that Gurcharan Singh was not a tenant of Gurdial Singh and thus not entitled to any part of the surplus area. As a result of this finding, the Financial Commissioner, holding that Gurdial Singh had wrongly taken possession of the surplus land directed that he should be immediately dispossessed and the surplus area originally allotted to the petitioners should be restored to them. The actual possession, however, could not be delivered to the petitioners as crops were standing therein. Before the compensation for those crops, which was assessed by the Gram Panchayat, could be deposited by the petitioners, Gurcharan Singh (respondent No. 5) questioned the validity of the Financial Commissioner's revisional order dated 5th November, 1965 by means of a petition under Arts. 226 and 227 of the Constitution (Civil Writ No. 2955 of 1965). On admission of the writ petition Gurcharan Singh moved for staying the operation of the Financial Commissioner's order, on which Narula, J. on 15th December, 1965 directed: "Status quo regarding possession of the petitioner to be maintained" pending notice to the opposite party. As at that time the possession of the land in dispute was with Gurdial Singh and not Gurcharan Singh and thus the order operated

to the benefit of Gurdial Singh and not that of the writ petitioner Gurcharan Singh, the present petitioners applied for the clarification of the order. Thereupon Dua J., after hearing the parties' counsel passed the following order on 11th February, 1966:—

"After hearing both sides it is agreed at the bar that the stay order of this Court should only be operative as against dispossession of Gurcharan Singh petitioner in the writ petition. The actual physical dispossession of Gurdial Singh landlord is not covered by this writ's stay order. It may however, be clarified that actual physical dispossession of Gurcharan Singh is quite clearly being stayed by this order pending the disposal of the writ petition....."

3. The petitioners allege that despite this order Gurdial Singh, in conspiracy with Pritam Singh (Respondent No. 1), S. I. Prem Singh (Respondent No. 2) and with the assistance of Bakhtawar Singh and Gurcharan Singh, (Respondents 4 and 5 respectively) reaped the Sarson crop despite the fact that the compensation for that crop as assessed by the Gram Panchayat had been deposited by the petitioners and realised by Gurdial Singh. The petitioners complain that this conduct of the respondents constituted gross disobedience of the order of the Financial Commissioner dated 5th November, 1965, and the stay order of this Court, as clarified on 11th of February, 1966 by Dua J. for which they be punished.

4. All the respondents have denied the alleged disobedience or defiance of the orders of this Court or that of the Financial Commissioner. The fact that Gurdial Singh had taken possession of the land which was originally allotted to the petitioners as surplus area and had also taken away the crops standing therein on the day the Financial Commissioner passed his order dated 5th of November, 1965 is not disputed by them. Sub-Inspector Prem Singh defended himself by stating that he acted under the orders of his superiors and the order of this Court dated 11th of February, 1966 was never brought to his notice.

5. Naib-Tehsildar Pritam Singh (Respondent No. 1) similarly pleaded that he acted in pursuance of the order of the Collector dated 11th August, 1965 and delivered possession of vacant area measuring 107 Kanals and 17 Marlas to Gurdial Singh through the Kanungo Agrarian, Bhatinda. He further stated that after the acceptance of the revision petition of Chhotta Singh he received an order from the Collector Agrarian, Bhatinda, to deliver possession to the petitioners after dispossessing Gurdial Singh. Thereupon he went to the spot along with

the Revenue Patwari when he found that the crops were standing in the land and actual possession could not be delivered. Under the circumstances he delivered symbolic possession to the petitioners and assessing compensation for the standing crops at Rs. 900 sent his proposal to the Collector Agrarian for necessary approval. The amount of compensation proposed by him was, however, objected by both the parties whereupon the Collector Agrarian by his order dated 10th December, 1965 referred the question of assessment of compensation to the Gram Panchayat, Bugran. It was, however, as late as 30th of December, 1965 that the Panchayat moved in the matter and fixed the compensation at Rs. 1300, but the present petitioners did not deposit the compensation. He further asserted that the order of Dua J. dated 11th of February, 1966 was not shown to him and all that he did in that matter after this order was passed was to report to the Collector that since compensation for the standing crops had not been deposited by the tenants, no further action could be taken in the matter till fresh orders were received from the Collector. Long before 30th of April, 1966 this Naib-Tehsildar relinquished the charge of his office and was succeeded by Shri Gauri Shankar.

6. The Respondents 3 to 5 have defended the cutting of the crops in the disputed land on the plea that the compensation assessed by the Panchayat (Rs. 1300) had not been deposited by the petitioners and they asserted that since the actual possession of the land was still with Gurdial Singh, he was entitled to take away the crops.

7. It is an admitted fact that on acceptance of the respondent Gurcharan Singh's application by the Collector, Gurdial Singh got back the possession of the land that was originally allotted to the petitioners as surplus area. The question whether Gurdial Singh was entitled to take such possession or not does not arise in these proceedings. It is also not disputed that consequent upon the acceptance of the petitioners' revision petition by the Financial Commissioner on 5th of November, 1965, since crops were standing in the land in dispute it was only symbolic possession that was delivered to the petitioners and the actual possession was deferred till the assessment of the compensation by the Panchayat and its payment by the present petitioners. It is common ground that if the compensation was not paid, the present petitioners were not entitled to take actual possession and in those circumstances the crops could be harvested by Gurdial Singh, who was in actual possession of the land at the time the Financial Commissioner passed his order dated 5th November,

1965 In this petition there is nowhere alleged by the petitioners that the compensation assessed by the Gram Panchayat was deposited by them. On the other hand, the respondents have vehemently maintained that this compensation was never deposited by the petitioners or paid to Gurdial Singh. In these circumstances, the crops which were ripe for harvesting could be taken away by Gurdial Singh. It is true that the status quo with regard to possession of the land in dispute had to be maintained pending the disposal of the writ petition, as directed by Narula, J. on 15th of December, 1965 and Dua, J., while clarifying that order on 11th February, 1966 had said that the actual possession of Gurdial Singh was not covered by this order but only that of Gurcharan Singh. The effect of these orders was to leave the present petitioners free to take actual possession of the land in dispute from Gurdial Singh and in terms of the order of the Collector Agrarian, before the actual possession could be taken by the petitioners they had to deposit compensation for crops as assessed by the Panchayat Bugran. Since they had not deposited the compensation, the crops which had ripened could not be allowed to remain standing indefinitely and if Gurdial Singh had harvested that crop it cannot be said that there was any violation of the orders made by this Court.

8 The copy of the Financial Commissioner's order, the disobedience of which is complained of, has not been placed on record. The Financial Commissioner had no doubt reversed the order of the Collector and directed that Gurdial Singh should be immediately dispossessed from the land that had been originally allotted to the petitioners but if in execution of that order the petitioners did not deposit the compensation for the standing crops, and the crop was harvested by Gurdial Singh it cannot be said that there has been any disobedience of those orders, which requires action by this Court under S 3 of the Contempt of Courts Act.

9. We thus find that even assuming that the Financial Commissioner is a Court subordinate to this Court, disobedience of whose orders can be punished as contempt by this Court under Section 3 of the Contempt of Courts Act, we find that this petition must fail on merits as it has not been proved that any of the respondents had flouted or acted in disobedience of the relevant orders of this Court and that of the Financial Commissioner.

10. In this view of the matter the legal question with regard to the jurisdiction of this Court to punish the disobedience of the orders of the Financial Commis-

sioner under Section 3 of the Contempt of Courts Act does not arise, but since it was this legal issue that necessitated reference to this Bench, we would like to express our opinion on it.

11. In the course of arguments, the parties' learned counsel have referred to decisions of various Courts in which the question whether the contempt of an authority other than a Civil or Criminal or Revenue Court can be punished by this Court has been considered. None of these authorities, however, relates to the disobedience of an order passed by a Financial Commissioner. In *Lakhama Pasha v. Venkatrao Swamirao Nazare*, AIR 1955 Bom 103 a Division Bench of that Court, to which Chagla C J., was a party, held that Chief Judge of the Court of Small Causes, acting as *persona designata* under City of Bombay Municipal Act was a Court subordinate to the High Court, and if a contempt is committed of that authority, it was open to the High Court to take cognizance of it and commit the contemner as if the contempt had been committed of the High Court itself. Later, in *Registrar, High Court, A. S. Bombay v. S. K. Irani*, AIR 1963 Bom 254, the same Court ruled that the authority constituted under Payment of Wages Act, 1936, is a Court subordinate to the High Court within the meaning of Section 3 of the Contempt of Courts Act. In *Chunnilal Ken v. Shyamlal Sukhran*, AIR 1959 Madh Pra 50, an Election Tribunal constituted under the Representation of the People Act, 1951, was held to be a Court subordinate to the High Court under Section 3 of the Contempt of Courts Act. The majority view taken in the Full Bench case of *Ram Saran Tewari v. Raj Bahadur Verma*, AIR 1962 All 315 is that Nyaya Panchayats established under the U. P. Panchayat Raj Act, 1947, are Courts subordinate to the High Court within the meaning of Section 3 of the Contempt of Courts Act. In the *Sitamarhi Central Co-operative Bank Ltd. v. Thakur Jugal Kishore Sinha*, AIR 1965 Pat 227 a Division Bench of the Patna High Court held that an Assistant Registrar exercising the powers of a Registrar under Section 48 of Bihar and Orissa Co-operative Societies Act, 1935 was a Court subordinate to the High Court.

12. In *Malabar Hill Co-operative Housing Society v. K. L. Gauba*, AIR 1964 Bom 147, the Bombay High Court held that contempt of a nominee of a Registrar appointed under Section 54 of the Bombay Co-operative Societies Act, 1925, was not punishable as the provision relating to the appointment of a nominee itself indicated that the power which he derived for deciding the dispute was not a power derived from the State, and though he possessed certain trappings of a Court, he

had no independent seisin over the case, and the power exercising by him was that of an arbitrator enabling him to make an award, which could not be equated with a judgment or decision of a Court. Similarly, in *Raja Himanshu Dhar Singh v. Kunwar B. P. Sinha*, 1962 All LJ 57 = 1963 (1) Cri LJ 507 the High Court refused to punish the contempt of an Assistant Registrar of Co-operative Societies, being of the opinion that "only those arbitrators can be deemed to be Courts who are appointed through a Court and not those arbitrators who function without the intervention of a Court."

13. The last two cases referred to above along with various other authorities bearing upon the interpretation of Section 3 of the Contempt of Courts Act have been considered by their Lordships of the Supreme Court quite recently in *Thakur Jugal Kishore Sinha v. Sitamarhi Central Co-operative Bank Ltd.* Criminal Appeal No. 18 of 1965, D/-13-3-1967 = (AIR 1967 SC 1494) and it is unnecessary to notice the other decisions of the various High Courts bearing on the point as the matter stands concluded by this latest pronouncement of their Lordships of the Supreme Court. In the earlier case of *Brajnandan Sinha v. Jyoti Narain*, AIR 1956 SC 66, on consideration of the various Indian and English decisions, it has been ruled that a Commissioner appointed under the Public Servants (Inquiries) Act, 1850, does not constitute a Court within the meaning of the term as used in the Contempt of Courts Act.

14. Section 3 of the Contempt of Courts Act provides:—

"3(1) Subject to the provisions of subsection (2) every High Court shall have and exercise the same jurisdiction, powers and authority, in accordance with the same procedure and practice, in respect of contempts of Courts subordinate to it as it has and exercises in respect of contempts of itself."

15. Before action can be taken under this provision, for the alleged contempt of the Financial Commissioner, two matters have to be considered, viz., (1) whether the Financial Commissioner is a Court, and (2) if the answer to the first question is in the affirmative, whether he is a Court subordinate to this Court.

16. It is now well settled, and this has not been disputed before us, that the word "Court" used in the Contempt of Courts Act is not confined to ordinary Civil, Criminal or Revenue Courts. In fact, both the questions posed above are concluded by the recent decision of their Lordships of the Supreme Court in Criminal Appeal No. 18 of 1965, D/-13-3-1967 = (AIR 1967 SC 1494) to which re-

ference has already been made. In considering what distinguishes a Court from a quasi-judicial or other authority, Mitter, J., delivering the judgment of the Court, relied upon *Cooper v. Wilson*, (1937) 2 KB 309 where at page 340 of the Report it was observed:—

"It is clear, therefore, that in order to constitute a Court in the strict sense of the term, an essential condition is that the Court should have, apart from having some of the trappings of a judicial tribunal, power to give a decision or a definitive judgment which has finality and authoritativeness which are the essential tests of a judicial pronouncement."

17. His Lordship also referred to the earlier decision of the Supreme Court in *Virindar Kumar Satyawadi v. State of Punjab*, 1955-2 SCR 1013 = (AIR 1956 SC 153) and quoted with approval the following passage from that judgment:—

"It may be stated broadly that what distinguishes a Court from a quasi-judicial tribunal is that it is charged with a duty to decide disputes in a judicial manner and declares the rights of parties in a definitive judgment. To decide in a judicial manner involves that the parties are entitled as a matter of right to be heard in support of their claim and to adduce evidence in proof of it. And it also imports an obligation on the part of the authority to decide the matter on a consideration of the evidence adduced and in accordance with law. When a question, therefore, arises as to whether an authority created by an Act is a Court as distinguished from a quasi-judicial tribunal, what has to be decided is whether having regard to the provisions of the Act it possesses all the attributes of a Court."

18. Proceeding further, reliance was placed upon the following observations contained in 1937-2 KB 309 (*supra*) which had been earlier approved by the Supreme Court in *Brajnandan Sinha's case*, AIR 1956 SC 66:—

"A true judicial decision pre-supposes an existing dispute between two or more parties, and then involves four requisites:

(1) The presentation (not necessarily orally) of their case by the parties to the dispute; (2) if the dispute between them is a question of fact the ascertainment of the fact by means of evidence adduced by the parties to the dispute and often with the assistance of argument by or on behalf of the parties on the evidence; (3) if the dispute between them is a question of law, the submission of legal arguments by the parties; and (4) a decision which disposes of the whole matter by a finding upon the facts in dispute and an application of the law of the land to the facts so found, including where required a ruling upon any disputed question of law."

19. In the light of these authoritative pronouncements laying down the tests for determining whether an authority is a Court or not, I now proceed to examine the functions in discharge of which the order, disobedience of which is complained of, was passed by the Financial Commissioner. That order was admittedly made by the Financial Commissioner while exercising his revisional jurisdiction under sub-section (3) of S 39 of the Pepsu Tenancy and Agricultural Lands Act, 1955 (hereinafter referred to as the Act). Under this provision, the Financial Commissioner has the authority to call for, examine and revise the proceedings of the prescribed authority or the Assistant Collector First Grade or the Collector or the Commissioner, as is provided in Section 84 of the Punjab Tenancy Act, 1887. Sub-section (5) of S 84 of the Punjab Tenancy Act, 1887, provides—

"If, after examining the record, the Financial Commissioner is of opinion that it is expedient to interfere with the proceedings or the order or decree on any ground on which the High Court in the exercise of its revisional jurisdiction may under the law for the time being in force interfere with the proceedings or an order or decree of a Civil Court, he shall fix a day for hearing the case, and may, on that or any subsequent day to which he may adjourn the hearing or which he may appoint in this behalf, pass such order as he thinks fit in the case."

20. Apart from this specific provision, making it incumbent upon the Financial Commissioner to hear the parties before interfering with the order against which the revisional proceedings are pending before him, the scheme of the Pepsu Tenancy and Agricultural Lands Act, 1955, itself leaves no doubt that the Financial Commissioner, in exercise of his revisional powers, functions as a Court. In this connection, it will suffice to refer to Section 41 of this Act, which runs thus—

"41 Officers holding enquiries to have powers of Civil Courts. Any officer or authority holding an enquiry or hearing an appeal or a revision under this Act shall have the powers of a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908), relating to—

- (a) Proof of facts by affidavits;
- (b) enforcing attendance of any person and his examination on oath,
- (c) production of documents;
- (d) issue of commission;

and every such officer or authority shall be deemed to be a Civil Court within the meaning of Sections 480 and 482 of the Code of Criminal Procedure, 1898 (Act IV of 1898)."

21. Section 42 then provides for penalty for making a false statement in

the course of the proceedings under the Act. Section 47 bars the jurisdiction of a Civil Court to settle, decide or deal with any matter which under this Act is required to be settled, decided or dealt with by the Financial Commissioner or the prescribed authority, and further provides:—

"No order of the Financial Commissioner, the Commissioner, the Collector or the prescribed authority made under or in pursuance of this Act shall be called in question in any Court."

22. In view of all these provisions and the Scheme of the Act, the conclusion is inescapable that the Financial Commissioner was acting as a Court in making the order, the disobedience of which is complained of before us.

23. That he is a Court subordinate to this Court for the purpose of Section 3 of the Contempt of Courts Act no longer admits of any doubt, as on review of the various authorities, it has been ruled by their Lordships of the Supreme Court in Criminal Appeal No 18 of 1965, D/13-3-1967 = (AIR 1967 SC 1494):—

"Under Art. 227 of the Constitution, the High Court exercises judicial control over all Courts and tribunals functioning within the limits of its territorial jurisdiction."

Reiterating the point, Mitter J., observed:—

"Article 227 is of wider ambit: it does not limit the jurisdiction of the High Court to the hierarchy of Courts functioning directly under it under the Civil Procedure Code and Criminal Procedure Code, but it gives the High Court power to correct errors of various kinds of all Courts and tribunals in appropriate cases. Needless to add that errors as to the interpretation of the Constitution is not out of the purview of Art. 227 although the High Court could not, under the powers conferred by this Article, withdraw a case to itself from a tribunal and dispose of the same, or determine merely the question of law as to the interpretation of the Constitution arising before the tribunal. In our view, the subordination for the purpose of Section 3 of the Contempt of Courts Act means judicial subordination and not subordination under the hierarchy of Courts under the Civil Procedure Code or the Criminal Procedure Code."

24. For all these reasons, we are of the opinion that the Financial Commissioner acting under the provisions of S 43 (39) of the Pepsu Tenancy and Agricultural Lands Act, 1955, is a Court subordinate to this Court for the purposes of Section 3 of the Contempt of Courts Act, 1952, and its contempt can

[be taken notice of and punished by this Court.

25. J. S. BEDI J.:— I agree.

CWM/D.V.C. Order accordingly.

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(V 56 C 75)

FULL BENCH

**D. K. MAHAJAN, SHAMSHER
BAHADUR AND R. S. NARULA JJ.**

Jagdish Mitter, Petitioner v. Union of India and another, Respondents.

Civil Writ No. 2307 of 1965, D/-28-2-1969, decided by Full Bench on Order of Reference made by P. D. Sharma J., D/-15-2-1967.

(A) Limitation Act (1908), Art. 102 — Dismissal of Government servant found illegal and set aside — Servant reinstated — Suit for recovery of arrears of salary — Can claim salary only for a period of three years and two months before the suit — R. 52 of the Fundamental Rules does not apply — ILR (1966) 1 Punj 302 & R. F. A. No. 8-D of 1964, D/-6-9-1966 (Punj) & (1967) 1 Ser. LR 594 (Punj) Overruled; AIR 1961 Mad 486 & AIR 1963 Mad 425, Dissented from — (Civil P. C. (1908), Preamble — Interpretation of Statutes — Statute of Limitation).

A public servant, after his dismissal or removal has been declared to be unlawful, can claim wages or salary only up to a period of three years and two months in lieu of the notice period under Section 80, Civil P. C. from the date when the cause of action accrued. Case law discussed. ILR (1966) 1 Punj 302 and R. F. A. No. 8-D of 1964, D/-6-9-1966 (Punj) and (1967) 1 Ser LR 594 (Punj) Overruled; AIR 1961 Mad 486 and AIR 1963 Mad 425, Dissented from. (Para 21)

When an order of dismissal of a civil servant is declared void or inoperative, the declaration of the Court does not make the order void but merely declares or exposes the already existing infirmity in the order. Such an order of dismissal being ineffective from its inception, the civil servant continues in service in spite of the order and the cause of action for the salary accrues every month. The right to recover wages or salary under Article 102 is a continuing right and each successive breach gives right to a fresh cause of action. (Paras 8, 18)

A legal fiction having been employed for saying that an order of dismissal is non est and non-existing in the eye of law, if it is found to be wrongful and ultra vires, all the consequences flowing from

it should be logically pursued and followed and one of such results is that the salary had accrued to the official who had been wrongfully dismissed. The sweep and amplitude of the legal fiction that the employee should be deemed to be in service all along will have the effect of preventing payment of arrears in respect of a period beyond three years when actually the employee was doing nothing for the Government. However, ethical considerations of fairness and equity are hardly relevant or germane in determining the strict and technical rules of limitation. When the terminus a quo is the time when the wages accrue and by a legal fiction the entire period of removal or dismissal is deemed to be one spent in actual service, it is legitimate to give full meaning and content to the words in the third column of Article 102 of the Limitation Act. (Paras 10, 11)

Further, in cases in which the dismissal of a public servant is declared invalid by a Civil Court and he is reinstated, the operation of R. 52 of the Fundamental Rules will come to a stop and it will cease to have any force in the eye of law. An order setting aside the dismissal cannot by its very nature alter the date of accrual of cause of action. (Para 16)

(B) Constitution of India, Art. 226 — Writ proceedings — Consequential relief — High Court has power to order.

Even in writ proceedings the High Court has, in exercise of its jurisdiction under Article 226 of the Constitution of India, power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief but the Court ought not ordinarily to lend its aid to a party by this extraordinary remedy of mandamus when the relief prayed for raises a triable issue of limitation in which case it would be best to leave the party to seek his remedy by the ordinary mode of action in a civil Court: AIR 1964 SC 1006 Rel. on. (Para 21)

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Abnasha Singh, for Petitioner; J. L. Gupta, for Respondents.

SHAMSHER BAHADUR, J.— The question which has been referred to this Full Bench by the order of P. D Sharma J of 15th of February, 1967, arises from two sets of Bench decisions of this Court in K. K Jaggia v State of Punjab ILR (1966) 1 Punj 302— Regular First Appeal No 8-D of 1964 (Punj) Union of India v Maharaj decided by S B Capoor and H R Khanna JJ. on 6th of September, 1966 and the State of Punjab v. Ram Singh Brar, (1967) 1 Ser LR 594 (Punj) decided by Mahajan and Narula JJ on the one hand and Union of India v Ram Nath, ILR (1966) 2 Punj 907 = (AIR 1966 Punj 500) (Dulat and S K. Kapur JJ) on the other, which though in conflict with each other purport to follow the same authority of the Supreme Court in Madhav Laxman Vaikunte v. State of

Mysore, (1962) 1 SCR 886 = (AIR 1962 SC 8). The impasse, which is sought to be resolved centres on the question whether, a Government employee whose dismissal from service has been found to be void and unlawful can recover by a suit or proceeding filed in time his claim for arrears of salary in respect of the entire period when he remained out of employment or is limited only to a period of three years before the institution of the suit or proceeding?

2. The facts with regard to the case in point may now be briefly narrated. The petitioner Jagdish Mitter, a temporary clerk in the office of the Post-Master General, Lahore, since 9th of October, 1946, was discharged from service on 1st of December, 1949. In a suit brought against the Union of India on 11th November, 1952, and dismissed by the trial Court on 22nd March, 1954, the lower appellate Court granted a decree in his favour on May 25, 1954 to the effect that the termination of his service was illegal being in contravention of the relevant Rules and Regulations. In a further appeal of the Union of India, the suit was again dismissed by a Single Judge of the Punjab High Court (S. B. Capoor J) on 10th August, 1959, and the petitioner, though unsuccessful in his appeal before the Letters Patent Bench which dismissed it in limine on 19th August, 1960, eventually gained his point on 20th of September, 1963, before the Supreme Court in a judgment which is often cited as an authority on the question of wrongful dismissal, this being Jagdish Mitter v. Union of India, AIR 1964 SC 449. According to the judgment of the Supreme Court, the decree passed in favour of Jagdish Mitter by the lower appellate Court was restored.

3. In consequence of the decision of the Supreme Court, which declared that the petitioner was illegally dismissed from service "and that, therefore, he continues in service", the Director, Postal Services, on 2nd July, 1964, passed an order for reinstating him as a lower division clerk with effect from 1st December, 1949. It was further directed that the petitioner would be entitled to such of his pay and allowances for the period between 1st of December, 1949, when his services were terminated and 4th of October, 1963, when he was reinstated by virtue of the Supreme Court decision, as would be permissible under the law of limitation. The petitioner kept on agitating departmentally for the full benefits which he claimed should have accrued to him as a result of his ultimate success in the litigation, but his request was turned down on 6th of November, 1964, and was offered only three years' pay preceding the date of his

reinstatement from which the sum which he had already drawn while temporarily employed was to be deducted. A notice under Section 80 of the Code of Civil Procedure was then sent by the petitioner to the Government of India on 3rd of April, 1965, and the present writ petition under Articles 226 and 227 of the Constitution of India was filed on 21st of August, 1965, praying that he should be deemed to be in service right from the date of termination of his service, i.e., 1st December, 1949, and that he should be paid arrears of salary for the entire period without deduction of the amounts which he may have received while in service during that period. Mr. Abnasha Singh, counsel for the petitioner, further submits that some ancillary relief for proper adjustment of seniority has also to be spelled

out from the relief claimed in the petition.

4. Sharma J., who heard the petition on 15th of February, 1967, noticed a conflict of judicial view regarding the question formulated aforesaid, and the matter has, therefore, been sent for the authoritative pronouncement of this Bench on the question whether after the cause of action is found to be in time, recovery can be effected for the entire period when the employee was under dismissal or suspension or up to a period of three years and two months in lieu of the notice period?

5. It is common ground that, the time from which the period would begin to run is governed by Article 102, of the Indian Limitation Act, 1908 which is to this effect:—

"Description of suit."	Period of limitation	Time from which period begins to run.
102. For wages not otherwise expressly provided for by this schedule.	Three Years.	When the wages accrue due."

6. The claim of the petitioner is founded on a Division Bench Judgment of Gurdev Singh J. and myself in Jaggia's case ILR (1966) 1 Punj 302, where in a writ petition it was held that the right to recover full pay and allowances for the period of interim suspension was to accrue to the aggrieved person from the date when the order of his dismissal was quashed and under Article 102 of the Limitation Act, if the proceeding was brought within three years from that date, the entire amount of arrears during the period of wrongful suspension became due. Gurdev Singh J., with whom I agreed, directed the respondent State of Punjab to

"pay full salary and allowances admissible to the petitioner for the entire period between the dates of his first suspension and reinstatement, i.e., from 16th May, 1956, to 19th September, 1963, after deducting the amount which the petitioner has already received as subsistence allowance for the period of his suspension prior to his dismissal."

7. Reliance for this conclusion was sought from the Supreme Court authority in Laxman Vaikunthe's case (1962) 1 SCR 886=(AIR 1962 SC 8) where a public servant reduced in rank on 11th August, 1948, continued in service and retired on superannuation on 29th of November, 1953. In a suit filed by the official against the Government of Bombay on 2nd of August, 1954, for a declaration that the order of reduction in rank passed on 11th August, 1948, was void, inoperative and ultra vires, as also for recovery of ar-

rears of salary, allowances etc., it was held that reduction in rank was unlawful but a decree in respect of three years' period from 2nd June, 1951, that is to say, three years plus two months for notice prior to the date of institution of the suit, was passed. The claim for arrears of salary prior to 2nd of June, 1951, was held to be barred by limitation. The decision of the Supreme Court was relied upon by the Bench in Jaggia's case ILR (1966) 1 Punj 302 for the proposition that in a suit to recover arrears of salary the provisions of Article 102 of the Indian Limitation Act are applicable. It seems to me in retrospect that the observation made by the Bench in Jaggia's case ILR (1966) 1 Punj 302 that if the suit is within three years the entire arrears of wages or salary could be recovered when a public servant remained under wrongful suspension or dismissal, was not in accord with the relief granted by the Supreme Court in Laxman Vaikunthe's case, (1962) 1 SCR 886=(AIR 1962 SC 8). No doubt, their Lordships of the Supreme Court did not give any reasons for this conclusion, but it is manifest from the decree in respect of three years and two months passed by the Court that the claim if otherwise in time was to be restricted to this period.

8. In Laxman Vaikunthe's case, (1962) 1 SCR 886=(AIR 1962 SC 8) the Supreme Court relied on a decision of the Federal Court in Punjab Province v. Tara-chand, 1947 FCR 89=(AIR 1947 FC 23) a decision to which reference was also made by Gurdev Singh J. in Jaggia's case ILR (1966) 1 Punj 302. Though the prin-

principal question in Tarachand's case, 1947 FCR 89=(AIR 1947 FC 23) related to the right of a servant of the Crown for arrears of salary and the decision of that Court that such a right was governed by Article 102 of the Limitation Act and that the word 'wages' was wide enough to include 'salary' Zafrulla Khan J., towards the end of the judgment made mention of the question of limitation which was raised by the counsel appearing for the contesting parties by the leave of the Court. At page 109 (of FCR)=(at p 29 of AIR) of the report, his Lordship observed.—

"It is obvious that if this was a case of breach of contract there were successive breaches at the end of each month and the respondent would still be entitled to recover arrears of pay which fell due within a period of three years before the institution of the suit. On this being pointed out counsel conceded that that was so and the point was not further pressed."

The ratio decidendi of the Federal Court on the aspect of limitation clearly was that, the right to recover wages or salary under Article 102 was a continuing right and each successive breach gave right to a fresh cause of action. The legal consequence which flows from this conclusion is that recovery could be made in respect of dues for a period of three years only before the institution of the suit or proceeding, and such was the implicit assumption of their Lordships of the Supreme Court in Laxman Vaikunth's case, (1962) 1 SCR 886=(AIR 1962 SC 8) when the suit of the aggrieved official which was found to be in time was decreed only for a period of three years and two months

9. As observed by the Supreme Court in State of Madhya Pradesh v Syed Qamarali, (1967) 1 Ser LR 228 (SC) if an order of dismissal is made in breach of mandatory provisions and is found to be void and inoperative it becomes totally invalid and such an order of dismissal, in the words of Mr. Justice Das Gupta "had therefore no legal existence and it was not necessary for the respondent to have the order set aside by a Court". In the eye of law, therefore, the order of dismissal ceases to have any existence and the period of dismissal in consequence must be regarded as a period for which the dismissed employee must be deemed to be in service. In short, the legal fiction itself regarding the non-existence of the order of dismissal gives rise to the other fiction about his continued accrual of wage or salary dues during the period of dismissal.

10. Mr. Abnasha Singh, the learned counsel for the petitioner, besides Jaggi's

case, ILR (1966) 1 Punj 302 has placed reliance on two other Bench decisions of this Court. In R F. A. No. 8-D of 1964, (Punjab) decided by a Circuit Bench of S B. Kapoor and H R Khanna JJ. of this Court on 6th of September, 1966, Maharaj, an employee of the Military Secretary's Branch, General Headquarters, Government of India, was dismissed from service with effect from 20th of May, 1947, and his suit for reinstatement in service though dismissed in the first instance, was decreed by the lower appellate Court. The Government's appeal was dismissed by the High Court on 25th March, 1955, and the application to file a letters patent appeal was further dismissed on 21st of September, 1956. The employee was in consequence reinstated in November, 1957. In a suit brought by the official for recovery of arrears a point was raised on behalf of the Government that he could not recover more than three years and two months' salary in consequence of the decision in Laxman Vaikunth's case, (1962) 1 SCR 886=(AIR 1962 SC 8). The Bench observed that in the Supreme Court decision and the case before it, the essential difference was that the plaintiff before the Supreme Court had not been dismissed or discharged from service but had been reverted from his officiating to his substantive post, while Maharaj was actually dismissed from service. An observation was made that the pay and allowances of a Government servant, who is dismissed or removed from service cease from the date of "such dismissal or removal". As provided in Rule 52 of the Fundamental Rules, "the pay and allowances of a Government servant who is dismissed, or removed from service cease from the date of such dismissal or removal".

'According to the Bench, the continuing breach, to which reference was made in Tarachand's case 1947 FCR 89=(AIR 1947 FC 23), ceased to be of any effective use in a case of removal or dismissal. As it would be necessary in such a case for the Government servant to have the order of dismissal or removal first set aside for suit for recovery of arrears, the claim should not be restricted to a period of three years and two months. In the words of the Court—

"It is, however, only by a legal fiction that the Government servant in such a case is deemed to have been in service all along, but the hard fact is that in consequence of the order of his dismissal the plaintiff was barred by Fundamental Rule 52 from making any claim to salary until he had the order of dismissal set aside by the Court. It would be absurd and futile to suggest that in the long interval while the litigation remained pending

the plaintiff should have periodically filed suits for his salary."

The answer to this argument is that a legal fiction having been employed for saying that an order of dismissal is non est and non-existing in the eye of law, if it is found to be wrongful and ultra vires, all the consequences flowing from it should be logically pursued and followed and one of such results is that the salary had accrued to the official who had been wrongfully dismissed. In a House of Lords case in *East End Dwellings Co. Ltd. v. Finsbury Borough Council*, (1952) AC 109, Lord Asquith said thus at page 132:—

"If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it . . . The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

11. No doubt, Lord Asquith was speaking of the legal fiction in the construction of a statute, but I do not see how the principle will not apply in the case of a legal fiction which has been employed by the highest Court of the land in the case of a wrongful order of dismissal. In fact, the sweep and amplitude of the legal fiction that the employee should be deemed to be in service all along will have the effect of preventing payment of arrears in respect of a period beyond three years when actually the employee was doing nothing for the Government. However, ethical considerations of fairness and equity are hardly relevant or germane in determining the strict and technical rules of limitation. When the terminus a quo is the time when the wages accrue and by a legal fiction the entire period of removal or dismissal is deemed to be one spent in actual service, it is legitimate to give full meaning and content to the words in the third column of Article 102 of the Indian Limitation Act.

12. The reason for distinguishing the case of *Maharaj, R.F.A. No. 8-D of 1964 D/- 6-9-1966* (Punj) from that of the Supreme Court in *Vaikunth's case* (1962) 1 SCR 886=(AIR 1962 SC 8) adduced by the learned Bench does not appear to us to be tenable. There is neither any reason nor principle in differentiating a case of reversion or reduction in rank from that of dismissal when the claim for wages or salary is founded on the wrongful act of dismissal or reversion. Moreover, *Tarachand's case*, 1947 FCR 89=(AIR 1947 FC

23), on which the decision of *Vaikunth's case* (1962) 1 SCR 886=(AIR 1962 SC 8) is based made it clear about the continuing cause of action which subsisted for the claimant during the period of wrongful dismissal.

13. Before referring to the third decision of this Court in favour of the petitioner, it may be useful to make mention of a Bench decision of the Madras High Court in *State of Madras v. Anantharaman*, ILR (1963) Mad 1014=(AIR 1963 Mad 425) in which also *Laxman Vaikunth's case* (1962) 1 SCR 886=(AIR 1962 SC 8) and *Tarachand's case*, 1947 FCR 89=(AIR 1947 FC 23) are discussed. In speaking of the fiction with regard to the period of wrongful dismissal, the learned Chief Justice Ramchandra Ayyar observed at page 1018 (of ILR)=(at p. 426 of AIR) —

"The fiction that a person who had been illegally dismissed continues to be in service, though one in law, is not a statutory fiction to warrant the application of the rule stated above. Again the purpose of the fiction is merely to regard a public servant as if he had not been legally removed or dismissed. But that cannot necessarily justify the importation of another fiction, namely, that while he was in such fictitious service his salary also accrued every month. No principle of law warrants the second fiction."

Relying also on Rule 52 of the Fundamental Rules, the Madras High Court held that in a case of dismissal of a public servant, his right to salary will accrue only when the order of dismissal has been set aside either by the departmental authorities or by a civil Court and claim made within three years from the date of order setting aside the dismissal must be held to be in time under Article 102 of the Limitation Act. With respect, we consider that the judgment of the Madras High Court in *Anantharaman's case* ILR (1963) Mad 1014=(AIR 1963 Mad 425) following another Division Bench judgment of *Jagadisan and Kailasam JJ. in Union of India v. R. Akbar Sheriff*, AIR 1961 Mad 486, is subject to the same attack and criticism as the Circuit Bench decision of this Court in *Maharaj's case* R. F. A. No. 8-D of 1964 D/- 6-9-1966 (Punj). In *Sheriff's case*, AIR 1961 Mad 486 the learned Judges in holding that the claim, if in time, would cover the entire period of dismissal, said at page 495 about the Federal Court decision in *Tarachand's case* 1947 FCR 89=(AIR 1947 FC 23) that

"it cannot be that the salary of each month fell due at the beginning of next month on the facts of the present case. So long as the dismissal order was in force against the plaintiff he had no right to claim salary."

14. The decision in the case of Maharaj, R.F.A. No 8-D of 1964 D/- 6-9-1966 (Punj) was followed by a Bench of D. K. Mahajan and Narula, JJ in (1967) 1 Ser LR 594 (Punj) in which reference was made to the Supreme Court decision in Laxman Vaikunthe's case (1962) 1 SCR 886=(AIR 1962 SC 8). In that case, the plaintiff was retired compulsorily from service by the Government of Pepsu on 6th of September, 1948, and was reinstated by the order of the Government on 23rd of February, 1951. He kept on agitating for the arrears of salary and a suit was filed for recovery on 23rd April, 1957. Though the suit for arrears of salary was barred under Article 102 of the Limitation Act having been filed more than three years after the date of reinstatement, it was observed at page 596 that—

"So far as relief qua declaration is concerned, we may safely say that if the suit was within limitation, the plaintiff would be entitled to his salary from the 8th of September, '48, to the 23rd of February, 1951, and for that purpose we need refer only to a Division Bench decision of this Court in Regular First Appeal No 8-D of 1964 (Punj) decided by S. B. Kapoor and H. R. Khanna JJ."

15. Thus, the Bench in the case of Ram Singh Brar (1967) 1 Ser LR 594 (Punj) affirmed unequivocally the principle which had been enunciated by S. B. Kapoor and H. R. Khanna, JJ. in the case of Maharaj R. F. A. No. 8-D of 1964, D/- 6-9-1966 (Punj)

16. The other point of view, which we are inclined to accept being in accord with the decision of the Supreme Court in Laxman Vaikunthe's case (1962) 1 SCR 886=(AIR 1962 SC 8) was expounded by the Circuit Bench of this Court of Dutt and S. K. Kapur JJ in ILR (1966) 2 Punj 907=(AIR 1966 Punj 500). Ram Nath an employee of the Posts and Telegraph Department, who remained under suspension from 9th April, 1946 to 18th January, 1952, was dismissed on 19th January, 1952 in consequence of a departmental enquiry. A suit was filed by him on 5th March, 1957, to challenge the order of dismissal and a substantial sum was claimed as arrears of his pay till 28th February, 1957. Both the reliefs of declaration that the dismissal was illegal and ultra vires and a decree for Rs. 24,430.65 on account of arrears of salary from 19th January, 1952, to 13th January, 1950, were granted by the trial Court. Both parties appealed and on behalf of the Union of India the only plea raised was that the decree could only be passed for a period of three years and two months, the rest of the claim being barred by time under Article 102 of the Limitation Act. While discussing the

case of ILR (1963) Mad 1014=(AIR 1963 Mad 425), which had distinguished the Laxman Vaikunthe's case (1962) 1 SCR 886=(AIR 1962 SC 8) on ground of applicability of Fundamental Rule 52, S. K. Kapur J., speaking for the Court, observed that their Lordships of the Supreme Court had clearly laid down that "the period of limitation starts, not from the date of declaration by the court, but from the date it accrues due irrespective of such a declaration", this being implicit from the fact that the claim in Laxman Vaikunthe's case (1962) 1 SCR 886=(AIR 1962 SC 8), which was otherwise in time was allowed only from 2nd June 1951, uptill the date of the plaintiff's retirement from Government service. If the order of dismissal is illegal, it must follow logically, in the view of Kapur J., that Rule 52 of the Fundamental Rules, regarding which an argument was also raised before us by Mr. Abnasha Singh, never in the eye of law came into operation. An order setting aside the dismissal cannot by its very nature alter the date of accrual of cause of action. With regard to the argument which is pegged to Fundamental Rule 52, it may be mentioned that a similar contention with regard to Fundamental Rule 54, which enables the State Government of Uttar Pradesh to fix the pay of a public servant where dismissal is set aside in a departmental appeal, was raised before the Supreme Court and it was held in Devendra Pratap Narain Rai Sharma v. State of Uttar Pradesh, AIR 1962 SC 1334, that Rule 54 had no application in cases "in which the dismissal of a public servant is declared invalid by a civil court and he is reinstated". On a parity of reasoning, it can acceptably be urged that the operation of Rule 52 of the Fundamental Rules will come to a stop and it will cease to have any force in the eye of law, as observed by S. K. Kapur J.

17. We agree respectfully with the logic and reasoning of S. K. Kapur J and find that there is no escape from the conclusion that the Supreme Court in Vaikunthe's case (1962) 1 SCR 886=(AIR 1962 SC 8) had restricted the claim which was otherwise within limitation to a period of three years from the date of institution of the suit or proceeding. With regard to Jagga's case, ILR (1966) 1 Punj 302 it was rightly observed by Kapur J. that the point for decision only related to the question whether the suit was filed within time and the right to recover full pay and allowances for the period of employee's interim suspension accrued to him on the date when the order of dismissal was quashed by the competent Court.

18. Mr. Jawahar Lal Gupta, the learned counsel for the respondent, has relied

on various other decisions in support of the result reached by Dulat and Kapur JJ. in Ram Nath's case ILR (1966) 2 Punj 907=(AIR 1966 Punj 500). In Union of India v. P. V. Jagannath, AIR 1968 Madh Pra 204, a Division Bench of T. C. Shrivastava and G. P. Singh JJ. while discussing the entire case law on the subject said that when an order of dismissal of a civil servant is declared void or inoperative, the declaration of the Court does not make the order void but merely declares or exposes the already existing infirmity in the order. Such an order of dismissal being ineffective from its inception, the civil servant continues in service in spite of the order and the cause of action for the salary accrues every month. In that case, the entire claim was found to relate to a period prior to three years and was neg to be barred by time under Article 102 of the Limitation Act.

19. The Bench of Chief Justice Narasimham and R. K. Das J. of the Orissa High Court in Syam Sunder Misra v. Municipal Chairman, Parlakimedi, AIR 1964 Orissa 111, has taken a similar view. According to this decision, an employee who feels aggrieved by his dismissal from service by his employer has a right to sue not only for a declaration that his dismissal was wrongful, but also for the consequential relief for payment of arrears of wages and other emoluments. Chief Justice Narasimham, in speaking for the Court, resolved the difficulty with which an aggrieved employee may be confronted by saving that proceedings for declaration and recovery of salary should be initiated by him simultaneously. Said he at page 112:—

"He cannot obviously split up the two reliefs and sue for the former relief only, in view of the express prohibition contained in Order 2, Rule 2, Code of Civil Procedure, and Section 42 of the Specific Relief Act. Limitation for both the reliefs would therefore, run from the date on which the right to sue accrued to him. If, however, instead of filing a regular civil suit for these reliefs he seeks for an alternative remedy by a direct application to the High Court under Article 226 of the Constitution and does not pray for the consequential relief of arrears of salary, etc., he cannot urge that the right to ask for this latter relief accrued only after the date of the judgment of this Court in that writ application."

20. The Bombay High Court in State of Bombay v. Ganpat Dhondiba Sawant, AIR 1966 Bom 228, in a judgment of K. K. Desai and Palekar JJ. observed that the Supreme Court in Vaikunthe's case, (1962) 1 SCR 886=(AIR 1962 SC 8) had clearly held that the claim under Article 102

of the Limitation Act could be confined only to the period of three years from the date of institution of the suit in case of arrears of salary in respect of the period of wrongful dismissal. The State appeal with regard to the decree passed in favour of the employee for Rs. 1701-5-0 was held to be barred by the Law of Limitation on the ruling of the Supreme Court in Vaikunthe's case, (1962) 1 SCR 886=(AIR 1962 SC 8).

20A. Mr. Abnasha Singh strongly relied on a Single Bench judgment of Dhavan J. in Hari Raj Singh v. Sanchalak Panchayat Raj, AIR 1968 All 246. What fell for decision by the Court in that case was the right of a civil servant on reinstatement to receive arrears of pay and allowances for the period of his absence from duty under Rule 54 of the Fundamental Rules. No doubt, the learned Judge said in that case that the State Government is not permitted to reject the claim on the ground that it is time-barred after a Government servant has been reinstated, it having been found that his dismissal was unlawful. The views of the Supreme Court have already been noticed on this aspect and it would be an exercise in futility to pursue this matter further about the true effect of Rule 54 of the Fundamental Rules or for that matter of Rule 52 on which reliance has been placed before us. There are some other Single and Division Bench judgments cited at the Bar, such as Sudhir Kumar Das v. General Manager, N. F. Railway, Maligaon, Pandu, 1968 Ser LR 654 = (AIR 1968 Assam 8) decided by Chief Justice Nayudu and Goswami J. of the Assam High Court, but in view of the authoritative pronouncements of the Supreme Court, it is not necessary to subject them to any close analysis.

21. On a review of the authorities which, to emphasise, make no distinction between civil suits and writ proceedings, we are of the opinion that a public servant, after his dismissal or removal has been declared to be unlawful, can claim wages or salary only up to a period of three years and two months from the date when the cause of action accrued. The decisions of this Court in ILR (1966) 1 Punj 302; R. F. A. No. 8-D of 1964 (Punj) and (1967) 1 Ser LR 594 (Punj), in so far as they take a contrary view have not, in our opinion, been correctly decided. Even in writ proceedings, as was held in State of Madhya Pradesh v. Bhailal Bhal, AIR 1964 SC 1006, the High Court has, in exercise of its jurisdiction under Article 226 of the Constitution of India, power for the purpose of enforcement of fundamental rights and statutory rights to give consequential relief but the Court ought not ordinarily to lend its aid to a party by

this extraordinary remedy of mandamus when the relief prayed for raises a triable issue of limitation in which case it would be best to leave the party to seek his remedy by the ordinary mode of action in a civil Court.

22. This answer to the reference does not settle completely the case of the petitioner as, according to Mr. Abnasha Singh, his learned counsel, there is still the

question of his seniority and other reliefs to be settled. We will, therefore, send back this case to the learned Single Judge for passing appropriate orders. The question of costs does not arise at this stage.

23. D. K. MAHAJAN, J.:— I agree.

24. R. S. NARULA, J.:— I also agree.
LGC/D.V.C. Order accordingly.

END

not lose it by the precise ascertainment of its value in cases which do not admit of such ascertainment at the time of its institution. Moreover, in the present case, the defendant completely identified himself with the plaintiff and not only failed to raise any objection regarding jurisdiction but positively agreed to all the assertions made by the plaintiff in the plaint and therefore, it did not lie in the defendants mouth to raise any such objection regarding jurisdiction, unless he was able to show that it was a case of total lack of jurisdiction. AIR 1960 Pat 244 (FB), Rel. on. (Paras 14 and 15)

The utmost that can be said is that there was under-valuation of the subject-matter of the suit but the decree of the trial Court on that account is not liable to be set aside unless the appellate Court was satisfied that the under-valuation of the suit had prejudicially affected the disposal of the suit on merits: AIR 1946 All 456 and AIR 1953 Mad 492 and AIR 1942 Oudh 481, Disting.; AIR 1926 Cal 184 and AIR 1967 Mys 217, Ref.; AIR 1954 SC 340, Rel. on; AIR 1962 SC 199 and AIR 1933 All 249 (FB), Ref. (Para 18)

(B) Civil P. C. (1908), S. 115 — New point — Objection not taken at any earlier stage of litigation — It could not be allowed to be raised in revision. (Para 19)

(C) Civil P. C. (1908), O. 20, Rr. 1, 4 and 5 and S. 33 — Statement in judgment of District Judge that no other point, except that of jurisdiction, was argued before him — No affidavit by counsel appearing before District Judge nor of petitioner himself filed, alleging that any other point was argued and that statement in judgment is erroneous — Held that in these circumstances, the statement contained in the judgment must be taken to be true. (Para 20)

Cases Referred: Chronological Paras
(1967) AIR 1967 Mys 217 (V 54) =
(1967 2 Mys LJ 49, Smt. Girija Bai v. Thakur Das 7, 13
(1962) AIR 1962 SC 199 (V 49) =
(1962) 2 SCR 747, Hiralal Patni v. Kali Nath 8, 16
(1960) AIR 1960 Pat 244 (V 47) =
ILR 39 Pat 121 (FB), Shyam Nandan Sahay v. Dhanpati Kaur 8, 18
(1954) AIR 1954 SC 340 (V 41) =
1955 SCR 117, Kiran Singh v. Chaman Paswan 8, 15, 18
(1953) AIR 1953 Mad 492 (V 40) =
(1952) 2 Mad LJ 524, Chidambaram v. Subramanian 7, 10
(1950) AIR 1950 Mad 751 (V 37) =
(1950) 1 Mad LJ 120, Krishna Poduval v. Lakshmi Nathiar 8
(1946) AIR 1946 All 456 (V 33) =
ILR (1946) All 454, Mt. Sunder v. Kandhayia Lal 7, 9

(1942) AIR 1942 Oudh 481 (V 29) =
1942 Oudh WN 493, Sitaram Singh v. Tikaram Singh 7, 11
(1933) AIR 1933 All 249 (V 20) =
ILR 55 All 315 (FB), Moolchand Motilal v. Ram Kishan 8
(1926) AIR 1926 Cal 184 (V 13) =
86 Ind Cas 765, Loke Nath Saha v. Radha Govind 7, 12
R. R. Chacha, for Petitioner; K. M. Singhvi, for Respondents.

ORDER: This is a defendant's revision arising out of a suit for partition.

2. The case has a chequered history. Defendant Mahadeo petitioner is the father and the plaintiff Hanuman Mal (who has died since the institution of this revision petition and is now represented by respondents Nos. 1(a) to 1(j) was the son of Mahadeo. Baboolal respondent is the second son of Mahadeo. Mahadeo had two brothers Chaturbhuj and Kaluram. Chaturbhuj left no issue and Kaluram had one son Gordhan Prasad, who is also one of the respondents before me. Hanumanmal filed the suit for partition in the Court of Civil Judge, Ratangarh on 13-1-1953 against Mahadeo, Baboolal and Gordhan Prasad alleging that his grand-father Chandanmal had left a 'Haveli' in Ratangarh in which Gordhan Prasad had half share which had already been partitioned by metes and bounds and thus there remained the other half share in which he, his brother Baboolal and his father Mahadeo were entitled to get 1/3rd share each. He also averred in the plaint that there was some moveable joint family property belonging to himself and his father and brother which too had to be partitioned. He valued 1/6th share in the Haveli to which he was entitled at Rs. 2000 and 1/3rd share of the moveables at Rs. 500 and thus valued his suit for the purpose of pecuniary jurisdiction at Rs. 2500. It was prayed that the Haveli may be partitioned by metes and bounds and he may be put in possession of 1/6th share of the same. It was also prayed that the moveable property may be partitioned and 1/3rd share in the moveable property may be ordered to be given to him.

3. Defendant Gordhan Prasad remained absent in spite of service and was proceeded against ex parte. Mahadeo filed written statement but did not contest the plaintiff's claim but on the other hand admitted it. Defendant No. 2 Baboolal in his written statement, pleaded that besides the house mentioned in the plaint there were some more properties liable to be partitioned. He pleaded that a suit for partial partition could not lie and that the entire joint family property including the assets of the joint family firm Chandanmal Mahadeo should be partitioned. His case was that if all the properties liable to be partitioned were taken into consideration then the share of the plaintiff alone in those properties would be more than Rs. 10,000. He there-

fore, contended that the suit was beyond the pecuniary jurisdiction of the Civil Judge, Ratangarh, who was competent to try suits of valuation of not more than Rs 10 000. On the pleadings of the parties the learned Civil Judge, Ratangarh framed six issues in all which read as under:-

1 Are the 'Nohra' situate in the Mohalla of Beghraj Maharajya and the Haveli situated behind the temple of Mahes ancestral properties of the parties, and, therefore, must be included in the suit for partition?

2 Is the suit not triable by the Civil Judge, Ratangarh?

3 Is the firm Chandanmal Mahadeo an ancestral firm of the parties and should be included in the partition suit?

4 Are the silver bar, gold ornaments and utensils etc also the ancestral properties of the parties and should be included in the suit?

5 What should be the scheme of the partition?

6 Relief?

Before any evidence could be led on any of these issues, an application (marked Ex. A1 on the record) signed by Mahadeo Hanumanmal and Baboolal was presented before the Court on 6-4-1954 praying that the parties wanted to get the dispute regarding partition decided by the arbitrators Sagarmal Norangamal and Ghanthvandas. It was prayed in this application that the arbitrators would have full authority to determine the joint family property of the parties and to give any decision in the matter which they thought fit. In other words very wide and comprehensive power was given to the arbitrators to determine the items of joint family property and to carry out the partition in whatever way they liked. The trial court allowed this application and referred the matter to the said arbitrators for filing award. The arbitrators filed their award on 22-4-1954 and besides immoveable property they also gave directions for partition of certain moveables including ornaments.

4. After the award had been submitted to the Court, Hanumanmal and Mahadeo filed their objections to the award on 15-5-1954. They also led evidence in support of their objections. Here, it may be stated, that one of the objections raised by Mahadeo was that the Court of Civil Judge, Ratangarh had no jurisdiction to make the award the rule of the Court inasmuch as the plaintiff's share according to the award was of a valuation of more than Rs 10 000. It will be however interesting to note that without deciding the objections on merits, on 29-9-1955 the learned Civil Judge Ratangarh observed that admittedly the plaintiff's share according to the award was more than worth Rs 10 000 and as such no decree could be passed by him in accordance with the award. He, therefore, referred the case to the District Judge, Bikaner

for withdrawing the suit from his Court and transferring it to a competent court. The learned Civil Judge also observed in his order dated 29-9-1955 that the valuation of the plaintiff's share according to the award would be Rs 11,570 and even if the award was set aside, the property which may fall to the share of the plaintiff will not be less than worth Rs 10,000. The learned District Judge transferred the cases to the Court of Civil Judge, Churu for decision according to law. The Civil Judge Churu on receiving the file of the case proceeded with its trial and passed a Decree in accordance with the award on 9-6-1956.

5. Aggrieved by the judgment and decree of the Civil Judge, Churu the plaintiff Hanumanmal and defendant Mahadeo filed an appeal before this Court which was decided on 6-4-1960. This Court held that the Civil Judge Churu had no jurisdiction to deal with the case at all and in this view of the matter the judgment and decree of the Civil Judge Churu were set aside and the case was sent back to the Civil Judge, Ratangarh for disposal of the objections against the award according to law.

6. After remand of the case to his Court the learned Civil Judge, Ratangarh heard the arguments and held that the objections preferred by the parties to the award given by the arbitrators had no substance and therefore he decreed the suit in accordance with the award. Dissatisfied with the judgment and decree of the Civil Judge, Ratangarh the defendant Mahadeo filed an appeal in the Court of District Judge, Bikaner who dismissed the same on 31-7-1964. Mahadeo thereupon, filed a second appeal in this Court from the judgment and decree of the learned District Judge, Bikaner. When the case came up for admission on 23-4-1965, Mr. Chacha, learned counsel for the appellant Mahadeo made a prayer that the second appeal filed by Mahadeo may be treated as a revision petition and this was allowed to be done.

7. Mr Chacha, learned counsel for the petitioner Mahadeo, has argued the following points before me

1 That the learned Civil Judge Ratangarh had no jurisdiction to refer the whole matter to arbitration inasmuch as the arbitrators could not have decided the question of jurisdiction of the Court, which was one of the issues in the case

2 That the award given by the arbitrators is a nullity inasmuch as it contained decision with respect to matters outside the scope of the suit.

3 The Civil Judge, Ratangarh had no jurisdiction to pass a decree for partition in accordance with the award inasmuch as the valuation of the share of the property allotted to the plaintiff according to the award was of a valuation of more than Rs 10 000 and thus beyond the pecuniary jurisdiction of the learned Civil Judge

4. That the learned District Judge has erred in observing that apart from the question of jurisdiction no other point was pressed before him.

I shall take the points *seriatim*, points Nos. 1 and 2 in my opinion can be decided together. A bare perusal of the application for making reference (Ex. A 1) would show that the parties had agreed that whatever decision the arbitrators would give, that is, whichever property is held by the arbitrators to be either joint family property or the self-acquired property of any party will be binding upon all the parties. It is further stated in the application that whatever portion of the property is allotted to any of the parties will not be objected to by them. Thus it is clear from the contents of the application that no reference was sought to be made to the arbitrators on the question of jurisdiction of the Court but what the parties wanted was that all their disputes pertaining to partition may be decided by the arbitrators. In these circumstances it cannot be said that the issue regarding jurisdiction of the Court had been referred to the arbitrators. The more important point, however, argued by the learned counsel for the petitioner is that since according to the award the valuation of the share of the joint family property allotted to the plaintiff Hanumanmal was more than Rs. 10,000 the learned Civil Judge, Ratanagarh had no jurisdiction to make the award the rule of the Court. He submits that in the plaint the plaintiff had stated that there were only two items of partition viz. one house and a few moveables, and the valuation of the plaintiff's share as mentioned in the plaint was about Rs. 2500/-. Baboolal contended in his written statement that there were more properties to be partitioned and according to him the valuation of the suit was more than Rs. 10,000. In the award given by the arbitrators some more items of property were included and thus the valuation of the plaintiff's share as determined in the award definitely came to be about Rs. 15,700. It is thus argued by Mr. Chacha that there was inherent lack of jurisdiction and the learned Civil Judge could not pass a decree in accordance with the award. In this connection he had placed reliance on Sections 6 and 15 of the Civil Procedure Code. Section 6, Civil Procedure Code reads as below:—

"6. Save in so far as is otherwise expressly provided, nothing herein contained shall operate to give any Court jurisdiction over suits the amount or value of the subject-matter of which exceeds the pecuniary limits (if any) of its ordinary jurisdiction." Section 15 further provides that "every suit shall be instituted in the Court of the lowest grade competent to try it." The Civil Judge, Ratanagarh was admittedly competent to try suits of valuation of not more than Rs. 10,000/- only, and, therefore,

argues Mr. Chacha, the decree passed by the learned Civil Judge was beyond his jurisdiction, and therefore a nullity. In this connection it has also been argued that in a partition suit a defendant is also in the position of a plaintiff and in the present case as Baboolal also claimed a share in the joint family properties even though he had raised other pleas he was in the position of a plaintiff. The learned counsel has further submitted that Section 11 of the Suits Valuation Act has no application to the present case inasmuch as it is not a case of undervaluation or overvaluation of the suit but it is a case of complete lack of jurisdiction. In support of his argument the learned counsel has placed reliance on *Mt. Sundar v. Kandhavia Lal* AIR 1946 All 456, *Chidamberam v. Subramanian*, AIR 1953 Mad 492, *Sita Ram Singh v. Tikaram Singh* AIR 1942 Oudh 481, *Loke Nath Saha v. Radha Gobinda* AIR 1926 Cal 184, and *Smt. Girija Bai v. Thakur Das*, AIR 1967 Mys 217.

8. On the other hand the learned counsel for the respondent Baboolal has contended that the petitioner had waived all objections including that of jurisdiction by agreeing to get the matter decided by the arbitrators. It is argued that as a matter of fact Mahadeo had never raised any objection regarding the jurisdiction of the Court. It is also submitted that the objection regarding the jurisdiction cannot be allowed to prevail as there is no failure of justice in the present case and no prejudice has been caused to any party on merits, and to fortify his submission Mr. Kistoor Mal, learned counsel for the respondent Baboolal has referred to *Kiran Singh v. Chaman Paswan*, AIR 1954 SC 340, *Hiralal Patni v. Sri Kali Nath* AIR 1962 SC 199, *Moolchand Motilal v. Ram Kishan* AIR 1933 All 249 (FB), *Shyam Nandan Sahay v. Dhanpati Kuer* AIR 1960 Pat 244 (FB) and *Krishna Poduval v. Lakshmi Nathiar* AIR 1950 Mad 751.

9. I may state at once that none of the authorities cited by the learned counsel for both the parties is with respect to a suit for partition, yet they do lay down certain guiding principles in such matters. In AIR 1946 All 456 a suit had been instituted to obtain a declaration that a deed of gift was not binding on the plaintiff. The suit was valued at Rs. 2000 and instituted in the Court of Munsiff, who had jurisdiction only upto that limit. At a later stage the plaintiff amended the plaint and added a prayer for an injunction which was valued at Rs. 100. In these circumstances the learned Judges held that the facts of the case did not bring it within the ambit of S. 11, Suits Valuation Act. This was obviously not a case of under-valuation and a distinct relief for injunction had been added later on, with the result that the valuation of the suit became more than what was the

pecuniary jurisdiction of the Munsiff. This case is therefore, clearly distinguishable on facts and in my opinion of no assistance to the petitioner.

10. In AIR 1953 Mad 492, it was observed that a Court which has no jurisdiction to determine any matter in controversy in a suit has no jurisdiction to refer it for determination by arbitrators. It was further observed that it will be illogical to hold that what a Court cannot do directly, it can do indirectly through the machinery of arbitration. In my opinion there cannot be any dispute with this proposition. The point, however, is whether apart from reference to arbitrators the Court had jurisdiction to determine the matter in controversy in the present suit, and I shall presently deal with the question whether the Civil Judge, Ratangarh had jurisdiction to decide the suit.

11. In AIR 1942 Oudh 481 it was held that the principle under S 11, Suits Valuation Act cannot be extended to a case where there is a want of inherent jurisdiction.

12. In AIR 1926 Cal 164 it was held that in a suit for partition the position of the parties is not that of the plaintiffs and defendants as in other suits for in a partition suit or in a suit for administration, or in a suit of a similar nature, every party stands in a position of a plaintiff with reference to another and that of the defendant with reference to some other. Therefore, unless there is a special reason, it is not possible to deny to a coparcener that right of partition either at his own instance or at the instance of any one else.

13. In AIR 1967 Mys 217 it was observed that in a suit for partition, each co-owner, as against another occupies in herself or himself the role of the plaintiff as well as the defendant. It is in consequence of this reciprocal character of the right which co-owners have in the matter of partition, that even those who are not the actual plaintiffs can claim that their shares also be allotted to them by the decree.

14. A survey of the authorities cited above by the learned counsel for the petitioner would go to show that in a suit for partition the defendant can also claim to have the partition carried out. It has also been held that in those cases where there is inherent want of jurisdiction S 11 of the Suits Valuation Act can have no application. It is not denied by the learned counsel for the respondent that his client who was the defendant in the suit had the right to claim partition and could claim that partition be carried out not only with respect to the property which had been mentioned by the plaintiff in his plaint, but also with respect to other property, which had been wrongly excluded by the plaintiff. The question, however, remains whether the Civil Judge, Ratangarh had jurisdiction to try the suit. There is no gain-saying the

fact that the plaint as framed by the plaintiff was triable by the Civil Judge, Ratangarh. The valuation which the plaintiff has fixed in the plaint was within the pecuniary jurisdiction of the Court of Civil Judge, Ratangarh. It is well established that the "value of a suit" for purposes of jurisdiction is to be determined by the valuation in the plaint. The valuation which the plaintiff has given in the plaint in the present case is Rs. 2500, and therefore the suit was clearly within the jurisdiction of the Court of Civil Judge, Ratangarh. The petitioner did not contest either the valuation in the plaint or the jurisdiction of the Court. The defendant-respondent Baboolal, however pleaded that the valuation of the plaintiff's share would be more than Rs. 10,000, if all the partible property was taken into consideration. Before the parties could start their evidence, the case was referred to arbitrators and according to the award given by the arbitrators the valuation of the plaintiff's share no doubt came to be more than Rs. 10,000. In these circumstances a question arises could the Civil Judge pass a decree on the basis of the award? In my opinion he could. The reason is that in every case when the Court is seized of jurisdiction it cannot and does not lose it by the precise ascertainment of its value in cases which do not admit of such ascertainment at the time of its institution. Moreover, in the present case, the petitioner completely identified himself with the plaintiff and not only failed to raise any objection regarding jurisdiction but positively agreed to all the assertions made by the plaintiff in the plaint and therefore it does not lie in the petitioner's mouth to raise any such objection regarding jurisdiction, unless he is able to show that it is a case of total lack of jurisdiction.

15. The learned counsel for the respondent urged that it was only case of under-valuation and not a case of inherent lack of jurisdiction. In this connection he has placed reliance on AIR 1954 SC 340. While discussing the scope of Section 11 of the Suits Valuation Act (1887) their Lordships of the Supreme Court were pleased to observe

"With reference to objections relating to territorial jurisdiction, Section 21 of the Civil Procedure Code enacts that no objection to the place of suing should be allowed by an appellate or revisional Court, unless there was a consequent failure of justice. It is the same principle that has been adopted in Section 11 of the Suits Valuation Act with reference to pecuniary jurisdiction. The policy underlying Sections 21 and 90 C.P.C. and Section 11 of the Suits Valuation Act is the same namely, that when a case had been tried by a Court on the merits and judgment rendered, it should not be liable to be reversed purely on technical grounds unless it had resulted in failure of justice, and the policy of the legislature,

has been to treat objections to jurisdiction both territorial and pecuniary as technical and not open to consideration by an appellate Court, unless there has been a prejudice on the merits. The contention of the appellants, therefore, that the decree and judgment of the District Court, Monghyr, should be treated as a nullity cannot be sustained under Section 11 of the Suits Valuation Act."

16. In a later case AIR 1952 SC 199 the validity of a decree passed on award was called into question during the course of execution proceedings and their Lordships of the Supreme Court held that the validity of a decree can be challenged in execution proceedings only on the ground that the Court which passed the decree was lacking in the inherent jurisdiction in the sense that it could not have seized of the case because the subject matter was wholly foreign to its jurisdiction or that the defendant was dead at the time the suit had been instituted or decree passed, or some such other ground which could have the effect of rendering the Court entirely lacking in jurisdiction in respect of the subject matter of the suit or over the parties to it."

17. Learned counsel for the petitioner, has not been able to show how the decree passed by the learned Civil Judge, Ratangarh was entirely lacking in jurisdiction. At one time he argued that the learned Judge had no jurisdiction to refer the matter to arbitration at all. He contended that what the court could not do directly could not be done indirectly. What he meant to suggest was that if the Court had no jurisdiction to try the suit, it could not indirectly invest itself with such jurisdiction by referring the matter to arbitration. I, however, for reasons which I shall presently state find myself unable to accept any of these contentions.

18. In this connection I may refer to the observations made in AIR 1960 Pat 244. In that case a distinction was drawn between the cases where there is inherent lack of jurisdiction apparent on the face of the record and the case where it is doubtful, or at least not so apparent, whether the Court possesses jurisdiction or not. Where there is total lack of jurisdiction, nothing can confer the same on the Court, and an objection to jurisdiction cannot be waived. Therefore, even if such objection has not been raised by any party, the entire proceeding of the Court from the very initial stage is without jurisdiction and void. Where, however, there is no total lack of jurisdiction, but, on the contrary, the averments in the plaint, if not challenged manifestly bring the case within the jurisdiction of the Court in which it is filed, its proceedings are perfectly with jurisdiction, and want of jurisdiction in such a case can rightly be waived. In other words this kind of defect in jurisdiction is not fundamental in character and

does not amount to anything more than a mere irregularity in the exercise of jurisdiction. The lack of pecuniary jurisdiction, it was observed, comes under the latter of the above two kinds of defects, and, therefore, is not fundamental in character. It can be waived by any of the parties, and if not challenged at the proper time, it cannot be questioned subsequently. This is apparent from Section 11 of the Suits Valuation Act which clearly indicates that there is no apparent defect in the frame of a suit due to low valuation and it does not take away the inherent jurisdiction of the Court to entertain it. In the present case on the valuation given in the plaint, it cannot be disputed that the Courts of Civil Judge, Ratangarh had jurisdiction to try the suit. The defendant raised an objection that the subject-matter of the suit had been under-valued and the valuation of the suit was above Rs. 10,000 but none of the parties wanted to pursue the objection regarding jurisdiction but on the other hand made an application for reference to arbitrators. Learned counsel for the petitioner has failed to show that there was a complete lack of jurisdiction in the Court of Civil Judge, Ratangarh to try the suit, or that there was any defect of fundamental character in the exercise of jurisdiction. The utmost that can be said is that there was under-valuation of the subject-matter of the suit but the decree of the trial court on that account is not liable to be set aside unless the appellate court was satisfied that the under-valuation of the suit had prejudicially affected the disposal of the suit on merits. Learned counsel did not at all contend that his client had been prejudicially affected on merits. As observed by their Lordships of the Supreme Court in AIR 1954 SC 340 the objection regarding territorial or pecuniary jurisdiction of a Court is only technical. In this view of the matter I hold that the decree passed by the Civil Judge, Ratangarh for partition of the joint Hindu family property belonging to the parties is neither without jurisdiction nor otherwise null and void. Consequently I overrule this objection also.

19. The next contention raised by the learned counsel for the petitioner is that a decree has been passed by the trial Court with respect to the property which was neither the subject matter of the plaint, nor mentioned in the written statement by the defendant Baboolal. Suffice it to say, that no such objection was taken at any stage of the litigation so far. This objection is not contained even in the memorandum of appeal, and during the course of arguments the learned counsel for the petitioner verbally sought leave to urge this ground. I do not, however, consider it proper to allow this ground to be raised in revision at such a late stage, especially when it is being vehemently opposed by the learned counsel

for the respondent. This objection also therefore does not hold any water and is to be stated only to be rejected.

20. Lastly the learned counsel for the petitioner has submitted that his client had urged several grounds attacking the award on merits before the first appellate Court. It is stated that the award was assailed on the ground that the arbitrators had misconducted themselves but the learned District Judge has wrongly mentioned in his judgment that no other point except that of jurisdiction was argued before him. It clearly appears from the judgment of the lower court that no other point was argued before it except the question of jurisdiction. The learned District Judge has mentioned at more than one place in his judgment that no other point was pressed. The statement contained in the judgment must be taken to be true unless there is convincing proof to the contrary. No affidavit either of the counsel who argued the case before the District Judge, nor of the petitioner himself has been filed in this Court alleging that any other points were urged before him and that the statement in the judgment of the lower Court "that no other point was argued" is erroneous. In absence of such an assertion on oath I am not prepared to hold that the observation of the lower court in this respect is incorrect.

21. In the result I do not see any force in this revision and hereby dismiss it, but in the circumstances, I leave the parties to bear their own costs of this revision.

VGW/D.V.C. Revision dismissed.

AIR 1969 RAJASTHAN 310 (V 56 C 57)

D. M. BHANDARI C. J. AND V. P. TYAGI, J.

Commissioner of Wealth Tax, Delhi and Rajasthan, Assessor v. Ganganagar Sugar Mills Ltd. Jaipur, Opposite Party.

Civil Wealth Tax Ref. No. 19 of 1964 D/- 10-1-1969

Wealth Tax Act (1957) S. 7(2) — Allowance of depreciation — Matter of discretion of the tribunal — Books showing cost price — Assessee cannot claim depreciation as of right — Finality of exercise of discretion by Tribunal.

It always depends upon the facts and circumstances of each case what amount of depreciation should be allowed and how adjustment is to be made while computing the value of the assets under S. 7(2). While the assessee cannot as a matter of law or as a matter of right urge that depreciation should be allowed to him in accordance with the provisions of the Income-tax Act where his books of account and balance sheet show the assets only at cost price, it cannot be said that when the Tribunal al-

lows depreciation on that basis in the exercise of its discretion, it necessarily commits an error of law. AIR 1964 Guj 154 and (1966) 62 ITR 841 (AP), Ref. to

(Para 9)

Cases Referred: Chronological Paras

(1967) AIR 1967 Guj 12 (V 54) =

1965 50 ITR 544, Commr. of Wealth Tax, Gujarat v. New Raipur Mills Ltd

(1968) 1966-62 ITR 841 = ILR (1968)

Andh Pra 345, Commr. of Wealth Tax v. Andhra Sugars Ltd

(1966) 1965-60 ITR 447 = 1965-1

ITJ 769 (Cal), Commr. of Wealth Tax Calcutta v. Tungabhadra Industries Ltd

(1964) AIR 1964 Guj 154 (V 51) =

1964-52 ITR 482, Commr. of Wealth Tax Gujarat v. Raipur Manufacturing Co. Ltd.

Sumerchand Bhandari for the Commissioner of Wealth Tax; Hastimal Parekh, for Opposite Party

BHANDARI C. J.: This is a reference under S. 27(1) of the Wealth-tax Act, 1957 (Act No. XXVII of 1957) (hereinafter called the Act) by the Income-tax Appellate Tribunal, Delhi Bench "A" (hereinafter called the Tribunal), referring the following question to this Court for opinion—

"Whether in the facts and circumstances of the case, adjustment for depreciation due under the Income-tax Act for the preceding years but not debited to the block account in the balance sheet is in law justified for computing the net wealth of the assessee?"

2. This reference relates to the assessment years 1957-58, 1958-59 and 1959-60. The statement of the case submitted by the Tribunal shows that the assessee is a limited company carrying on the business of manufacture of sugar. For its business, accounts are maintained by the assessee regularly in accordance with the provisions of Section 7(2) of the Act, the Wealth Tax Officer determined the net value of the wealth as a whole, having regard to the balance-sheet of the business as on the valuation date. It was claimed by the assessee that adjustment be made in respect of depreciation on the fixed assets. It was pointed out that all along upto the year ending on 30-6-1955, the assets of the business were shown in the balance-sheet as at cost. For the balance-sheet drawn on 30-6-1956, the value of the assets was shown at cost, less depreciation written off for the year ending 30-6-1956. A note to the effect that "the depreciation on the fixed assets up to the previous year ended 30th June 1955, comes to Rs. 16,73,955 against which a sum of Rupees 1,25,000 only has been provided as a reserve in the previous year due to losses" was appended to the balance sheet. It was claimed that adjustment in respect of the depreciation as due on the assets for the preceding years should be made while determining the net value of the assets on the basis

of the balance-sheet. The Wealth Tax Officer and on appeal by the assessee to the Appellate Assistant Commissioner of the Wealth Tax, refused to make any adjustment for the depreciation due in respect of the assessment years prior to the year ending on the valuation date. When the matter went up in appeal before the Tribunal, it was held that for a proper valuation of the assets incorporated in the balance-sheet, it was only proper that adjustments should be made in respect of the depreciation due on the assets under the Income Tax Act for the various preceding years. The Tribunal directed the Wealth Tax Officer to recompute the net wealth of the assessee after making adjustment for depreciation due under the Income-tax Act for the preceding years but not taken into account while drawing up the balance-sheet. This common-question referred to us arose in all the three assessment years 1957-58, 1958-59 and 1959-60, so this question of law as mentioned above has been referred to this Court.

3. Under Section 3 of the Act, tax is to be charged in respect of the net wealth of the assessee. The valuation of the net wealth is to be made as provided under Section 7 of the Act which runs as follows:

7. Value of assets how to be determined

"(1) The value of any asset, other than cash, for the purpose of this Act, shall be estimated to be the price which in the opinion of the Wealth Tax Officer it would fetch if sold in the open market on the valuation date.

(2) Notwithstanding anything contained in sub-section (1).—

(a) Where the assessee is carrying on a business for which accounts are maintained by him regularly, the wealth-tax Officer may, instead of determining separately the value of each asset held by the assessee in such business, determine the net value of the assets of the business as a whole having regard to the balance-sheet of such business as on the valuation date and making such adjustments therein as the circumstances of the case may require.

(b)"

4. Under Section 7(1), the value of any asset will be deemed to be the value which the asset would fetch if sold in the open market on the valuation date. This value is to be determined by the Wealth-tax Officer. In order to avoid all complexities involved in determining the value of an asset of an assessee who owns considerable number of properties—big and small—under S. 7(1) another method has been provided under Section 7(2) in the case of an assessee carrying on business and maintaining accounts regularly. Under it, the Wealth-tax Officer may instead of determining separately the value of each asset held by the assessee in such business, determine the net value of the assets of the business as a whole having regard to the balance-sheet of such business as on the valuation date and mak-

ing such adjustments therein as the circumstances of the case may require.

5. All the revenue authorities in the case adopted this second method in the case of the assessee. It was contended by the assessee all along that its balance-sheet showed the value of the assets at cost and did not take notice of the depreciation. The Wealth Tax Officer took the view that the assessee had not written off any depreciation in his books of account and that the general statement of counsel for the assessee that machinery had depreciated could not be accepted, that in these circumstances, the claim of the assessee was not correct and the book value should be taken as the market value. The Appellate Assistant Commissioner of Wealth-Tax dismissed the appeals of the assessee on the ground that earlier assessments had been set aside with the direction that the Wealth-Tax Officer should give the appellant an opportunity of proving that the market value of the assets was less than their book value and such an opportunity was given by that Officer, but the appellants could not adduce any specific and acceptable evidence in this behalf apart from their general assertion that the relevant assets viz., plant and machinery were more than 50 years old and had changed several hands, that the machinery was worked by steam where as the new plants for manufacture of sugar were electric powered but the Wealth-tax Officer in the reassessment under appeal had taken the view that because of import restriction, the value of machinery had been on the increase in the recent years. He concluded by making the following observation:—

"In absence of any specific evidence to indicate that the market value was lower than the book value, the Wealth Tax Officer, to my mind, was justified in going to the book value, this book value, as already stated above took into account charged depreciation of Rs. 1,51,557/- for the year but not reserve of Rs.1,25,000/- or unabsorbed depreciation of earlier years
... ..
... ..
This view seems to be in order and it is upheld.

6. The Tribunal, however, did not accept this view and granted relief to the assessee by making the following observation:—

"The Revenue authorities have refused to make any adjustment for the depreciation due in respect of the assessment years prior to the year ending on the valuation date. For a proper valuation of the value of assets incorporated in the balance-sheet, it is only proper that adjustments should be made in respect of the depreciation due on the assets under the Income-tax Act for the various years. Accordingly the assessee's contention that for working out the valuation of the fixed assets adjustments must be made for the depreciation due on these

assets in the preceding years but not accounted for in the balance-sheet, must be upheld.

7. It is thus clear from the order of the Tribunal as well as of the Appellate Assistant Commissioner and the Wealth Tax Officer that these authorities proceeded to determine the value of the assets of the assessee not under Section 7(1) but under Section 7(2) of the Act. The balance-sheet showed the assets at cost, but a note had been appended earlier that depreciation had not been taken into account. The Tribunal took the view that for this reason adjustment must be made in the balance-sheet in computing the value of the assets of the assessee. In the circumstances of the case, the Tribunal took the view that depreciation is to be calculated as provided under the Indian Income-tax Act for the various years and granted relief to the assessee.

8. It is clear from the provisions of Section 7 that while valuing the assets of the assessee, any of the two alternative methods provided in Sections 7 (1) and 7 (2) may be adopted by the Revenue Authorities. It is contended by Mr. Sumerchand Bhandari appearing on behalf of the Department that while adopting the method provided in Section 7 (2) it must be kept in mind that the value of the assets as determined by this method is as near as possible as to the value of the assets if sold in the open market. It is further contended that as the assessee must be taken to have known full well what was the value of his assets on the date of valuation, the valuation shown in his balance-sheet must have been accepted and as the assessee did not make any adjustment on account of depreciation it must be taken that as a whole the assets remained at cost price as shown in the balance-sheet and had not depreciated. But under Section 7 (2) it was open to the Tribunal to make adjustment as the circumstances of the case required and the Tribunal took the view that in the circumstances of the case, depreciation should be allowed. It may have done so for the various reasons that had been urged by the assessee before the Appellate Assistant Commissioner that the machinery was purchased secondhand long back, that it had gone old on account of use and that it was in no way modern as it was to be operated by steam. It cannot be contended as a matter of law that the Tribunal was not justified in making any adjustment on account of depreciation. Mr. Bhandari has, however, contended that even if any allowance was to be made for depreciation, it should have been allowed to the extent allowable under the provisions of the Indian Income-tax Act, because the written down value as calculated under the provisions of that Act merely represents the notional value and may be for different from the

market value. Sometimes this may be true, but it cannot be said to be always so. As pointed out by their Lordships of the Calcutta High Court in Commissioner of Wealth-tax, Calcutta v. Tungbhadra Industries Ltd., 1966-60 ITR 447 (Cal), written down value of an asset would give a fair idea of the proper value unless there are abnormal circumstances. In this connection, we may quote the following observations of their Lordships:

"While we agree that the written down value may not in all cases represent the real value of the assets, in normal cases it will give the Wealth-tax Officer a fair idea of its proper value unless the plant and machinery are of a rare type or are of a quality which is not generally available in India and for which there is a keen demand. No such uncommon feature is to be found in the case before us."

9. The Tribunal has in its discretion, in the circumstances of the case before us, taken the view that depreciation is to be computed in accordance with the provisions laid down in the Indian Income-tax Act. The law says that adjustment may be made as the circumstances of the case may require. It was, therefore, in the discretion of the Tribunal to make such adjustment as it deemed proper. Of course, it would have been better if detailed reasons had been given by the Tribunal for computing the depreciation in this manner, but the Tribunal has taken the view that in the circumstances of the case, the proper valuation of the assets was by making the adjustment in respect of depreciation due on the assets according to the provisions of the Indian Income-tax Act. We cannot say that as a matter of law, this exercise of discretion was wrong or erroneous. We do not mean to say that in every case, depreciation of assets as shown in the balance sheet of a company is necessarily liable to be adjusted with reference to the written down value of such assets according to the provisions of Income-tax Act. This is the view taken by the Gujarat High Court in Commissioner of Wealth-Tax, Gujarat v. Rapur Manufacturing Co Ltd 1964-62 ITR 482 = (AIR 1964 Guj 154). This case has been referred and followed by the same High Court in (1965) 56 ITR 544 = (AIR 1967 Guj 12). These cases lay down the correct law, but this does not mean that in the circumstances of a particular case, if the Tribunal is satisfied, it should not allow depreciation according to the provisions of the Indian Income-tax Act. Mr. Bhandari has referred to Commissioner of Wealth-Tax v. Andhra Sugars Ltd., 1966-62 ITR 841 (AP) and has urged that the net value of the assets shown in the books of account of the assessee represents the market value of the assets as estimated by the assessee himself and unless circum-

stances justified, the assessee could not claim a further depreciation. It was further urged that allowances permitted under the Income-tax Act are notional allowances varying from time to time according to the exigencies of the revenue and the interests and promotion of industry by the Finance Acts and they do not represent the true market value at the end of each year. In that case, the assessee had already made adjustment in his books of account to the tune of Rupees 15,42,000/- for depreciation and he further claimed deduction of Rs. 18,14,564/- towards the difference between the depreciation allowance under the Income-tax Act and the depreciation deducted by the assessee from the value of the assets according to the method of accounting followed by it and the contention raised was that depreciation should always be allowed in accordance with the provisions of the Indian Income-tax Act because the principle of market value of the assets cannot be taken into consideration when the Wealth Tax Officer had taken recourse to the method indicated under Section 7 (2). After referring several cases of the High Courts, some of which we have already noticed, the concluding part of the judgment is that as a matter of law or of right, the assessee cannot claim deduction of an amount equal to the difference between the depreciation already provided by the company itself in its books and the aggregate sum of normal depreciation and extra shift allowance that he is entitled to under the Income-tax Act. This conclusion is correct. The assessee could not as a matter of law or as a matter of right urge that depreciation should be allowed to him in accordance with the provisions of the Income-tax Act. But it cannot be said that when the Tribunal allowed depreciation on that basis, it necessarily committed an error of law. It always depends on the facts and circumstances of each case what amount of depreciation should be allowed and how adjustment in respect of depreciation is to be made while computing the value of the assets under Section 7(2). It may even be said that when the value of the assets cannot be properly determined by applying the provisions of Section 7 (2), the Revenue authorities may take recourse to Section 7 (1). But in this case, recourse was not taken to Section 7 (1) of the Act and the authorities adhered to the procedure laid down in Section 7 (2) and the Tribunal thought it proper in its discretion to allow depreciation at the rate provided under the provisions of the Indian Income Tax Act. In our view, it cannot be said that any mistake of law has been committed by the Tribunal in doing this. All this was a matter purely of discretion which it exercised as it thought proper. Our answer,

therefore, to the question referred to us is in the affirmative.

CSV/D.V.C.

Reference answered in favour of the assessee.

AIR 1960 RAJASTHAN 313 (V 56 C 58)

JAGAT NARAYAN, J.

Poonamchand, Petitioner v. M/s. Bastiram Deokishan and another, Respondents.

Civil Revn. No. 77 of 1967, D/- 19-11-1968; against order of Senior Civil J. No. 2 Jodhpur D/- 10-2-1967.

(A) Civil P. C. (1908), S. 115 — Stamp Act (1899), S. 35 — Question as to whether document is admissible or not admissible in evidence is matter of procedure and error in deciding question can be corrected in revision. (Para 4)

(B) Stamp Act (1899), Ss. 35 and 45 — Civil P. C. (1908), S. 115 — Order making document inadmissible in evidence under Section 35 — Order whether revisable.

The power given to the Chief Controlling Revenue authority by Section 45 to refund is discretionary and no further proceedings are maintainable if the application is refused. The remedy provided by Section 45 is thus not as efficacious as the remedy provided under Section 115, C. P. C. Therefore, a revision application should be entertained against an order of the subordinate court holding that a document is inadmissible in evidence under Section 35 of the Stamp Act, if the contention of the applicant is that either the document does not require any stamp or it is sufficiently stamped. If, however, the document is insufficiently stamped (which includes documents which require to be stamped but are unstamped) no revision would lie against an order offering to admit the document in evidence on payment of a certain amount of duty and penalty if the contention of the applicant is that the document has been wrongly classified and the duty and penalty demanded are excessive. (Para 6)

(C) Stamp Act (1899), Sec. 1, Arts. 5 and 23 — Document relating to sale of truck — Document providing for payment of price in instalments and also for interest on unpaid price — Document also entitling seller to seize truck and keep it with him if instalments are not paid in time and sell it thereafter — Held, document was not exclusively agreement or memorandum of agreement relating to sale of goods falling within exemption (a) to Art. 5 — Document was chargeable with duty as agreement and not as conveyance: AIR 1931 All 392 (FB) and AIR 1957 All 391 (FB), Foll.

(Paras 9, 10 and 13)

CM/EM/B265/69/D

Cases Referred: Chronological Paras
(1957) AIR 1957 All 391 (V 44) -
1957 All LJ 426 (FB), Revenue Board v. P B Singh 12
(1931) AIR 1931 All 392 (V 15) -
1931 All LJ 608 (FB), In re. Raj Balamgir 9
J R Taha for the Petitioner: S. K. M. Lodha for the Respondents

ORDER:— This is a plaintiff's revision application against an order of the Senior Civil Judge No. 2, Jodhpur, holding that a document relating to the sale of a truck is inadmissible in evidence by virtue of Section 35 of the Stamp Act as it is not duly stamped.

2. The case of the plaintiff with regard to this document is that it is an agreement or memorandum of agreement relating to the sale of goods and is exempt from stamp duty under Exemption (a) to Article 5 of the First Schedule of the Stamp Act. The trial court held that it is a conveyance which is chargeable with stamp duty under Article 23 of the First Schedule.

3. On behalf of the defendants two preliminary objections have been taken with regard to the maintainability of this revision application. The first objection is that the finding of the trial court is based on an interpretation of the document and an interpretation of the provisions of the Stamp Act and if there is any error it is an error of law which cannot be interfered with in revision.

4. It is not correct to say that no error of law can be corrected on an application under Section 115, C. P. C. An error of law by which a court assumes jurisdiction which it has not, or declines to exercise a jurisdiction which it has, will come under Clauses (a) and (b). An error of law in the mode prescribed for the exercise of jurisdiction will come under clause (c). Such errors can be corrected under Section 115, C. P. C. It is only a decision of the case on merits arrived at in the proper exercise of jurisdiction which cannot be corrected on an application under Section 115, C. P. C. on the ground that it is erroneous in law. All procedural errors fall under clause (c). The question as to whether a document is admissible or not admissible is a matter of procedure. The first preliminary objection has therefore no force.

5. The second preliminary objection is that as the plaintiff has an alternative remedy under the Stamp Act this Court should not interfere with the order of the trial court under Section 115, C. P. C. That remedy is provided by Section 45 of the Stamp Act which runs as follows.—

"45 (1) Where any penalty is paid under Section 35 or Section 40, the Chief Controlling Revenue authority may, upon application in writing made within one

year from the date of the payment, refund such penalty wholly or in part.

(2) Where, in the opinion of the Chief Controlling Revenue authority, stamp duty in excess of that which is legally chargeable has been charged and paid under Section 35 or Section 40, such authority may, upon application in writing made within three months of the order charging the same, refund the excess."

6. The power given to the Chief Controlling Revenue authority to refund is discretionary and no further proceedings are maintainable if the application is refused. The remedy provided by Section 45 is thus not as efficacious as the remedy provided under Section 115, C. P. C. I am therefore of the opinion that a revision application should be entertained against an order of the subordinate court holding that a document is inadmissible in evidence under Section 35 of the Stamp Act if the contention of the applicant is that either the document does not require any stamp or it is sufficiently stamped. If however the document is insufficiently stamped (which includes documents which require to be stamped but are unstamped) no revision would lie against an order offering to admit the document in evidence on payment of a certain amount of duty and penalty if the contention of the applicant is that the document has been wrongly classified and the duty and penalty demanded are excessive.

7. My attention has been drawn to decisions of some High Courts in which it has been held that as an alternative remedy has been provided under Section 45 of the Stamp Act no revision application should be entertained by the High Court. For reasons given above, I am unable to subscribe to the view taken in them. I accordingly hold that the present revision application is maintainable.

8. The facts of the case are that a truck RJQ 2927 was sold by defendant No. 1 to Poonamchand plaintiff and Dhanraj defendant. The document in question was executed on the date of the sale. It is recited in it that the truck was sold on the date of the execution of the document to Poonamchand and Dhanraj for Rupees 19,001/-. The price was to be paid in instalments of Rs 450/- per month. Interest was payable monthly at 9 per cent per annum on the price which remained to be paid. If interest was not paid at the end of each month it was to be added to the principal amount and further interest was to accrue on the whole of this amount. The truck was delivered to the buyers on the date of the execution of the deed, but it was provided in it that in case there was any default in the payment of instalments the seller would be entitled to seize the truck and keep it with himself. In case of such seizure the buyers were entitled to get the truck released on

payment of the instalments due within a period of one month of the seizure. If the buyers failed to get the truck released within the period of one month from the date of seizure the seller was entitled to sell the truck and recover the deficiency in price from the buyers. There are some other terms so incorporated in the deed which are redundant because they amount merely to a statement of the law.

9. So far as the terms relating to the payment of the price in instalments and the payment of interest are concerned they are part of the agreement to sell. So far as these terms are concerned the document is exempt from stamp duty under exemption (a) to Article 5 of the Stamp Act which runs as follows:—

“Agreement or memorandum of agreement,—

(a) for or relating to the sale of goods or merchandise exclusively, not being a Note or Memorandum chargeable under No. 43.”

The above document does not fall under Article 23. A motor truck is “goods” within the meaning of Section 2 (7) of the Sale of Goods Act. The document is thus an agreement or memorandum of agreement relating to the sale of goods. In this connection I may refer to the decision of the Full Bench of the Allahabad High Court in *In re, Raj Balamgir*, AIR 1931 All 392.

10. But the above document is not exclusively an agreement or memorandum of agreement relating to the sale of goods. The terms contained in it entitling the seller to seize the truck and keep it with him if instalments were not paid in time and thereafter to sell it are not statutory rights of a seller under the Sale of Goods Act. These terms constitute an agreement between the parties which is in addition to the agreement relating to the sale of goods.

11. Under the Sale of Goods Act an unpaid seller has a lien on the goods only when they are still in his possession — See Section 46 (1) (a). He has no right of re-sale of the goods once they have gone into the possession of the buyer.

12. In this connection I may refer to the decision of the Full Bench of the Allahabad High Court in *Revenue Board v. P. B. Singh*, AIR 1957 All 391.

13. I accordingly hold that the document is chargeable with duty as an agreement. The trial court erred in holding it to be a conveyance within the meaning of Article 23. As the document was however inadmissible in evidence because it was insufficiently stamped no interference can be made in revision with the order of the trial Court as has been explained by me above.

14. I accordingly dismiss the revision application. In the circumstances of the

case, I leave the parties to bear their own costs of it.
AKJ/D.V.C.

Revision dismissed.

AIR 1969 RAJASTHAN 315 (V 56 C 59)

JAGAT NARAYAN, J.

Jupiter Insurance Co. Ltd., Petitioner v. Mohammad Malik and others, Respondents.

Civil Revn. No. 167 of 1965. D/- 11-10-1968, against order of Senior Civil J No. 1, Jaipur. D/- 22-1-1965.

Civil P. C. (1908), S. 151 and O. 1, R. 8 — Insurance claim — Insured negligent in defending suit — Right reserved in policy for insurer to defend actions in insured's name — Insurer should be allowed to do so under S. 151. AIR 1955 Bom 278 and AIR 1955 Bom 39, Foll. AIR 1959 SC 1331, Ref. (Motor Vehicles Act (1939), S. 96).

(Paras 4 and 5)

Cases Referred: Chronological Paras (1959) AIR 1959 SC 1331 (V 46) =

(1960) 1 SCR 168, B. I. G. Insurance Co. Ltd. v. Ithar Singh 4

(1955) AIR 1955 Bom 39 (V 42) =

ILR (1954) Bom 1422, Royal Insurance Co. Ltd. v. Abdul Mahomed Meheralli 3, 4

(1955) AIR 1955 Bom 278 (V 42) =

56 Bom LR 1013, Vimlabai v. General Assurance Society Ltd. 3

C. K. Garg, for Petitioner; P. C. Bhandari, for Respondents (Nos. 1 and 2).

ORDER:— This is a revision application by the Jupiter General Insurance Co. Ltd., defendant No. 3 against an order of the Senior Civil Judge No. 1, Jaipur City, refusing to allow it to defend the suit in the name of Shri Beharilal defendant No. 1.

2. The 10 year-old-son of the plaintiff was run over by a truck belonging to Beharilal and was killed on the spot on 14-7-59. The present suit for the recovery of damages was filed on 13-7-60 against Beharilal, the owner of the truck, Lallu, driver of the truck, the Jupiter General Insurance Co., the Insurer of the truck, and M/s. Prakash and Co. the financier who advanced money for the purchase of the truck. The Insurer and the financier filed separate written statements on 30-5-61.

Shri J. K. Gupta who appeared on behalf of defendant No. 3 also filed a power on behalf of Beharilal defendant No. 1. But no written statement was filed on his behalf. On 18-8-61 the Insurer filed an application to the court for permission to defend the suit on behalf of and in the name of defendant No. 1. No order was passed on this application. On 21-9-61 it was mentioned in the order-sheet that the suit was proceeding ex parte against de-

defendant No 1 The plaintiffs closed their evidence on 1-5-62 and 4-8-62 was fixed for the evidence of defendants Nos 3 and 4 As no order had been passed on the application of defendant No 3 dated 18-8-61 another application to the same effect was moved on 3-7-62

The learned Senior Civil Judge did not pass any order on this application either. The Insurer thereupon sent for the Insured and got him to apply for the setting aside of the ex parte order on 30-7-62 This application was allowed by the learned Senior Civil Judge on 24-10-62 But the order was set aside in revision by this Court as no sufficient ground for non-appearance of defendant No 1 was made out. Beharilal admittedly left for Nepal without giving any instructions to Shri J. K. Gupta because he knew that the damages would only be recovered from the Insurer. The insurance policy is for Rs. 20,000/- but a sum of Rs 30,000/- has been claimed as damages and if any sum above Rs 20,000/- is decreed the Insured would be personally liable to pay it

3. The contention on behalf of the Insurer is that the Insured was negligent in defending the suit and it should be allowed to defend it in the name of the Insured as it is bound to meet the liability under the decree to the extent of Rs 20,000/- Reliance is placed on the decision in *Vimlabai v General Assurance Society Ltd*, AIR 1955 Bom 278 and *Royal Insurance Co v Abdul Mahomed*, AIR 1955 Bom 39

4. On behalf of the plaintiffs the decision of their Lordships of the Supreme Court in *B I G Insurance Co v Ithar Singh*, AIR 1959 SC 1331 was referred to. In this decision the case of AIR 1955 Bom 39 has been referred to, but the decision in it has not been disapproved. In para 18 of the judgment in AIR 1959 SC 1331 it is mentioned that the Insurer has the right, provided he has reserved it by the policy, to defend the action in the name of the Insured. Such a right is conferred by condition No. 2 of the policy.

The Bombay cases referred to above have also taken the view that the Insurer cannot defend the suit in its own name except on the grounds mentioned in Section 96 (2) of the Motor Vehicles Act. But it has been held that if the Insured is negligent in defending the suit and a right has been reserved by the policy enabling the Insurer to defend the action in the name of the Insured then it should be allowed to do so under the inherent power of the court under Section 151 C. P. C.

5. This is a proper case in which such power should be exercised. I accordingly allow the revision application, set aside the order of the trial court dated 22-1-65 and permit defendant No. 3 to defend the suit in the name of and on behalf of defendant No. 1.

6. Shri J. K. Gupta was allowed to cross-examine the witnesses of the plaintiffs. The Insurer is permitted to file a list of witnesses on behalf of defendant No 1 The written statement on merits has already been filed by defendant No 3 This written statement shall be treated as being on behalf of defendant No 1 also. The suit will be decided after recording the statements of the witnesses on behalf of defendant No. 1 produced by defendant No 3.

7. In the circumstances of the case, I direct that parties shall bear their own costs of this revision application.

JRM/D.V.G.

Petition allowed.

AIR 1969 RAJASTHAN 316 (V 56 C 60)

L. N. CHHANGANI, J.

Yadav Motor Transport Co. and others, Petitioners v Jagdish Prasad Bhimgani Ward Kota, Respondent

Civil Revn No 553 of 1966, D/- 13-3-69, against order of Sr. Civil J. Baran D/- 26-7-1966

Motor Vehicles Act (1039), Ss. 110-F, 110 and 110-A (3) — Scope — Accident — Change of forum from Civil Court to Claims Tribunal — No vested right in litigant — Claims Tribunal constituted after 60 days of accident — Suit for compensation after constitution of Tribunal — Jurisdiction of Civil Court held barred — By virtue of S. 110-A (3) Tribunal has discretion to entertain application even after expiry of sixty days — (Civil P. C. (1908), Pre. — Interpretation of Statutes). AIR 1964 Madh Pra 133 and 1962 MPLJ 465, Dissented from: AIR 1962 Punj 307 held overruled by AIR 1965 Punj 102.

Section 110-F bars jurisdiction of the civil courts in respect of all claims to be made after the constitution of the Tribunals even though the accidents may have occurred before the constitution of the Tribunals Case law discussed: 1962 MPLJ 465 and AIR 1964 Madh Pra 133, Dissented from: AIR 1962 Punj 307, held overruled by AIR 1965 Punj 102.

(Para 7)

Though the right to compensation for injuries is a substantive right and ordinarily such a right cannot be construed to have been taken away by a statute except by express words of the statute or necessary intendment, the same however cannot be said with respect to the forum in which an action can be agitated. No litigant has or can have vested right in a particular forum The matters relating to forum and limitation relate to the law procedure and should be governed by the law in force at the time of the institution

of the Tribunal. The presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the court even where the alteration which the statute makes, has been disadvantageous to one of the parties. (Para 6)

In case of constitution of the Claims Tribunal after the expiry of sixty days from the accident, the proviso to sub-section (3) of Section 110-A can be used to meet the difficulty. Under Section 110-A (3) the tribunal has been given discretion to entertain application even after the expiry of sixty days. (Para 7)

Cases Referred: Chronological Paras

- (1967) ILR (1967) Guj 495 = 8
Guj LR 779, Natverlal Bhikhalal Shah v. Thakardas Khodaji Kalaji
(1966) 1966 ACJ 19 (Mad), Palani Ammal v. Safe Service Ltd.
(1965) AIR 1965 Mad 149 (V 52) = ILR (1965) 1 Mad 136, V. C. K. Bus Service (P) Ltd. Coimbatore v. H. B. Sethna
(1965) AIR 1965 Punj 102 (V 52) = ILR (1965) 1 Punj 104, Unique Motor and General Insurance Co. Ltd., Bombay v. Kartar Singh
(1964) AIR 1964 Madh Pra 133 (V 51) = 1962 MPLJ 876, Sushma Mehta v. Central Provinces Transport Services Ltd.
(1962) 1962 MPLJ 465 = 1962 MPC 24, Iqbal Prakash v. State of Madhya Pradesh
(1962) AIR 1962 Punj 307 (V 49) = 63 Pun LR 524, Mulak Raj Bhola Shah v. Northern India Goods Transport Corporation Ltd.
(1961) AIR 1961 Madh Pra 295 (V 48) = 1961 MPLJ 587, Khatumal Ghanshamdas v. Abdul Qadir Jamaluddin
(1932) AIR 1932 All 30 (V 19) = 1931 All LJ 844, Hazari Tewari v. Mst. Maktula Chaubain
(1931) AIR 1931 All 635 (V 18) = ILR 54 All 299 (FB), Ramkaran v. Ramdas
(1905) 1905 AC 369 = 74 LJPC 77, Colonial Sugar Refining Co. Ltd. v. Irving

S. K. Jindal, for Petitioners; B. L. Purohit, for Non-Petitioner.

ORDER:— This is a defendants' revision and is directed against the order of the Senior Civil Judge, Baran dated 26th July 1966 deciding issue No. 6 in favour of the plaintiff-respondent and overruling the defendants' objections as to the maintainability of the civil suit. The facts giving rise to revision application are briefly these:

On 15th March 1964 the plaintiff-respondent Jagdish Prasad, while going on a cycle from Kota on the Kota-Jhalawar road was knocked down at about 8 A. M.

near 6th furlong of 7th mile by motor truck No. RJR 977 and received some injuries. The truck was registered in the name of M/s. Yadav Motor Transport Co., Nasirabad, the defendant-petitioner No. 1 and the defendant-petitioner No. 2 is said to be one of the partners of the Yadav Motor Transport Co. Defendant-petitioner No. 3 Ghasiram is said to be the driver of the truck. At the time of the accident there was no Motor Accidents Claims Tribunal (hereinafter referred to as the Claims Tribunal) in existence for the area in which the accident took place. However, Government of Rajasthan, in the exercise of the power conferred by Section 110 of the Motor Vehicles Act, 1939 issued notification dated 9th November 1964 constituting Motor Accidents Claims Tribunals for the areas specified in column 3 of the notification. The District and Sessions Judge, Kota was constituted a Tribunal for districts Kota, Bundi and Jhalawar. It was after the constitution of this Tribunal that the plaintiff-respondent Jagdish Prasad filed a suit in the court of the District Judge which was transferred to the court of the Senior Civil Judge on 12th March, 1965, claiming an amount of Rs. 70,000/- as compensation. The defendants resisted the suit and inter alia pleaded that the Civil Court had no jurisdiction to try the suit after the constitution of the Motor Accidents Claims Tribunal under S. 110 of the Motor Vehicles Act, 1939.

The trial court framed a number of issues. Issue No. 6 covered the defendants' objection as to the maintainability of the suit and reads as follows:

“Whether this court has jurisdiction to entertain this suit?”

The trial Judge referred to the cases cited before him by the counsel for the parties and then emphasised the fact: “A claim is to be filed before the Tribunal within two months from the accident, therefore, by the time the Tribunal was constituted no time remained to file this instant claim before the Tribunal as the period of two months from 15th March 1964 had already expired.” The judge thereafter observed: “It shows that the bar under Section 110-F does not apply to the facts of the instant case as it was a question relevant to any claim for compensation which may be adjudicated upon by the ‘Claims Tribunal.’ Without commenting upon the cases he observed: “None of the above cases is on all fours with the case in hand and none of the cases has decided to oust the jurisdiction of the civil court. The likely anomaly is the abrupt closing of remedy in a civil suit by the constitution of the Claims Tribunals on 19th November 1964 without there being any positive alternative remedy to the plaintiff.” With these observations the Court decided issue No. 6 in favour of the plaintiff. The defendants have come in revision.

2. During the pendency of the revision the petitioners Nos 2 and 3 died but as the petitioner No. 1 is competent to agitate the controversy raised in the revision petition the revision was heard on merit. The question for determination is whether Section 110-F bars the jurisdiction of the civil court in respect of a claim made after the constitution of the Tribunal even though the claim arose out of the accident occurring before the constitution of the Tribunal. It may be mentioned however that the question relating to the jurisdiction of the Civil court to continue the trial of cases which had been entertained before the constitution of the Tribunal does not arise or call for examination.

3. It may be pointed out that prior to the introduction of Section 110-F in the present form in the Motor Vehicles Act of 1939 by the amending Act No 100 of 1956 with effect from 16th February 1957, a person suffering injuries in an accident could file a civil suit within one year of the date of the accident in a civil court. The legislature presumably considering the remedy of a suit inconvenient, dilatory and expensive provided a complete self-contained machinery for adjudication of claims for compensation in respect of accidents involving the death of or bodily injury to persons arising out of the use of the motor vehicles. Section 110 of the Act provided for the constitution by the State Government by a notification in the official gazette of Motor Accidents Claims Tribunal for such area as may be specified therein for the purpose of adjudicating upon claims for compensation in respect of accidents involving the death of, or bodily injury to persons arising out of the use of motor vehicles. Section 110-A provides for making of applications for compensation. Sub-section (3) of S 110-A provides that no application for compensation shall be entertained unless it is made within sixty days of the occurrence of the accident. Section 110-B and Section 110-C provide for the award of compensation by the Tribunal, its powers and procedure to be followed and for appeals against awards. Then Section 110-F which is important runs as follows.

"Bar of Jurisdictions of Civil Courts — Where any Claims Tribunal has been constituted for any area, no civil court shall have jurisdiction to entertain any question relating to any claim for compensation which may be adjudicated upon by the Claims Tribunal for that area, and no injunction in respect of any action taken or to be taken by or before the Claims Tribunal in respect of the claims for compensation shall be granted by the civil court."

4. The contention of the petitioner is that once a Claims Tribunal is constituted the jurisdiction of the civil court to entertain suits for compensation is ousted as

Section 110-F confers exclusive jurisdiction on the Claims Tribunal. The respondent's submission on the other hand is that the right of a suit being a vested right could not be taken away by Section 110-F which cannot be said to have retrospective operation. The learned counsel for the respondent relied upon a few decisions of the Madhya Pradesh High Court and one Single Bench decision of the Punjab High Court reported in *Mulak Raj Bhola Shah v Northern India Goods Transport Corporation Ltd.* AIR 1962 Punj 307.

5. Taking up the Madhya Pradesh decisions the earliest case is one reported in *Khatumal Ghanshamdas v Abdul Qadir Jamaluddin*, AIR 1961 Madh Pra 295. In that case the controversy related to the continuance of the civil suit which had already been instituted prior to the constitution of the Tribunal and the Court did not decide the question whether after the constitution of the Claims Tribunal the civil court jurisdiction to entertain the claim for compensation in respect of an accident taking place before the constitution of the Tribunal was taken away or not. The respondent's counsel therefore cannot derive much assistance from this case. Another case of the Madhya Pradesh High Court is the decision reported in *Iqbal Prakash v State of Madhya Pradesh*, 1962 MPLJ 465 where it was held that a claim for compensation instituted after the constitution of the Tribunal could be tried by the civil court as Section 110-F was not retrospective. The ground for the decision was:

"to require a claimant to apply to the Tribunal within sixty days of the accident when the Tribunal itself did not exist within that period is to ask him to do the impossible."

The third case of the M P High Court is the decision reported in *Sushma Mehra v. Central Provinces Transport Services Ltd.*, AIR 1964 Madh Pra 133 where it was observed that any enactment which has the effect of destroying an existing right cannot be given retrospective effect without express words. The Court also referred to the case of *Colonial Sugar Refining Co Ltd v Irving* 1905 AC 369 where the right to appeal was treated as a vested right, and on analogy extended it to the remedy which a litigant has for obtaining relief by means of a suit.

6. I have given my careful consideration to the cases of the Madhya Pradesh High Court and have not felt persuaded to follow the view taken by that High Court. In considering the question of vested right a distinction must be drawn between what is a substantive right and the procedural right. The right to compensation for injuries is a substantive right and ordinarily such a right cannot be construed to have been taken away by a sta-

tute except by express words of the statute or necessary intendment. The same however cannot be said with respect to the forum in which an action can be agitated. No litigant has or can have vested right in a particular forum. He cannot say as a matter of right that a suit or an application should be tried by this or that forum which existed on the date his cause of action arose. Forum belongs to the realm of procedure and does not constitute substantive right of a party or a litigant.

Similarly, limitation cannot be treated as a vested right. A litigant cannot say, where the legislature abolishes a forum that he can wait until the last day of limitation as a matter of right and therefore the court should be retained for his purpose though abolished for other purposes. The matters relating to forum and limitation relate to the law procedure and should be governed by the law in force at the time of the institution of the Tribunal. A reference to authoritative text books on interpretation shows consistent support of a view that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the court even where the alteration which the statute makes, has been disadvantageous to one of the parties. I need only refer to Salmond on Jurisprudence. Salmond considers

"that the substantive law is concerned with the ends which the administration of justice seeks; procedural law deals with the means and instruments by which those ends are to be attained"

He gives the illustration in this manner:

"Whether I have a right to recover certain property is a question of substantive law, for the determination and the protection of such rights are among the ends of the administration of justice; but in what courts and within what time I must institute proceedings are questions of procedural law, for they relate merely to the modes in which the courts fulfil their functions."

The same view has been approved in a number of leading cases. In *Ramkaran v. Ramdas*, ILR 54 All 299 at p. 306 : (AIR 1931 All 635 at page 639) (FB) Suleman C. J. observed:

"No doubt, a substantial right is not assumed to be taken away by a new Act unless it expressly says so. But a right to sue in one Court rather than another or a right to wait for a particular period of time before suing is not a substantial right. The selection of forum and the period of limitation are ordinarily matters of procedure only. The selection of a Court in no way affects the right of suit itself. The Limitation Act does not necessarily extinguish the right though it cer-

tainly places a bar against the remedy by suit."

In *Hazari Tewari v. Mst. Maktula Chauhain*, AIR 1932 All 30 it was argued that the law of limitation available to the plaintiff under pre-existing law was a vested right and that therefore the provisions of the new enactment for the filing of application within a particular time could not be read as retrospective. The learned Judges refuted the contention on the ground that there could be no vested interest in the choice of any particular forum and observed:

"If the legislature has thought fit to deprive the civil court of its jurisdiction to entertain suits of a particular nature, a plaintiff cannot compel the civil court to hear his suit merely because his cause of action had accrued before the new Act depriving the civil court of its jurisdiction was passed. The choice of forum is a matter of procedure and not a substantive right, and in most cases a new Act would have a retrospective effect so far as the choice of forum is concerned. The analogy of a new Act not affecting a pending action does not apply."

In *Unique Motor and General Insurance Co. Ltd., Bombay v. Kartar Singh*, AIR 1965 Punj 102, V. C. K. Bus Service (P) Ltd., Coimbatore v. H. B. Sethna, AIR 1965 Mad 149, *Palani Ammal v. Safe Service Ltd.*, 1966 ACJ 19 (Mad) and *Natverlal Bhikhal Shah v. Thakarda Khodaji Kalaji*, ILR (1967) Guj 495, a view has been taken that Section 110-F bars the jurisdiction of civil courts in respect of all claims preferred after the constitution of the Claims Tribunals even though the claims arose out of accidents occurring before the constitution of the Claims Tribunals. I have gone through all the judgments and respectfully agree with the view taken in these decisions and I am unable to follow the view taken by the M. P. High Court. As for the Single Bench decision of the Punjab High Court I need only mention that the earlier Single Bench decision relied upon by the petitioner stands overruled by the later Bench decision of the same High Court reported in *Unique Motor and General Insurance Co. Ltd., Bombay*, AIR 1965 Punj 102.

7. The learned counsel for the respondent however emphasised the principle that where the retrospective application of a statute prescribing the period of limitation would destroy vested right of action, or inflict such hardship or injustice as could not have been within the contemplation of legislature then the statute is not any more than any other law to be construed retrospectively and relied upon this principle to support his contention that Sections 110 and 110-A must be held inapplicable to a claim in respect of an accident occurring more than sixty days prior to the constitution of a Claims Tri-

bunal, for in such a case it would be impossible to comply within the period of limitation laid down in sub-section (3) of Section 110-A and the vested right of action of an applicant would be destroyed. He admitted that under sub-section (3) of Section 110-A the Tribunal has been given discretion to entertain applications even after the expiry of sixty days but the discretion of the Tribunal does not amount to giving a vested right to a litigant to secure the entertainment of his application after the expiry of sixty days. The difficulties pointed out by the respondent's counsel are not insurmountable and do not warrant a conclusion that a plain and grammatical meaning of S 110-A should be departed from on the basis of these difficulties.

Referring to these difficulties the Madras High Court took the view that sub-s (3) of Section 110-A would not govern applications in respect of claims arising out of accidents occurring more than sixty days before the constitution of the Tribunal, for applications under sub-section (3) postulate the existence of a Tribunal. The same High Court expressed the opinion that the proviso to sub-section (3) of Section 110-A can also be used to meet these difficulties. The Punjab and Gujarat High Courts have also met arguments based on these difficulties with reference to the proviso. These difficulties may have some

bearing upon interpretation of the provisions governing limitations but they cannot have substantial bearing on the interpretation of Section 110 F. Having regard to all these considerations I am of the opinion that Section 110-F bars jurisdiction of the civil courts in respect of all claims to be made after the constitution of the Tribunals even though the accidents may have occurred before the constitution of the Tribunals. The Senior Civil Judge was not justified in deciding Issue No 6 in favour of the plaintiff and continuing his jurisdiction over the case. His decision on issue No. 6 must be reversed.

8. I therefore accept this revision and holding that the suit was not maintainable reject the plaint of the plaintiff. It will be open to the plaintiff to present an application before the Tribunal and to secure condonation of the delay in presenting the claim before the Claims Tribunal having regard to the observations made in the order of this Court. The respondent shall be entitled to the refund of the Court-fee paid in the court of the Senior Civil Judge.

9. In the circumstances of the case the parties are left to bear their own costs of this revision.

LGC/D.V.C.

Revision accepted.

END

not a "reserved" forest within the meaning of Section 20 in Chapter II and that no offences were committed under section 20 of the Act.

The forests in the present case are not those covered by the three forests mentioned above. It cannot be said that there is no reserved forest in Tripura at all. "Jhuming" also involves cultivation by clearing forest and if this is done in the "reserved" forest areas, contrary to the forest laws, it would also affect the maintenance of the public order. So, the grounds now urged in this Court and not taken before the Supreme Court also have no force.

17. The third contention of the petitioners' Counsel is that if the detenus and others committed offences under the Indian Penal Code or the Indian Forest Act or Cr. P. C., they could be dealt with suitably and that action under the Act was unnecessary. He relied on *Khalifa Janki Das v. Emperor*, AIR 1950 East Punj 172, which is a case arising under the East Punjab Public Safety Act (Act V of 1949). But, the purpose of the Act is to secure "preventive detention", justified by national security and maintenance of public order and essential supplies and services and its purpose is not criminal conviction justified by legal evidence and by existing laws relating to crimes and offences. If the ordinary laws of the land and their application to any particular person are enough to meet the situation, which the Act is intended to meet, then it is difficult to imagine either the purpose or the object of the Act, which is self-contained. The powers of preventive detention under the Act are in addition to those contained in the Cr. P. C., where preventive detention is followed by enquiry or trial. Vide *Raman Lal Rathi v. Commissioner of Police, Calcutta*, AIR 1952 Cal 26 and *Hadibandhu Das v. The District Magistrate, Cuttack*, AIR 1968 Orissa 148 in this connection. So, the respondent was not barred from exercising his powers under the Act.

18. The fourth contention of the learned Counsel for the petitioners is that the grounds were vague, that details of the speeches alleged to have been made by the detenus and the details of the meetings were not mentioned, that the names of the reserved forests were not mentioned and that they were handicapped in making their representations to the State Government. He also relied on *Sadat Jahan v. The State of Hyderabad*, AIR 1953 Hyd 295, where it was held that criticism of the Government, however strong, is not to be regarded as a justifying ground for taking action under the Preventive Detention Act, unless it is such as to undermine security or would tend to overthrow the Govern-

ment. It was also held that freedom of speech and of the press lies at the foundation of all democracy.

19. In appreciating the above contention it is necessary to examine the grounds covered by Ext. A-2 in all the cases. The grounds in Ext. A-2 in Habeas Corpus Petition No. 30 of 1968 fall under one category. The grounds in Ext. A-2 in Habeas Corpus Petition No. 32 of 1968 are almost similar to the grounds in Habeas Corpus Petitions Nos. 33 of 1968, 34 of 1968, 35 of 1968, 36 of 1968, 39 of 1968, 40 of 1968, 41 of 1968, 48 of 1968, 49 of 1968, 50 of 1968, 51 of 1968, 52 of 1968, 71 of 1968 and 73 of 1968 which raise only questions of fact. Ext. A-2 grounds in Habeas Corpus Petition No. 72 of 1968 may be separately extracted. These three categories of grounds are all as follows:

"(a) Ext. A-2 in Habeas Corpus Petition No. 30 of 1968.

"GOVERNMENT OF TRIPURA
OFFICE OF THE DISTRICT MAGISTRATE

No. 141/14/23/SC/PD/68

Agartala

Dated, the 15th February, 1968.

Grounds for detention under sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of section 3 of Preventive Detention Act, 1950 (Act IV of 1950).

To

Shri Nripendra Chakraborty,
S/O Late Raj Kumar Chakraborty,
Banamalipur, AGARTALA.

You are being detained in pursuance of the Detention Order made under sub-clauses (ii) and (iii) of clause (a) of sub-s. (1) of S. 3 of Preventive Detention Act, 1950, as you have been acting in a manner prejudicial to the maintenance of public order and supplies essential to the community as evidenced by the particulars given below:

1. That you have been instigating the loyal villagers particularly the tribals living in and around the Forest Reserve areas to damage the forest plantation and to do jhuming" in Reserve Forest areas in violation of forest laws. Towards this end, you have been attending a number of secret meetings in which it was decided to urge the public to start campaign against the Forest Department and to destroy the forest plantation. You have been voicing the same feelings and inciting the people in a number of mass meetings held in different parts of the District also. That you have by your speeches and activities induced the tribals of the District to take recourse to violence to paralyse the forest administration in Tripura and disturb the public order in Tripura.

2. That you have been instigating the loyal cultivators from delivering the paddy to the Government which has been

requisitioned under the Tripura Foodgrains Requisition Order for the maintenance of supplies of foodgrains to the people in lean months. You have been instigating and inciting the people to offer organised and violent resistance against the paddy procurement staff. Towards this end, you have been attending a number of secret meetings in which it was decided to urge the public to start campaign against the procurement of paddy. You have been directly inciting the people in a number of mass meetings also. That you have by your speeches and activities induced the (people) of certain areas to offer violent resistance to paddy procurement thereby preventing the Government from maintaining supplies essential to the community during times of need.

The above two facts are evident from the fact that you attended a meeting on 21-7-67 at Gurubaktapara (Garjee) in the house of Ganesh Jamatia, mass meetings on 8-11-67 at Fatukroy bazar (Kailashahar), on 12-11-67 at Kalyanpur, on 28-11-67 at Teliamura and on 6-12-67 at Manikpur bazar and secret meeting on 26-12-67 at Silachari (Sabroom) in the house of Mathu Mog Choudhury and another mass meeting on 27-12-67 at Silachari bazar.

Because of your activities and incitement, forest plantations have been damaged on 18-6-67 at Dograibari and Kakulia, on 21-6-67 at Debdari under P S Bikora, on 23-12-67 at Paratia under P S R K Pore, on 24-6-67 at Paratia on 25-6-67 at Srikantabari P S Bikora and on a number of other dates in different parts of the territory.

Because of your activities on 21-1-68, 900 K G of procured paddy was looted by tribal women at Barkthal under Sidhai P S. On 2-2-68 the procurement staff offered strong and violent resistance by an unruly mob at Chalitabari P S Teliamura.

3 That you took an active part in organising Tripura Bund on 23-8-67 and in preventing the motor vehicles and rickshaws etc from plying on the road.

You are hereby informed that you may make a representation to the State Government against the detention order and that such representation should be addressed to Secretary, Home (Police) Department and forwarded through the Superintendent of Jail in which you are detained as early as possible. You are also informed that under Section 10 of the Preventive Detention Act, 1950 (Act IV of 1950), the Advisory Board shall, if desire to be heard, hear you in person and if you desire to be so heard by the Advisory Board you should intimate such desire in your representation to the State Government.

Sd/- Illegible
District Magistrate,
Tripura

(b) Grounds in Ext A-2 in Habeas Corpus Petition No 32 of 1968

"GOVERNMENT OF TRIPURA
OFFICE OF THE DISTRICT MAGISTRATE
TRIPURA

Agartala,
No 157/14/31/SC/PD/68 Dated, the 15th
February, 1968.

Grounds for detention under sub clauses (ii) and (iii) of clause (a) of subsection (1) of section 3 of Preventive Detention Act, 1950 (Act IV of 1950)
To

Shri Nilparna Kalai, Linparna Kalai, son of Late Nabin Chandra Kalai of Sardu Karkari, P S Teliamura

You are being detained in pursuance of the Detention Order made under sub-clauses (ii) and (iii) of clause (a) of subsection (1) of section 3 of Preventive Detention Act, 1950, as you have been acting in a manner prejudicial to the maintenance of public order and supplies essential to the community as evidenced by the particulars given below.

1 That you have been instigating the loyal villagers particularly the tribals living in and around the Forest Reserve areas to damage the forest plantation and to do dhuming in Reserve Forest areas in violation of forest laws. Towards this end, you have been attending a number of secret meetings in which it was decided to urge the public to start campaign against the Forest Department and to destroy the forest plantation. That you have by your activities created resentment against the Forest Department and the forest laws under Teliamura P S thereby endangering the maintenance of public order.

2 That you have been instigating the loyal cultivators from delivering the paddy to the Government which has been requisitioned under the Tripura Foodgrains Requisition Order for the maintenance of supplies of foodgrains to the people in lean months. You have been instigating and inciting the people to offer organised and violent resistance against the paddy procurement staff. Towards this end, you have been attending a number of secret meetings in which it was decided to urge the public to start campaign against the procurement of paddy. You have been also attending mass meetings in which inciting speeches to the public have been made. That you have by your activities induced the people under Teliamura P S to offer violent resistance to paddy procurement thereby preventing the Government from maintaining supplies essential to the community during times of need.

The above reports are evident from the facts that you attended a secret meeting in the first week of December 1967 in the house of Iswar Deb Barma, Brahmachera, a meeting on 11-12-67 in your own house, on 10-12-67 in the house of Lakshi Charan Deb Barma and a mass meeting on 16-12-67 at Mahacherrabazar and on a number of dates in other places. Because of your activities and incitement on 2-2-68 the procurement staff was offered strong and violent resistance by an unruly mob at Chalitabari, P. S. Teliamura.

You are hereby informed that you may make a representation to the State Government against the detention order and that such representation should be addressed to Secretary, Home (Police Department) and forwarded through the Superintendent of Jail in which you are detained as early as possible.

You are also informed that under section 10 of the Preventive Detention Act, 1950 (Act IV of 1950), the Advisory Board shall, if you desire to be heard, hear you in person and that if you desire to be so heard by the Advisory Board you should intimate such desire in your representation to the State Government.

Sd/- Illegible.

15/2

DISTRICT MAGISTRATE
TRIPURA.

(c) Grounds in Ext. A-2 in Habeas Corpus Petition No. 72 of 1968.

"GOVERNMENT OF TRIPURA
OFFICE OF THE DISTRICT MAGISTRATE

AGARTALA,

No. Dated, the 19th March, 1968.

Grounds for detention under sub-clauses (ii) and (iii) of Clause (a) of sub-section (1) of section 3 of Preventive Detention Act, 1950 (Act IV of 1950).

To

Shri Bijoy Kumar Deb Barma
Alias Bijoy Comrade,
S/O Joy Narayan Choudhury,
Radhanagar, P. S. Sidhai,
Sadar.

You are being detained in pursuance of the Detention Order made under sub-clauses (ii) and (iii) of clause (a) of sub-section (1) of Section 3 of Preventive Detention Act, 1950 as you have been acting in a manner prejudicial to the maintenance of public order and supplies essential to the community as evidenced by the particulars given below:

That in pursuance of the agitational programme, you have been instigating the loyal cultivators not to deliver paddy to the Government which has been requisitioned under the Tripura Foodgrains Requisition Order for the maintenance of supply of foodgrains to the people in

lean months. You have also been inciting the people to offer organised and violent resistance against the paddy procurement staff. Towards this end, you have been attending number of Conferences and meetings in which various resolutions were adopted regarding formation of Resistance Committee Party and to offer violent resistance where the female party would be ahead of such resistance. You have also been found delivering speeches in a mass meeting on the above lines.

The above reports are evident from the facts that you attended the 7th Annual Conference of the Tripura Gan Mukti Parishad Central Committee from 22nd to 24th October, 1967 at Ramthakurpara, on 10-12-67, you participated in a secret meeting in your own house, another conference in the house of Shri Biswa Deb Barma at Dagraibari and on 7-1-68 you presided over a secret meeting in your own house. You delivered speeches in a mass meeting on 17-1-68 between 3-25 P.M. and 5.00 P. M. held at Daigala, P. S. Sidhai under the auspices of the Gan Mukti Parishad and along with others you also attended a secret meeting at night in the house of Shri Sushil Deb Barma of Barkathal, the same day.

Because of your activities and propaganda, on 20-1-68 when Shri Krishna Ch. Deb Barma S/O Raghu Das Baishnab and Narayan Deb Barma S/O Raj Kumar Deb Barma both of Barkathal brought 900 K. G. of paddy in compliance of the levy notices and kept the same in the shop of Sikrai Deb Barma of Barkathal Bazar for handing over to the Government Procuring Agency, about 200/300 tribal women looted away the paddy from the said shop.

You are hereby informed that you may make a representation to the State Government against the detention order and that such representation should be addressed to the Secretary, Home (Police) Department and forwarded through the Superintendent of Jail in which you are detained as early as possible.

You are also informed that under section 10 of the Preventive Detention Act, 1950 (Act IV of 1950), the Advisory Board shall, if you desire to be heard, hear you in person and that if you desire to be so heard by the Advisory Board, you should intimate such desire in your representation to the State Government.

Sd/- District Magistrate
Tripura."

20. A comparison of the grounds mentioned above with the grounds extracted by the Supreme Court in its judgment in Writ Petitions Nos. 89 to 92 and 94 of 1968, Bidya Deb Barma v. District

Magistrate, Tripura, Agartala (SC) shows that they are all practically similar. It was contended before the Supreme Court that the grounds did not mention in details regarding particulars of time, place and circumstances. The Supreme Court held that the grounds begin by stating generally what the activities were, that they consisted of instigation of tribal people to practise jhuming etc and preventing the authorities from delivering paddy to Government under the procurement schemes, that the instigation was through mass and secret meetings and resulted in violent resistance to Government, that the grounds then specified the places where and the dates on which the meetings were held, and the resistance took place and that no more detailed information was necessary to give the detenus opportunity to make their representations. It was also held that the grounds were specific. So, the same observations apply to the present case also, wherein the grounds are similar. Though the names of the reserved forests were not noted their location was mentioned. Though the speeches were not extracted in detail, their purport was noted. The petitioners could not be said to have been handicapped.

21 It was also pointed out that the petitioner in Habeas Corpus Petition No 30 of 1968 was in Madurai from 20-1-68 to 2-2-68 and that, therefore, the alleged activities etc could not have taken place on account of his alleged instigation. A similar contention also was raised before the Supreme Court that the results could not follow the activities of the detenus which were later. The contention was repelled on the ground that the mentioning of dates of meetings was merely some evidence to show the kind of activities that the Court is concerned with preventive detention, that there were enough instances cited, that the situation in the area was already bad, that the later activities would not make it any better and that the detention did not suffer from any defect. Besides, as can be seen from Ujagar Singh v State of Punjab, AIR 1952 SC 350 the past conduct or antecedent history of a person can be taken into account when making a detention order. It was also held that it is largely from prior events showing the tendencies or inclinations of the man that an inference could be drawn whether he is likely, even in the future, to act in a manner prejudicial to the maintenance of public order. So, the fact that the petitioner in Habeas Corpus Petition No 30 of 1968 was in Madurai from 20-1-68 to 2-2-68 is immaterial.

22 There is a long catena of cases in consonance with the view that it is the subjective satisfaction of the detaining

authority about the soundness of the grounds and that the Court is only concerned with whether there had been such subjective satisfaction, whether there is absence of mala fides and whether all the opportunities of making representation were given. Vide State of Bombay v Atma Ram Shridhar Vaidya, AIR 1951 SC 157, Bhim Sen v State of Punjab, AIR 1951 SC 481, AIR 1952 SC 350, Sodhi Shamsher Singh v State of Pepsu, AIR 1954 SC 276, Sarju Pandey v State, AIR 1955 All 589, D. B. Golam Rafique v State of Tripura, AIR 1957 Tri 25, Ramesh-wai Shaw v District Magistrate, Burdwan, AIR 1964 SC 334 and Godavari S Parulekar v State of Maharashtra, AIR 1966 SC 1404. So, vagueness of the grounds or absence of more details in the grounds is no ground for setting aside the orders of detention and there is no proof of want of bona fides.

23 The fifth contention of the learned Counsel for the petitioners is that all the petitioners except the petitioner in Habeas Corpus Petition no 30 of 1968 do not know English, that they were handicapped in making their representations to the State Government and the Advisory Board and that therefore, their detention orders are liable to be set aside. This ground was, no doubt, taken by the petitioners in the petitions themselves. The petitioner in Habeas Corpus petition no 30 of 1968 is said to be a holder of Master of Arts Degree. The petitioners in Habeas Corpus Petitions Nos 33 of 1968 & 36 of 1968 signed the acknowledgments in English, when they were served with the grounds. So, it is stated that the remaining 14 petitioners do not know English.

A similar ground was taken in the rejoinder in the Writ petition 94 of 1968 in the batch of cases, Bidya Deb Barma v District Magistrate, Tripura, Agartala. Writ Petitions 89 to 92 and 94 of 1968 (SC). The Supreme Court held that the detenu in that case filed the petition in English and questioned the implications of the language of the order and the grounds, that he had the assistance of the other detenus who know English and that the complaint was belated. The same observations apply to these cases also, though the objections in these cases are not belated. The Detenus-petitioners, who alleged that they do not know English, filed their petitions in English questioning the implications of Exts A-1 and A 2. Evidently, they had the assistance of the detenus who know English. Besides, they never asked the respondent or the local Government to serve them with copies of translations of the orders and the grounds.

The decision in Harkishan v State of Maharashtra, AIR 1962 SC 911, relied on

in the batch of cases before the Supreme Court was also relied on before me and it is distinguishable. In that case the detenu requested the District Magistrate to furnish him with a translation of the order of detention, which was in English. But, he was told that the order of detention and the grounds of detention were in English, which was the official language in the District, and that no translation of the same was legally necessary. It was, therefore, held that there was no sufficient compliance with the requirements of clause (5) of Article 22 of the Constitution and that the communication must bring home to the detenu effective knowledge of the facts and circumstances on which the order of detention was based. In the present case the detenus, who state that they do not know English, never raised any objection until May or June, 1968 when they filed the Habeas Corpus petitions. There is no force in the contention of the petitioners' Counsel that the respondent should have discovered for himself from their signatures, who knew English and who did not know it and that he should have served them with translations of Exts. A-1 and A-2. So, it cannot be stated that they were in any way handicapped in making any effective representations.

24. Though the petitioners were informed by the respondent that they could make representations to the State Government and that they would also be heard by the Advisory Board, if so desired, none of the petitioners except the petitioner in Habeas Corpus Petition No. 30 of 1968 made any representation. It was no doubt held in *Prem Dutta Paliwal v. Superintendent Central Prison Agra*, AIR 1954 All 315 that a review of the case of the Advisory Board is no bar to the High Court in exercising jurisdiction in issuing a Writ for Habeas Corpus. But, this Court had taken a contrary view in AIR 1957 Tri 25 that the Writ Petitions do not lie. The satisfaction of the detaining authority, which is his subjective satisfaction under Sec. 3 (1) (a) of the Act, is not justiciable. But, the plea of mala fides taken by the detenus is justiciable. So, the fact that the Advisory Board recommended further detention does not bar the Court from entertaining the petitions.

25. It was also contended that the grounds of detention were not served under Section 7 of the Act within 5 days from the orders of detention. In all the cases, except in Habeas Corpus Petition No. 72 of 1968, the orders of detention are dated 9-2-68. But, the petitioners therein were arrested on 11-2-68. Under Section 7 of the Act the grounds shall be served not later than 5 days from the date of detention. As they were all detained on 11-2-68, the grounds were validly served on them on 15-2-68. In Habeas Corpus Petition No. 72 of 1968 the petitioner was detained on 16-3-68 and was served

with grounds on 19-3-68. So, there is no illegality on this count.

26. It was finally contended that the respondent stated in his affidavits that the petitioners were "endangering public order" and not that they were acting prejudicial to the "maintenance of public order". This is a difference without distinction. Correct expressions were used in Exts. A-1 and A-2.

27. Thus, the additional grounds, which were urged in this batch of petitions have no force, specially after the batch of similar petitions was dismissed by the Supreme Court.

28. In the result, the petitions fail and are accordingly dismissed.
GGM/D.V.C.

Petitions dismissed.

AIR 1969 TRIPURA 53 (V 56 C 11)

R. S. BINDRA, J. C.

Ramesh Chandra Sutradhar, Appellant v. The State, Respondent.

Criminal Appeal No. 22 of 1967, D/- 27-5-1969, against judgment and order of S. J., Tripura in Sessions Trial No. 3 of 1967.

(A) Penal Code (1860), Chapter IV, General — Motive — Proof of, is not always necessary.

It is not incumbent on the prosecution to establish the existence of any motive for the crime with which the accused may be charged. However, it cannot be gainsaid that there must exist a motive for every voluntary act. It may also be stated without fear of contradiction that in a Criminal trial failure to prove the motive does not necessarily imply that there was no motive for the crime. It is equally well settled that the proof of motive is not necessary to sustain a conviction on a murder charge when there is clear evidence that the person had been done to death by the accused. In other words, when the facts establishing the charge are clear it is immaterial that the motive has not been proved. The reason is that the motive of an act may be known to the perpetrator and to none other and the investigator may not have been able to collect any information in regard thereto.

(Para 11)

(B) Penal Code (1860), Sections 304, Part II and 102 — Accused inflicting blows on deceased after latter had fallen on ground and weapon wrested from him — Held, that the accused had over-stepped the legal limits of defence of person and was punishable under Part II of Section 304 — In view of grave nature of injury inflicted on deceased the accused could be attributed knowledge that his act was likely to cause death.

(Para 12)

(C) Penal Code (1860), Section 304, Part II — Sentence — Number of injuries inflicted by accused on deceased smack of barbar-

HM/HM/D576/69/D

ism and nature thereof indicating barbarity — There cannot be any leniency in punishment — R 1. for 3 years and fine of Rs 2,000 imposed (Para 13)

M Nath (Amicus Curiae), for Appellant,
H C Nath, Govt Advocate, for Respondent

JUDGMENT This appeal by Ramesh Chandra raises the question whether he had killed Abinash Chandra, at about dusk time on 1-4-1966 in the village of Mohanpur inside the house of P W 2 Mahendra Debnath, in exercise of the right of private defence of his person. The learned Sessions Judge, Agartala, has returned the verdict of guilty under Section 302, I P C against the appellant and has sentenced him to life imprisonment.

2 A large number of labourers had been engaged by Mahendra Debnath (P W 2), on the date of occurrence, for the digging of a tank in the proximity of his residential house. About an hour before sun-set a Sadhu appeared on the scene and sat down on the west of southern hut in the house of Mahendra Debnath. The deceased Abinash Chandra and his father were busy at that time with agricultural operations in an adjoining field. After finishing the day's work Abinash Chandra proceeded to a place near the south-east corner of the tank where Mahendra Debnath was standing. Abinash Chandra, on being told by Mahendra Debnath that the person sitting close to the southern hut of the house was a Sadhu, expressed his desire to do pranam to him. He then carried a dao in his hand which he had brought from his field. He went towards the Sadhu carrying the dao with him. A short while after Mahendra Debnath heard some sound emanating from the eastern direction. When he turned his back to find out what the matter was he was startled to notice that Abinash Chandra lay on the ground and the Sadhu was administering blows to him with the dao. The Sadhu was none other than the present appellant Ramesh Chandra. Mahendra Debnath let out a cry saying that Abinash Chandra was being done to death by the Sadhu. The labourers working in the tank clambered out and proceeded towards the culprit. However, the latter scared them away by brandishing the weapon. Instantly, quite a few persons from the village including Dinesh Debnath (P W 3) reached the scene of occurrence. This Dinesh Debnath carried a bamboo lathi with him. He utilised the weapon for disarming the accused of the dao and for achieving that end, it is said he rained quite a few blows on his person. Once the weapon dropped from the hands of the accused, he was overpowered by the persons who had assembled around him. He was firmly secured with a rope and confined in a room.

3 One of the persons who had appeared on the scene soon after the occurrence was Subodh Chandra Debnath (P W. 1). After this Subodh had collected the facts of the

occurrence from the persons having knowledge of the same he left for the police station, Agartala, and lodged the F. I. R. Ext P-1 (a), at 7-55 P. M. on 1-4-1966, with the S. H. O. Apama Ranjan Bhattacharjee. The S. H. O. reached the scene of occurrence at 8-50 P. M. He placed the accused under arrest, prepared the inquest report and the rough site plan Ext P-4, and then sent the dead body of Abinash Chandra for post mortem examination.

4 The post mortem examination was done by Dr Dwigendra Lal Banerjee (P W. 18) at 11 A. M. on 2-4-1966. He found a large number of injuries on the person of the deceased including one clean cut gaping incised wound $6\frac{1}{2}'' \times 3'' \times$ bone deep on the back of the neck $2\frac{1}{2}''$ below the occipital region, an incised wound $3'' \times 2'' \times$ muscle deep just above the first mentioned injury, and another clean cut gaping incised wound $3'' \times 1'' \times$ muscle deep on the left side of the neck, an inch below the first injury. The internal examination revealed that the fourth cervical vertebra, the spinal cord, the trachea, the oesophagus, and the vessels of the neck had been cut at the level of injury No 1. All the injuries were ante-mortem and occasioned by a sharp-edged weapon like dao. The death according to the opinion of the doctor, had resulted from the shock and haemorrhage occasioned by the injuries received. Injury No 1, the doctor affirmed, was sufficient to cause death.

5 The accused pleaded not guilty to the charge. His defence, as put before the learned Sessions Judge, and repeated in this Court, was that Abinash Chandra, the deceased, and his wife had secured amulets from him to get a child, that the wife of Mahendra Debnath (P. W. 2) being ill he too had taken a charm from him for restoration to health of his wife, and that on the date of occurrence when he, (the accused) went to the house of Mahendra Debnath, the latter and Abinash Chandra abused him on the charge that amulets provided by him had proved ineffective. Abinash Chandra went a step further and opened an assault on him with the blunt side of the dao that he carried on his person. Left with no alternative the accused wrested the weapon from Abinash Chandra and in sheer self-defence occasioned blows therewith to Abinash Chandra, which resulted in the latter's death.

6 The learned Sessions Judge rejected the plea of self-defence and holding the accused as the author of the brutal injuries inflicted on Abinash Chandra sentenced him to life imprisonment on the charge under Section 302, I P. C.

7 Sri M. Nath appearing as amicus curiae for the appellant urged strenuously that there is ample material on the record to sustain the plea of self-defence and submitted that the trial Court had erred in rejecting that plea. Sri H. C. Nath, the learned Government Advocate, urged equally vigorously that the charge of clean murder

had been brought home to the accused, though he submitted, towards the close of arguments, that at the best the accused had exceeded the limits prescribed by law for exercising the right of private defence and so he may be held guilty of culpable homicide not amounting to murder under Part I of Section 304, I. P. C. It may be mentioned here that Dr. Dwigendra Lal Banerjee had found a number of injuries on the person of the accused when he happened to examine him at 2-15 A. M. on 2-4-1966. The injuries were a swelling with haematoma and congestion on the upper and lower eye-lids, multiple abrasions of different sizes on the right side of the face, a lacerated injury $1/4" \times 1/4" \times 1/4"$ on the right side of the forehead, two lacerated injuries each measuring about $1/4" \times 1/8" \times 1/4"$ on the lower lip, a lacerated injury $1/8" \times 1/4" \times 1/8"$ on the left side of the face near the border of the cheek, and another simple injury. The doctor also noticed that there was slight, but active, bleeding from the nose of the accused. All the injuries, the doctor affirmed, were on the face, nose, eyes and near about the eyes. It was conceded straightway by Sri H. C. Nath that it is for the prosecution to explain the injuries found on the person of the accused. Indeed it is so.

8. Sri H. C. Nath urged that the injuries had been occasioned to the accused, according to the testimony of the prosecution witnesses, by P. W. 3 Dinesh Debnath or by the people who had assembled near the scene of occurrence. Though it is correct that a large number of prosecution witnesses have deposed in chorus that Dinesh Debnath had been attracted to the spot by the hub-bub raised by Mahendra Debnath and that he had administered a number of blows to the accused with the lathi brought by him with the object of disarming him of the dao, a close scrutiny of that evidence and other circumstances have led me to the conclusion that this part of the prosecution story is a fabrication. The Investigating Officer admittedly reached the spot at 8-50 P.M. and we have his own testimony that he examined Mahendra Debnath, Nitai Debnath, Lakshan Debnath, Gopal Chandra Debnath and Karuna Mohan Debnath during the course of the night before sending the accused to the hospital for the treatment. It was not denied by Sri H. C. Nath that Dinesh Debnath was present in the village when the S.H.O. happened to reach there. However, the S.H.O. did not record the statement of Dinesh Debnath on that day but only on the 5th of April 1966. According to the version of the prosecution Dinesh Debnath had played a vital role at the time of the occurrence. In that context the S. H. O. was bound to record his statement on top priority basis and if he did not care to contact him soon after his arrival in the village, it must clearly be for the reason that the role assigned to Dinesh Debnath during the subsequent stages of the investigation had not been hammer-

ed out. Further, some of the injuries found on the person of accused were of bleeding nature. If those injuries had been occasioned by Dinesh Debnath, the lathi used by him would have been stained with blood. That lathi, however, was neither found by the S. H. O. at the spot, nor was it produced before him by Dinesh Debnath or some one else, nor again, the S. H. O. made any effort to locate it. In the F. I. R. it had been mentioned by Subodh Chandra Debnath (P. W. 1) that he had collected the facts pertaining to the offence from the labourers who had assembled at the spot. However, there is no recital in the document to the effect that either Dinesh Debnath had administered blows to the accused to deprive him of the weapon, or that after the accused had been relieved of the weapon the labourers had stormed him. All these facts cumulatively yield the inescapable conclusions that neither Dinesh Debnath had given lathi blows to the accused nor the labourers had fisted or cuffed the latter as contended by the learned Government Advocate. It may be appositely pointed out that the Medical Officer did not notice a single injury on the hands or arms of the accused and that none of the labourers was specific in saying who out of them had physically manhandled the accused. Another factor worth mention is that Kamala Kanta Debnath (P. W. 10), the father of the deceased, admitted that Dinesh Debnath is the maternal uncle of the deceased Abinash Debnath. If Dinesh Debnath is related to the deceased in that manner, Mahendra Debnath, a brother of Dinesh Debnath, would also be related to Abinash Debnath in the same way. Hence the averments of the two brothers, Mahendra and Dinesh, have to be taken with a grain of salt.

9. If the Court disbelieves the prosecution version that the injuries had been occasioned to the accused by Dinesh Debnath or by individuals assembled at the spot, as has been done above, it is left with no explanation, on the part of the prosecution, respecting the various injuries noticed by the doctor on his person. The corollary that follows is that the defence set up by the accused that those injuries had been occasioned to him by the deceased Abinash is thrown up in bold relief. Sri H. C. Nath minutely examined in Court all the injuries listed by the doctor and submitted that the haematoma and congestion on the eye-lids and the abrasions on the right side of the face could not have been occasioned by the blunt side of the dao as pleaded by the accused. I do not want to enter the lists with Sri H. C. Nath on that point. However, those two injuries can be easily explained. After the accused had wrested the weapon from the hands of Abinash Chandra, the latter could have entered into scuffle with him (the accused) to secure back the weapon and in the process to have administered him

some fist blows in the region of eyes. Such blows could have occasioned haematoma and congestion in the eye-lids. The abrasions on the face may well have come about when the accused was secured by the persons at the spot. Sri H C Nath did not contest the proposition that the lacerated injuries on the forehead, lower lip and on the left side of the face could have been occasioned with the blunt side of the dao which was brought to the Court room at my instance and was examined critically by Sri H C Nath.

10. Sri H C Nath very fairly conceded that the prosecution had not been able to establish genesis of the conflict that cropped up between the deceased Abinash and the accused Mahendra Debnath was the first to know about the occurrence but admittedly when he looked in the direction of the scene of conflict the deceased was lying on the ground and the accused was administering blows to him. What had happened before that moment was apparently not known to Mahendra. As against the complete absence of prosecution evidence bearing on the origin of the conflict, we have the version of the accused that Mahendra Debnath and the accused played foul with him because the objectives for which they had secured the amulets from him had not materialized. It is also the version of the accused that Abinash used the blunt side of the dao he carried in his hand in occasioning him (the accused) some blows and it is then that he snatched the weapon from Abinash and used the same effectively against the latter. This version of the accused is not in conflict with facts established by the prosecution evidence. It also explains the injuries found on the person of the accused and provides in addition a reasonable version of how the situation flared up. Sarat Debnath (P W 7), the son of Mahendra Debnath admitted that his mother had secured a talisman respecting her illness. It is in the statement of the Investigating Officer (P W. 20) that amongst other articles seized by him from the scene of occurrence there was the amulet Ext M O 5. Hence it is possible, nay probable, that the wife of Mahendra Debnath and the deceased had secured amulets from the accused. This piece of evidence also lends corroboration to the story propounded by the accused.

11. I agree with Sri H C Nath that it is not incumbent on the prosecution to establish the existence of any motive for the crime with which the accused may be charged. However, it cannot be gainsaid that there must exist a motive for every voluntary act. It may also be stated with out fear of contradiction that in a criminal trial failure to prove the motive does not necessarily imply that there was no motive for the crime. It is equally well settled that the proof of motive is not necessary to sustain a conviction on a murder charge when there is clear evidence that the person had

been done to death by the accused. In other words, when the facts establishing the charge are clear it is immaterial that the motive has not been proved. The reason is that the motive of an act may be known to the perpetrator and to none other and the investigator may not have been able to collect any information in regard thereto. In the background of these principles and the fact that the prosecution was unable to attribute any motive to the accused for having indulged in allegedly unprovoked assault with a deadly weapon on Abinash, we cannot lightly dismiss the motive which, according to the accused, had weighed with Abinash and Mahendra Debnath in creating a situation which cost a valuable young life. The defence of the accused that the two persons had firstly abused him and that Abinash had subsequently opened an assault on him with the blunt side of the dao looks highly probable, and since it has the merit of explaining the injuries suffered by the accused and also provides the motive for the accused making an assault on Abinash it cannot be left out of account. I would, therefore, accept the version preferred by the accused.

12. The only question that remains for determination is whether the facts bring the case within Exception 2 to S 300, I P C as canvassed by Sri M Nath, the Counsel for the appellant. That exception provides that culpable homicide is not murder if the offender, in the exercise in good faith of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of the defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence. It may also be mentioned at this stage that Clause 4 of Section 99, I P C enacts that the right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence, and that Section 102, I P C states that the right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed and that it continues as long as such apprehension of danger to the body continues. It was contended by Sri M Nath that the apprehension to the person of the accused commenced when Abinash opened the assault on him with the dao and that it terminated only after the accused had succeeded in flooring Abinash. When the unchallenged statement of Mahendra Debnath (P W 2) that the accused had administered some blows to Abinash even after the latter had fallen on the ground was brought to his notice, Sri M Nath said that his client may be held guilty on the footing of that evidence under Section 324, I P C for having exceeded the right of private defence. Sri H. C Nath, however, urged that im-

mediately after the moment the accused had succeeded in wresting the weapon from Abinash the right of private defence of body ceased to exist, and since all the blows had been administered by the accused to Abinash after that moment, he should be held guilty of murder. In my opinion, the truth lies somewhere in between the two extreme stands taken by the parties' Counsel. To quote the words from an American judgment, "detached reflection cannot be demanded in the presence of an uplifted knife". It is, indeed, often said, and rightly, that one cannot weigh in golden scales what maximum amount of force was necessary to keep within the limits of the right of private defence. Hence I cannot subscribe to the contention of Sri H. C. Nath that apprehension to the person of the accused had terminated with the snatching of the weapon by him from the hands of Abinash. As observed earlier, Abinash must have in all likelihood continued the scuffle with the accused in a bid to snatch back the weapon from the latter. I have also observed above that possibly the injuries around the eyes of the accused had been occasioned by Abinash at that stage of the scuffle. Therefore, I do not feel safe in holding that the danger to the person of the accused had terminated after Abinash had been deprived of the weapon. At the same time I cannot agree with Sri M. Nath that the danger at that stage to the person of the accused was so grave that he could legitimately harbour the apprehension that Abinash would either kill him or occasion him grievous hurt.

In terms of Section 100, I. P. C. the right of private defence of the body extends to the voluntary causing of death, if the offence which occasions the exercise of the right be, inter alia, such an assault as may reasonably cause the apprehension that death or grievous hurt shall otherwise be the consequence of that assault. I cannot believe that in bare-handed condition Abinash could have made an assault of such a nature on the accused. I would in consequence hold that the accused had over-stepped the legal limits of the defence of persons and as such he is guilty of an offence made punishable by Part II of Section 304, Indian Penal Code. I find material on record much too scarce to sustain the finding that the accused had any intention of causing death of Abinash or causing such bodily injury to him as was likely to cause his death. However, in view of the grave nature of the injuries inflicted on Abinash especially injury no. 1, the accused can be attributed the knowledge that his act was likely to cause death of Abinash. If the accused had come with the set intention of taking the life of Abinash, he must have brought some weapon with him. But that is not the case of the prosecution. The weapon used by him against Abinash had, by common agreement, been secured by him from the possession of Abinash.

13. In the matter of sentence I am not inclined to show any leniency to the accused. The reason is that the number of injuries inflicted by him smack of barbarism and the nature thereof indicates brutality. I would, therefore, sentence him to 3 years' rigorous imprisonment and a fine of Rs. 2,000/-, or, in default, additional rigorous imprisonment for 2 years. The fine, if realised, shall be paid to the heirs of the deceased Abinash. Announced.
MVJ/D.V.C. Order accordingly.

AIR 1969 TRIPURA 57 (V 56 C 12)

R. S. BINDRA, J. C

Ful Kumar Tripura and another, Appellants v. The State, Respondent.

Criminal Appeal (Jail) No. 7 of 1967, D/-20-6-1969, against the judgment and order of Addl. S. J., Agartala, Tripura in S. T. No. 21 of 1965.

(A) Evidence Act (1872), S. 3 — Penal Code (1860) — Circumstantial evidence — Appreciation of — Must be consistent only with guilt of accused — (Criminal P. C. (1898), S. 367) — (Penal Code (1860), S. 364).

The principles bearing on what should be the nature and quality of the circumstantial evidence before a charge can be held established by it are: (i) the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established; (ii) all the facts so established should be consistent only with the hypothesis of the guilt of accused; and (iii) the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. It is equally well established that, in cases dependent on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and also incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstantial evidence, therefore, must be a combination of facts creating a network through which there is no escape for the accused, or, in other words, the facts taken as a whole do not admit, to the extent of moral certainty, of any inference but of his guilt. The chain of facts constituting the evidence must be so complete as not to leave any reasonable ground for a conclusion therefrom consistent with the innocence of the accused. AIR 1952 SC 343 & AIR 1960 SC 29, Rel. (Para 12) on.

Held on facts that it could not be said that the circumstantial evidence was consistent only with the hypothesis that the accused had abducted the two deceased or that the abduction was for purposes mentioned in S. 364, Penal Code. (Para 12)

(B) Penal Code (1860), Chapter IV, General, Ss. 364, 302 — Prosecution for murder.

HM/HM/D575/69/D

der — Motive — Proof of, whether essential

Though it is not essential for the prosecution to establish motive against the accused in all cases, but at the same time it cannot be gainsaid that without adequate motive, speaking normally, none is expected to take the life of another human being. To bag human body as a game is a rare occurrence, if at all (Para 11)

(C) Penal Code (1860), S. 364 — Offence under S 364 — No enmity between the two accused persons and two deceased — Third co-accused P who was alleged to have procured services of accused for abduction of deceased, exonerated of charge under S 364 read with S 109, I P. C and acquitted — It is futile for prosecution to contend that either of the two accused had any motive for committing double murder — If the co-accused P had not engaged them for alleged abduction, charge of abduction against accused must fall ipso facto inasmuch as it was the basis of prosecution story that it was P who procured abduction of deceased.

(Para 11)

Cases Referred Chronological Paras

(1960) AIR 1960 SC 29 (V 47)=

1960 Cri LJ 137, Govinda Reddy v State of Mysore 12

(1952) AIR 1952 SC 543 (V 39)=

1953 Cri LJ 129, Hanumant Govind v State of Madhya Pradesh 12

A M Lodh, (*Amicus Curiae*) with H Dutta, for Appellants, H C Nath, Govt. Advocate for Respondent

JUDGMENT The appellants Fulkumar and Lalikumar challenge the correctness of their conviction under Section 364, Indian Penal Code, and sentence of 8 years' rigorous imprisonment, imposed on each by Shri N M Paul, the Additional Sessions Judge at Agartala, by his judgment dated 27-12-1966

2 The two appellants were tried on the charge of murder under Section 302, Indian Penal Code and in the alternative on the charge under Section 364, Indian Penal Code. Their co-accused Promode Ranjan Dewan was charged under S 302 read with S 109, I P C and in the alternative under S 364 read with Section 109, Indian Penal Code. The charge of murder could not be sustained against either of the accused and so they were all acquitted of that charge. Promode Ranjan Dewan was also exonerated of the charge under Section 364 read with Section 109, Indian Penal Code. The present appellants were held guilty under Sec 364, Indian Penal Code and sentenced in the manner stated above.

3 The prosecution story, as gathered from the testimony of the various witnesses examined at the trial, is that at about 9 P M., on 22-9-1963, the appellants Fulkumar and Lalikumar visited the house of the deceased Panchakumar when the latter was sitting in his hut at Hajachara along with his wife and

both were smoking. The two accused requested Panchakumar to accompany them out and he agreed. The party of three left the house of Panchakumar and made for that of Khagendra, the other deceased of this case. Khagendra and his wife Chandrasree were also enjoying smoke in their hut. Fulkumar and Lalikumar requested Khagendra to go out with them and Khagendra nodded assent. However, neither Panchakumar nor Khagendra returned to their respective huts during that night and so their spouses felt anxiety in regard to their safety. Bagalaxmi, the wife of Panchakumar, contacted Chandrasree, the wife of Khagendra, on the morning of 23rd to ascertain if the latter had any information respecting her husband. Each apprised the other that her husband had not returned since he had left on the previous night in the company of Fulkumar and Lalikumar. Both the women also happened to meet Fulkumar and Lalikumar in the village on the same morning and made inquiries about their husbands. However, Fulkumar and Lalikumar denied any knowledge in regard to their whereabouts. After the necessary but abortive search in the village and elsewhere the two women went to the police Outpost at Silachari to report that their husbands were missing since the previous night. It appears that Radhapada, the A S I in charge of the Outpost at Silachari, advised them to submit their report in writing. Consequently, they went to the bazar at Silachari and requested Benoy Bhusan (P. W. 3) to help them in preparing the reports. Benoy Bhusan prepared the reports Exts P-1 and P-1(a) at their instance and these reports were then presented to Radhapada, who sent those reports, in original, on the same day by post to the police station Sabroom, under which the Outpost at Silachari falls.

4 On 23rd of September, 1963, Priyanath Ghosh (P. W. 9), an employee in the Anti-Malaria Department as Field Worker, was surprised to notice one aged lady and an aged man on the run while he was proceeding from Hajachara to Silachari. On enquiry from those two persons, the witness learnt that they had seen two dead bodies, with serious injuries on their persons, lying in a paddy field close-by. The witness then visited the place where the dead bodies were reported to be lying and was convinced about the veracity of the information passed on to him by the aforementioned two persons. On the next day, 24-9-1963, Priyanath Ghosh communicated what he had seen to Anil Kumar (P. W. 4), an employee in the Forest Department, and this Anil Kumar, in turn, went to the Outpost at Silachari and told A S I Radhapada, the officer in charge, that the dead bodies of two persons were lying in the paddy field. A S I Radhapada then contacted Priyanath Ghosh (P. W. 9) and asked him to accompany him to the place where the dead bodies were lying. Priyanath excused himself but detailed one peon of his own Department for accompany-

ing A. S. I. Radhapada to the relevant field. A police party headed by Radhapada then left for that field where they reached at about 3 P. M. After seeing the dead bodies, Radhapada sent a word to the widows of Panchakumar and Khagendra. After those women had reached the field and identified the bodies of their husbands, Radhapada prepared the inquest reports. He seized one blood-stained sickle, some blood-stained earth and some blood-stained garments from the scene of occurrence and prepared the recovery memo in that respect. That done, he sent the dead bodies to Silachari and busied himself in the search of Fulkumar and Lalikumar. That search, however, was unavailing. He returned to the Outpost at about 7-30 P. M. and then sent a radiogram message to the Officer-in-charge of the police station Sabroom intimating the recovery of the dead bodies of Panchakumar and Khagendra as also the reports lodged by the widows of the deceased on the previous day. On the next morning (25-9-1963) Radhapada sent the dead bodies to Sabroom for post mortem examination.

5. The radiogram message sent by Radhapada was received by Aparna Ranjan Bhattacharjee, the Officer-in-charge of the police station Sabroom, at 9 A. M. on 25th of September. On the basis of that message Bhattacharjee registered a case and then started the investigations. At about 2 in the night between 25th and 26th, he left for the place of occurrence via the Outpost Silachari. From the latter Outpost he collected all the papers on the evening of 26th and after spending the night at that Outpost he left for the place of occurrence on the next morning. He prepared the site plan and collected from there another two sickles and two tufts of blood-stained hair. Thereafter, he went to the village of the two deceased and examined a few persons. He also happened to search the houses of the accused Fulkumar and Lalikumar, but abortively. On 29-9-1963 Bhattacharjee happened to arrest Amarendra Dewan, a nephew of the accused Promode Ranjan Dewan, and Sonadhan Chakma, from whose paddy field the dead bodies were found. But it appears that they were subsequently released, nothing incriminating having been discovered against them. One Brajendra Tripura was also arrested in connection with this case, but he too was not ultimately proceeded against. Bhattacharjee arrested Promode Dewan on 4-10-1963, while Radhapada (P. W. 18) succeeded in arresting the present appellants on 15-12-1963.

6. Before the investigations had concluded, Bhattacharjee had to leave Sabroom for Kamalpur in connection with Court evidence. He, therefore, made over the investigations on 17-12-1963 to Gobinda Gopal Basak (P. W. 17). Radhapada sent the two appellants on 17-12-1963 to the police station Sabroom. Sri G. G. Basak secured police remand respecting them on 18-12-1963 from the Magistrate at Sabroom. It is in the statement of

Basak that on 20th of December, 1963, both the accused made disclosure statements to him and that pursuant thereto he recovered the takkal daos Exts. PM-1 and PM-1 (a) respectively at the instance of Fulkumar and Lalikumar.

7. The post-mortem examination on the two dead bodies was done by Dr. Nilmani Deb Barma (P. W. 15) on 26th of September, 1963. He noticed a large number of incised wounds on the persons of the two deceased. All the wounds, the doctor affirmed, were ante-mortem and sufficient to occasion death.

8. P. W. 1 Bagalaxmi and P. W. 2 Chandrasree, the wives of the two deceased, happened to affirm that their husbands had taken some lands on rent from Promode Dewan, the accused since acquitted, that Promode Dewan wanted their husbands to vacate the lands, and that since the deceased had refused to oblige Promode Dewan the latter happened to nurse a grievance against them. It was to secure his objective, the two women insinuated, that Promode Dewan had procured the murders of Panchakumar and Khagendra with the help of the present appellants. These facts, the prosecution contended constituted the motive culminating in gruesome felony.

9. Fulkumar and Lalikumar entered the plea of not guilty. The defence set up by them was that they were altogether innocent and had been falsely implicated.

10. Shri A. M. Lodh, the learned Counsel representing the appellants as amicus curiae, urged vehemently that the evidence on the record falls far short of establishing the various ingredients of Section 364, Indian Penal Code. That section provides that whoever kidnaps or abducts any person in order that such person may be murdered or may be so disposed of as to be put in danger of being murdered, shall be punished with imprisonment for life, or rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. The expression "abduction" is defined in Section 362, Indian Penal Code. That section enacts that whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person. Shri Lodh canvassed that it was not the contention of the prosecution that the appellants had forcibly compelled the two deceased to accompany them out, on the evening of 22-9-1963, and that in consequence the prosecution could at the best contend that the deceased had been beguiled into going out of their huts by deceitful means. However, the Counsel urged further that there was not an iota of evidence to establish that any deceitful means had been employed by the appellants against the two deceased. Shri H. C. Nath, the learned Government Advocate, did not join issue with Shri Lodh on the point that it was not the prosecution case that any force had been used by the two accused against the deceased for the purpose of taking them

out of their huts. However, Shri Nath submitted that the circumstantial evidence available on the record leaves no scope for doubt on the point that the accused did apply deceitful means in taking the two deceased out. When asked by the Court to detail the circumstantial pieces of evidence in support of his contention, Shri Nath could marshal only two of them. They are, (i) that at about 9 P. M. on 22nd of September, 1963, the two accused had firstly visited the house of Panchakumar and then of Khagendra and had taken them out of their huts along with them, and (ii) that the dead bodies of Panchakumar and Khagendra were found lying in the paddy field of Sonadhan Chakma on the morning of 23rd of September, 1963. Shri Lodh, it must be stated here, did not contest that the two facts listed by Shri Nath are proved beyond doubt by dependable evidence.

The statements of P. W. 1 Bagalaxmi and P. W. 2 Chandrasree sound wholly convincing on the points that the two appellants had visited their respective huts late in the evening of 22-9-1963 and had taken their husbands along with them, and that they had lodged the reports Exts. P-1 and P-1 (a) with the Outpost at Silachari in the evening of 23rd of September, 1963, after they had failed to get any information about their husbands, despite intensive and extensive search during the day. It is convincingly established from the testimony of Priyanath Ghosh (P. W. 9) that he had seen the dead bodies lying in the paddy field on 23-9-1963 and that he had vouched that information to Anil Kumar (P. W. 4). This Anil Kumar deposed that he happened to visit the Outpost at Silachari on 24th of September, 1963 when he communicated the information, passed on to him by Priyanath Ghosh, to Officer-in-Charge of the Outpost Radhapada (P. W. 18) affirmed that on 23rd the reports Exts. P-1 and P-1 (a) had been delivered to him by the two women and that on the next day Anil Kumar apprised him personally that two dead bodies were seen lying in the paddy field. He deposed further that after ascertaining for himself that the bodies were lying at the place mentioned by his informant, he sent a radiogram to the police station Sabroom. That radiogram message is marked Ext. P-11. It is recited therein that the two women had made the reports on 23rd of September and that the dead bodies of the two persons had been found lying in the paddy field of Sonadhan Chakma of Hajachara on 24th. Therefore, the two facts emphasised by Shri Nath are proved indisputably.

11. However, the point that falls for determination is whether those two facts per se constitute sufficient material to warrant the conclusion that the two accused had abducted the deceased persons or that their abduction was actuated by the intention to murder them or that they may be so dispos-

ed of as to be put in the danger of being murdered. The motive, if any, behind the murder of the two deceased persons was attributed only to the accused Promode Dewan. However, he has been completely cleared of the charge and acquitted. His acquittal has not been challenged by the State. Though, I agree, it is not essential for the prosecution to establish motive against the accused in all cases, but at the same time it cannot be gainsaid that without adequate motive, speaking normally, none is expected to take the life of another human being. To bag human body as a game is a rare occurrence, if at all. In the reports Exts. P-1 and P-1 (a) no evil intentions were imputed to the present appellants, nor the two women assigned any motive to them in their statements made at the trial. P. W. 13 Jogendra happened to affirm in the committing Court that there was no enmity between the two deceased and the accused Promode Dewan. This averment of a prosecution witness dwarfs the contrary assertion of the widows of the deceased Naradmoni (P. W. 7), the elder brother of the deceased Panchakumar, undoubtedly deposed that his family had enmity with Promode Dewan. However, it is significant that he did not go further to state that the appellants had any differences with the two deceased. He also did not affirm that the accused Promode had such intimate connections with the appellants that he could prevail upon the latter to murder the deceased. P. W. 2 Chandrasree affirmed at the trial that she had stated before the committing Magistrate that her husband had no enmity with the accused Fulkumar and Lalikumar. In the face of all this data it is futile for the prosecution to contend that either of the two appellants had any motive for committing the double murder. The learned Trial Court could not record a definite finding against the appellants respecting the motive part of the story. In para 24 of its judgment, it is mentioned that

"Though there was no direct evidence to prove the motive of the accused Fulkumar and Lalikumar, it may be inferred from the circumstances of the case that the accused Fulkumar and Lalikumar might have been engaged to abduct the deceased with a plan that they would be murdered or be so disposed of as to be put in danger of being murdered."

It is further stated in the same para that as a consequence of their abduction the deceased Panchakumar and Khagendra had been murdered during the course of the night. The expression 'might have been engaged' is clearly indicative of the doubt in the mind of the trial Court respecting the motive attributed to the accused. The view of the trial Court would look rather amazing in the context that not only Promode Dewan, who is alleged to have procured the services of the two appellants for the abduction of the deceased, but also the appellants have been given clear acquittal on the charge of mur-

der, and that, in addition, Promode Dewan has also been exonerated of the charge under Section 364 read with Section 109, Indian Penal Code. If Promode Dewan had not engaged the two appellants for the alleged abduction of the deceased, a corollary that follows from his acquittal, the charge of abduction against the two appellants must fall through ipso facto inasmuch as it is the basis of the prosecution story that it was Promode Dewan who had procured the abduction of the two deceased through the appellants.

12. Coming back to the submission of Shri H. C. Nath that there is abundant material available on the record to justify the conclusion that the appellants had abducted the deceased for the purpose mentioned in Section 364, Indian Penal Code, it can bear repetition to state that he had founded that submission on the facts that the deceased Panchakumar and Khagendra had accompanied the appellants from their respective huts at about 9 P. M. on 22nd of September, 1963, and that the dead bodies of Panchakumar and Khagendra were seen lying in a paddy field on the morning of the next following day. The principles bearing on what should be the nature and quality of the circumstantial evidence before a charge can be held established by it are well settled. They are, (i) the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established; (ii) all the facts so established should be consistent only with the hypothesis of the guilt of accused; and (iii) the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In this connection, reference is invited to the cases of Hanumant Govind v. State of Madhya Pradesh, AIR 1952 SC 343, and Govinda Reddy v. State of Mysore, AIR 1960 SC 29. It is equally well established that, in cases dependent on circumstantial evidence, in order to justify the inference of guilt, the incriminating facts must be incompatible with the innocence of the accused or the guilt of any other person and also incapable of explanation upon any other reasonable hypothesis than that of his guilt. Circumstantial evidence, therefore, must be a combination of facts creating a network through which there is no escape for the accused, or, in other words, the facts taken as a whole do not admit, to the extent of moral certainty, of any inference but of his guilt. The chain of facts constituting the evidence must be so complete as not to leave any reasonable ground for a conclusion therefrom consistent with the innocence of the accused.

If we examine the facts of the case in hand in the light of these principles, there looks no scope for doubt on the point that the network constituted by the two facts, relied upon by Shri H. C. Nath, leaves gaps of varied dimensions through which the accused can get out with facility. The record is altogether barren of evidence that the two ap-

pellants and the deceased had remained together for any length of time after 9 P. M. Nor is there any evidence to indicate, even approximately, the time at which Panchakumar and Khagendra were hacked to death. Again, there is no evidence to establish that the two appellants had not slept at their respective houses during the night of occurrence. The prosecution evidence is altogether insufficient to prove that the appellants had any motive for taking the lives of Panchakumar and Khagendra. Further, it is in prosecution evidence that the dead bodies were found lying in a paddy field, that A. S. I. Radhapada had recovered one bloodstained sickle from that field, and that S. S. I. Bhattacharjee (P. W. 21) came by another two sickles from the same field. It may be that the two deceased had gone to cut standing paddy crop from the field of another and the latter opened an assault on them with some dangerous weapon. The unchallenged acquittal of Promode Dewan smashes the foundations of the prosecution edifice that the appellants had wilyly brought the two deceased out of their huts at the instance of Promode Dewan, either to murder them or to dispose of them in a way that they may be exposed to the danger of being murdered. All these factors constitute loopholes which lend colour to the contention of the appellants that they had been hauled up without any justification. Lastly, it may be mentioned that in the reports Exts. P-1 and P-1 (a) the appellants were not mentioned as the possible culprits, and that the Investigating Officer happened to arrest, within a few days of the occurrence, Brajendra Tripura (P. W. 10), Amarendra Dewan and Sonadhan Chakma. The present appellants were the last in the list of the persons to be arrested in the case, their arrests having been effected as late as 15-12-1963. There is no evidence to establish that the appellants had been absconding right up to the date of their arrest. They are labourers by profession and so could not have adopted any means to escape arrest if the police were earnest in apprehending them. No incriminating article was recovered from or at the instance of the appellants. The trial Court has rejected the testimony of Shri Basak that the appellants had made disclosure statements before him or that those disclosure statements had led to the recovery of any instruments. Shri H. C. Nath did not challenge that finding of the trial Court. Hence I find it difficult to uphold the conclusions of the trial Court that the circumstantial evidence was consistent only with the hypothesis that the accused had abducted the two deceased or that the abduction was for purposes mentioned in Section 364, Indian Penal Code.

13. As a result, I allow the appeal, set aside the conviction and sentence of both the appellants, and order their immediate release. Announced.
LGC/D.V.C.

Appeal allowed.

AIR 1969 TRIPURA 62 (V 56 C 13)

R S BINDRA, J C.

Nripendra Chandra Dutta Majumder, and others, Petitioners v Administration of Tripura and others, Respondents

Writ Petn No 10 of 1963, D/- 21-7-1969

(A) Tenancy Laws — Tripura Land Revenue and Land Reforms Act (Central Act 43 of 1960), Ss. 2 (s), 99 (1) (c), 135 (d), 134 (1), 133 (d) — Jotedars are owners of lands as also trees thereon — Government cannot claim royalty respecting those trees.

The expression "jotedar" is synonymous with expression "rayat" used in Tripura Land Revenue and Land Reforms Act (Para 3)

After the Government had acquired the rights, title and interest of intermediaries in the estates in terms of Section 134 (1), it (the Government) passed on all the rights in the lands to the tenants of those lands and such tenants were given the nomenclature of rayats. The bundle of rights given to rayats, as gathered from clauses (a) and (b) of S 99 (1), are virtually the plenary rights of ownership and what detracts, if at all, from their ownership is the designation "rayat". Otherwise, the rayats have all the attributes of ownership, e.g., their rights in the land are permanent and those rights are heritable and transferable. The rayats are referred to as owners in S 2 (s) and they are liable to pay, like an ordinary owner, only land revenue to the Government and nothing more (Para 3)

Under S 99 (1) (c) the jotedars can take benefit of this clause and the trees standing on their jote lands shall be their property. In such an event the question of payment of royalty respecting those trees would not arise. The concept of ownership militates against the claim of royalty respecting the property owned. Hence, if the jotedars are owners of the lands as also of the trees standing thereon, the Government cannot claim royalty respecting those trees (Paras 4, 5)

(B) Forest Act (1927), Ss 41, 42, 2 (4) — Transit Rules respecting timber and other forests produce — Chief Commissioner is possessed of ample powers to make rules relating to transit of all timber and other forest produce whether found in or brought from reserved forests or private lands (Para 6)

(C) Constitution of India, Art 226 — Subsequent events — Courts can take notice of developments which take place pendente lite. (Para 5)

M R Choudhury and R L Chakraborty, for Petitioners, H. C Nath, Govt Advocate, for Respondent

ORDER: In this writ petition, under Article 226 of the Constitution, the petitioners allege that they are owners and in occupation, as jotedars, of certain lands situate in the villages of Charlam and Chasnmai and that a large number of trees of various varieties are standing on those lands. It is complained that though the Government has no

claim or right to those trees, yet the forest officials at Charlam object to the petitioners' felling the trees and utilizing them for their personal requirements. The forest officials, it is alleged further, demand royalty from the petitioners respecting those trees and threaten them with dire consequences in case the trees are felled and removed without transit pass secured from them or without payment of royalty. Aggrieved by such illegal demands made by the local forest officials, it is stated, the petitioners addressed a number of representations, including the one dated 30th of March, 1963, to the Chief Forest Officer of the Union Territory of Tripura, but the latter without giving any hearing to them rejected the last one on 24-4-1963. The prayer made by the petitioners is for issuance of a Writ of mandamus directing the respondents to desist from claiming royalty from them and not to insist on their securing the transit pass before removing from their lands the trees after they are felled. Another prayer made is that the respondents be directed not to act upon Notification No 12 issued under the Tripura Forest Act and Forest Rules as that Notification, it is pleaded, has no sanction behind it and so is illegal. It is also prayed that the aforementioned order dated 24-4-1964 of the Chief Forest Officer rejecting the representation dated 30th of March, 1963, of the petitioners should be quashed.

2 The respondents resist the prayers made by the petitioners on the assertions that the forest officials are within their rights in demanding the royalty from the petitioners, the trees being in the ownership of the Government, and also in insisting that the petitioners must arm themselves with the transit pass before removing the trees from the place at which they are felled, this being in accordance with Notification No 12, dated 29-4-1952, issued by the Government under the Tripura Forest Act. It is vehemently denied that the Notification or any part of it is illegal. The correctness of the stand taken by the Chief Forest Officer in his order dated 24-4-1963, it is urged, is perfectly valid in law and sound in principle.

3. The first point canvassed by Shri M R Choudhury, representing the petitioners, is that the officials of the forest department are not justified in law in claiming royalty from the petitioners respecting the trees standing on the lands of which they happen to be jotedars. Shri H C Nath, the learned Government Advocate, does not challenge the fact that the petitioners are jotedars of the lands mentioned in the writ petition, though he did not concede that the petitioners have absolute right to the user of the trees standing on those lands or that they are not liable to pay the royalty claimed by the forest officials. The expression "jotedar", it is commonly admitted, is synonymous with the expression "rayat" used in the Tripura Land Revenue and Land Reforms Act of 1960 (hereinafter called the Act). In clause (s) of

Section 2 of the Act, "raiya" is defined to mean "a person, who owns land for purposes of agriculture paying land revenue to the Government and includes the successors-in-interest of such person". The rights which "raiya" hold in the land are precisely defined in Section 99 of the Act which runs as under:—

"99. (1) For the removal of doubts, it is hereby declared that subject to the other provisions of this Act.—

(a) the rights of a raiya in his land shall be permanent, heritable and transferable;

(b) the raiya shall be entitled by himself, his servants, under-raiyas, agents or other representatives to erect farm buildings, construct wells or tanks or make other improvements thereon for the better cultivation of the land or its convenient or profitable use;

(c) the raiya is entitled to plant trees on his land, to enjoy the products thereof and to fell, utilise or dispose of the timber of any trees on his land.

(2) Nothing in sub-section (1) shall entitle a raiya to use his land to the detriment of any adjoining land which is not his or in contravention of the provisions of any other law for the time being in force applicable to such lands."

According to clause (c) of sub-section (1), the raiya is given the right to fell and utilize or dispose of the timber of any tree on his land. Hence, if clause (c) has been enforced in the region in which the petitioners' lands are situated, then the petitioners are justified, in my opinion, in advancing the contention that they are not liable to pay any royalty to the Government. From the definition clause (s) of Section 2 of the Act it can be safely spelled out that the Parliament has given the status of owner to the raiya respecting the land in his occupation for purposes of agriculture. The only obligation imposed on him respecting such land is that he shall have to pay the land revenue to the Government. By cls. (a) and (b) of sub-section (1) of Section 99 of the Act, it is declared that the rights of raiya in his land shall be permanent, heritable and transferable, and that the raiya shall be entitled by himself, his servants, under-raiyas, agents or other representatives to erect farm buildings, construct wells or tanks or make other improvements thereon for the better cultivation of the land or its convenient or profitable use. How a person is clothed with the title of raiya, as defined in cl. (s) of Section 2, is made clear by clause (d) of Section 135 of the Act.

It is stated therein that notwithstanding anything contained in any law for the time being in force or in any agreement or contract, express or implied, with effect from the vesting date (specified by the Administrator by a Notification issued under Section 134 (1) of the Act) but subject to the other provisions of the Act, "every tenant holding any land under an intermediary shall hold the same directly under the Government as a raiya thereof and shall be liable to pay to the Gov-

ernment land revenue equal to the rent payable by him to the intermediary on the vesting date". The expression "tenant" is defined in clause (d) of Section 133 of the Act to mean "a person who cultivates or holds the land of an intermediary under an agreement, express or implied, on condition of paying therefor rent in cash or in kind or delivering a share of the produce and includes a person who cultivates or holds land of an intermediary under the system generally known as "bhag," "adhi" or "barga."

It clearly follows from these statutory provisions that after the Government had acquired the rights, title and interest of intermediaries in the estates in terms of Section 134 (1) of the Act, it (the Government) passed on all the rights in the lands to the tenants of those lands and such tenants were given the nomenclature of raiyas. The bundle of rights given to raiyas, as gathered from clauses (a) and (b) of Section 99 (1) of the Act, are virtually the plenary rights of ownership and what detracts, if at all, from their ownership is the designation "raiya". Otherwise, the raiyas have all the attributes of ownership, e.g., their rights in the land are permanent and those rights are heritable and transferable. The raiyas are referred to as owners in clause (s) of Section (2) of the Act and they are liable to pay, like an ordinary owner, only land revenue to the Government and nothing more.

4. In Section 12 (1) of the Act, it is stated that the right to all trees, jungles or other natural products growing on land set apart for forest reserves, and to all trees, brush wood, jungle or other natural product, wherever growing, 'except in so far as the same may be the property of any person,' vests in the Government, and such trees, brush wood, jungle or other natural product shall be preserved or disposed of in such manner as may be prescribed, keeping in view the interests of the people in the area with regard to the user of the natural products. The underlined (here in ' ') words indicate unmistakably that the trees and other natural products do not vest in the Government if they happen to be the property of any individual. Clause (c) of S. 99 (1), as reproduced above, enacts that the raiya is entitled to fell, utilize or dispose of the timber of any tree standing on his land. It is obvious that if the petitioners can take benefit of this clause, then the trees standing on their jote lands shall be their property and in such an event the question of payment of royalty respecting those trees would not arise. The concept of ownership militates against the claim of royalty respecting the property owned. Hence, if the petitioners are owners of the lands as also of the trees standing thereon, it would be fantastic to suggest that the Government can claim royalty respecting those trees.

5. Sub-section (3) of Section 1 of the Act provides that the Act shall come into force on such date as the Administrator may,

by notification in the Official Gazette, appoint, and different dates may be appointed for different areas and for different provisions of the Act. On 12th of May, 1966, the Administrator issued the Notification No. F 39(60)-Rev/63 stating that in exercise of the power conferred on him by sub-sec (3) of Section 1 of the Act, he had appointed 15th of May, 1966, as the date on which clause (c) of sub-section (1) of Section 99 of the Act shall come into force, inter alia, in Bishalgarh Police Station of Sadar Sub-division. Shri H C Nath, the learned Government Advocate, was fair in admitting that the land in dispute is situate in the Bishalgarh Police Station as mentioned in Para 1 of the writ petition.

In fact, the allegation made in that para had not been challenged by the Government in the counter-affidavit. Therefore, cl (c) of Section 99 (1) of the Act is very much in force respecting the lands in dispute with the result that the petitioners are at present the full-fledged owners of the trees standing on their lands with the right to fell, utilize or dispose of them in the manner desired. Hence, the petitioners can legitimately contend, as at present, that the respondents be restrained by suitable writ or direction from claiming royalty respecting the trees standing on the lands mentioned in the petition. It is correct that clause (c) was not in operation on 25th of June, 1963, when the writ petition was filed. However, it is well settled that the Courts can take notice of the developments which take place pendente lite. Here, again, Shri H C Nath did not contest the validity of this proposition of law. I would therefore hold that the petitioners being the owners of the trees as also of the land on which those trees stand, the demand of royalty from them respecting those trees cannot be countenanced and so the respondents have to be restrained from making such a claim.

6 This brings us to the consideration of the second contention raised by Shri Choudhury on behalf of the petitioners. He submitted that the forest officials have no authority to insist that the petitioners cannot remove the timber of the trees standing on their lands without a transit pass. It was vehemently urged by Shri Choudhury that the Notification dated 29th of April, 1952, issued by the Chief Commissioner, Tripura, under Sections 41 and 42 of the Indian Forest Act prescribing Transit Rules respecting timber and other forest produce is ultra vires. He was particularly critical of para 11 of the Notification which bears the heading "Removal of forest produce of private forests and lands". Shri H C Nath contended, on the other hand, that the Chief Commissioner is possessed of a statutory authority to issue such a Notification and in consequence the contention put forth by Shri Choudhury is without any merit or substance. I think the

stand taken by Shri H C. Nath can withstand legal scrutiny and so must prevail. The Indian Forest Act came into force in the Union Territory of Tripura on 16-4-1950 when simultaneously the Tripura Forest Act was repealed. Section 41 (1) of the former Act gives power to the State Government to make rules to regulate the transit of all timber and other forest produce, while Sec 42 arms the State Government with authority to provide in the rules formulated under Section 41 the penalties to which the person contravening the provisions of the rules shall be subject to.

The expression "forest produce" is defined in clause (4) of Section 2 of the Indian Forest Act to include timber whether found in, or brought from, a forest or not. Hence, it can be stated without demur that the Chief Commissioner is possessed of ample powers to make rules relating to the transit of all timber and other forest produce whether found in or brought from reserved forests or private lands. Hence, the proposition canvassed by Shri Chaudhury has to be negatived. Towards the close of his argument, I may mention, Shri Chaudhury realised that there was no substance in the submission made by him and so he did not seriously press it. However, he wanted this Court to give the definition of the expression "transit". I am not inclined to do so because the question what constitutes transit in terms of the rules formulated by the Chief Commissioner does not arise in a pointed manner in the instant case. Moreover, this point was emphasised by Shri Choudhury during the course of his reply to the arguments addressed by Shri H C Nath and so the latter had no opportunity to make his submissions respecting that point. It would, therefore, be unfair to the Government Advocate if I were to express my opinion on what constitutes "transit". Shri Choudhury had some justification for making the request. He represented that the lands of his clients are adjacent to their homesteads and so it would mean real hardship to them if the forest officials were to insist on their securing a transit pass before they can move the trees felled on their lands even to their homesteads. For reasons already stated, I leave the matter open.

7. As a result of the conclusions recorded above, I allow the writ petition in part and direct the respondents not to claim royalty from the petitioners respecting the trees standing on the lands mentioned in para 1 of the writ petition. However, I reject the petitioners' prayer that the respondents should be restrained from insisting on their securing a transit pass in connection with the transit of the timber of trees standing on those lands. In view of the partial success of the parties I leave them to bear their own costs. Advocate's fee Rs 50/- SSG/DVC

Petition partly allowed

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